

**IN THE MATTER OF ARBITRATION BETWEEN**

**The U.S. Department of Housing and Urban Development (Agency)**

**And**

**The American Federation of Government Employees  
National Council of HUD Locals 222, AFL-CIO (Union)**

**Before Arbitrator Sean J. Rogers**

**HUD/AFGE FLSA Overtime Grievance**

**AGENCY POST-HEARING BRIEF  
GS-360 EQUAL OPPORTUNITY SPECIALIST SERIES**

STATEMENT OF THE CASE

This case arose when the union invoked arbitration over its Grievance of the Parties (grievance) alleging that the agency improperly exempted certain bargaining unit employees from the coverage of the Fair Labor Standards Act (FLSA). The grievance essentially asserted that every bargaining unit position classified as exempt should have been classified as non-exempt. As a preliminary matter, the Parties agreed to address the positions in question on a series by series basis. The first series in line was GS-360 - Equal Opportunity Specialist. Since the agency had previously concluded that all positions at the GS-10 level and below are properly non-exempt, the only possible grades at issue for the purposes of the hearing were GS-11-15. Subsequent to the hearing, and upon further review, the agency concluded that the Equal Opportunity Specialist GS-360-11 position was properly classified as FLSA non-exempt. Accordingly, the positions at issue for purposes of this post-hearing brief are Equal Opportunity Specialist GS-360 12-15. The agency's position is that the Equal Opportunity Specialist GS-360 positions meet the criteria for an Administrative Exemption from the coverage of the FLSA based on the duties that they actually perform. (5 C.F.R. 551.202, Union Exhibit #1)(U #1).

ISSUE

The issue is whether the evidence in the record supports the conclusion that the Equal Opportunity Specialist GS-360-12-15 positions are properly excluded from the coverage of the FLSA pursuant to the administrative exemption criteria.

FACTS

An administrative i.e., FLSA exempt, employee is defined in 5 C.F.R. 551.206, (U#1). For purposes of this case, in a nutshell, an administrative employee is an advisor, assistant or representative of management who meets the following criteria, (1) the primary duty test, (2) the non-manual work test and (3) the discretion and independent judgment test. The GS-360 Equal Opportunity Specialist positions meet the criteria of the

administrative exemption. The facts in the record as they apply to each criterion will be discussed in turn.

### PRIMARY DUTY TEST

The primary duty test, in pertinent part, is met if the employee's work significantly affects the formulation or execution of management programs or policies or involves management or general business functions or supporting services of substantial importance to the organization. The record reveals that the GS-360 12-15 positions meet the primary duty test under the administrative exemption.

Marlene Thrash, agency classifier, testified that she analyzed the GS-360-12 position descriptions (Headquarters and Field) against the administrative exemption criteria and produced an FLSA Evaluation.<sup>1</sup> Transcript September 29 page 40 (T 9/29 p.40). With respect to the implementation of policy, she noted that the GS-360 employees have the responsibility to develop recommendations to change management policies and practices where improvement is needed. Ms. Thrash also noted that the work performed by the "group", i.e., the GS-360', is of great significance since the consequences of errors on their part would be costly to the agency, and that, therefore, the jobs are highly complex and highly demanding. Their decisions require a great deal of judgment and creativity,

Floyd O. May, General Deputy Assistant Secretary of the Office of Fair Housing and Equal Opportunity (FHEO) testified in a similar vein. He noted that the discrimination complaint investigations of the GS-360s could have a *profound* (emphasis supplied) impact on the agency's enforcement policy. He noted that this is particularly true in matters such as zoning cases, pattern and practice cases and lending cases. Under 5 C.F.R. 551.206, employees significantly affect the execution of management programs or policies typically when the work involves obtaining compliance with such policies by other individuals or organizations within or outside the Federal Government or making significant determinations furthering the operation of programs and accomplishment of program objectives. This alone fully supports the conclusion that the GS-360 positions meet the primary duty test.

### THE NONMANUAL WORK TEST

The record clearly demonstrates that the GS-360 positions meet the nonmanual work criterion. Nonmanual work is office 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. This is an empirical fact.

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<sup>1</sup> While Ms. Thrash did not have an opportunity to interview the incumbent employees and their supervisors. The signature of the supervisor on each GS-360 position description cover sheet verifies the fact that the GS-360 position descriptions accurately reflect actual duties.

Classifier Marlene testified that the GS-360s are required to have expert skill in fact-finding, analysis, problem solving and writing. Accordingly, she concluded the nonmanual work test is met.

The testimony of the supervisors of the GS-360s also supports that conclusion. Barbara Knox, FHEO Chicago HUB Director noted the intellectual nature of #^ work as well as the importance of special training and specialized knowledge. In so doing she, *inter alia* focused on case analysis and the need for special HUD related investigator training. (T. 9/29 pp. 191-192) Debra Bouziden, Supervisor, Miami, related how the 360s encounter diverse issues on a daily basis. (T. 11/3 p. 90) Floyd May stated that persons in the 360 series are expected to possess analytical skills that allow them to review information, analyze information and make critical judgments regarding the worth of that information as it pertains to a fair housing investigation. Additionally, he noted, the individuals are expected to review complex data sources such as bank records, witness testimony and computer generated information. (T. 10/11 p. 24) Thus, there can be no doubt that the nonmanual work test is met in this case.

#### DISCRETION AND INDEPENDENT JUDGMENT TEST

To meet this test the employee must frequently exercise discretion and independent judgment under only general supervision in performing normal day-to-day work. Discretion and independent judgment means work that involves comparing and evaluating possible courses of conduct, interpreting results and implications, and independently taking action or making a decision after considering the various possibilities. Final decisions are not necessary to support the exemption. The “decisions” made as a result of the exercise of independent judgment may consist of *recommendations for action* ( emphasis original) 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 does not mean the employee is not exercising discretion and independent judgment of the level required for exemption. (5C.F.R. 551.206, Administrative Exemption Criteria, U#1)

The record in this case conclusively establishes that the GS-360s meet the discretion and independent judgment test. Much of the testimony in this area centered on the FHEO Investigative Handbook and the investigators’ Investigation Plans. During the hearing, it soon became evident that the Handbook and the Plan constitute mere guides within which the GS-360s continually exercise discretion and independent within the meaning of the Code of Federal Regulations.

Candace Tapscott, Supervisory Equal Opportunity Specialist testified firmly that theGS-360-12s she supervises work independently with free rein as the top of the line level investigators in FHEO. They receive complaints, plan investigations and develop recommendations all on their own. (T. 10/11 pp. 63-64)

Vicki Ray, Louisville FHEO Center Director, also verified the discretion and independent judgment exercised by the GS-360s. She noted that they receive only

limited supervision and that the level of their independently completed investigations should be 100%. (T. 11/3 pp. 46-47) Ms. Ray also addressed the Investigative Plan. Regarding the Plan, she explained that it is a tool and/or a guide that helps in planning an investigation. Significantly, she affirmed that it is definitely not a “one size fits all” document. Rather, in reality, it is a living document which is expected to change during the course of an investigation. Thus, it does not tell on how to investigate. In fact it cannot do so because each discrimination complaint is different. Ms. Ray does not even see the Investigative Plan until she receives the completed file from the investigator (T. 11/3 pp.42-45)

Debra Bouziden, Enforcement Branch Chief, Miami addressed the topics of independent judgment, the Investigative Plan and the Investigative Handbook. She testified, consistently with all other supervisors that the 360s work on their own time frames, set their own schedules and produce a full completed investigative file. (T. 11/3 pp. 87-88) With respect to the Investigative Plan, Ms. Bouziden initially explained what it is. In so doing, she likened the Plan to a roadmap. She noted that the investigators develop the plan all on their own, and that, as a “living document” it is subject to modification (T. 11/3 pp.78-83)

Also consistent with the testimony of the other supervisors and managers Ms. Bouziden characterized the Investigative Handbook as a “guide”. She noted that it is not the “bible”. She noted that, since each and every case is unique, it is only a suggested guide and those investigators need to make their own decisions regarding how to handle a case. (T. 11/3 pp. 84-85) Ms. Bouziden also clarified the impact the Handbook may have on any given investigation. She noted persistently that it is not a rigid document. Since each case is unique, and may require its own unique approach the Handbook could and should be disregarded, as appropriate. Thus she noted that, in the real world, Handbook terms such as “must” and “mandatory” re to be interpreted to mean “optional” in the interests of an effective investigation. (T. 11/3 pp. 97-98).

A measure of the foregoing facts against the above noted definition of the Discretion and Independent Judgment test must lead to the conclusion that the GS-360 positions cross its threshold. Accordingly, that test is met in this case.

## SCOPE OF EVIDENCE

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 at GS-14-15<sup>2</sup>. Since the GS-13 level evidence supports a finding of 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 the GS-11 positions would be held nonexempt if the GS-12s were found to be nonexempt.<sup>3</sup> 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. *Naval Explosive Ordnance Disposal Tec. Div Indian Head MD*, 56 FLRA 280 (2000) and *Navy, Indian Head Md v. AFGC Local 1923*, 57 FLRA 280 (2001). 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 not be considered nonexempt.

## ARGUMENT

The above referenced facts make it clear that the GS-360-12-13 positions are properly exempted from FLSA coverage. In this regard, it must be noted that all criteria for the administrative exemption are met by the duties and responsibilities of the Equal Opportunity Specialists. Accordingly, the agency respectfully requests the arbitrator to deny the grievance in question and the remedy it seeks in their entirety.

Respectfully submitted,

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Norman Mesewicz  
Agency Representative

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<sup>2</sup> The record contains brief testimony from a headquarters GS-30-13, Martin Kiebert. The agency submits that his testimony supports the conclusion that GS-360-13 positions are properly exempt. In this regard his testimony indicates that his "cause findings are adopted 95% to 99% of the time. He also works independently and interprets law, rule and regulations without supervisory input. (T. 9/29 pp.72-73). Most significantly, Mr. Kiebert testified that he considered himself to have a quality control administrative type function as opposed to an assembly line type. Thus, he testified that the GS-360-13 meets the primary duty test.

<sup>3</sup> This agreement was reached before the agency's review of the GS-11 positions found them to be nonexempt.

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served upon the union via Email  
February 21, 2006.

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Norman Mesewicz  
Agency Representative