IN THE MATTER OF ARBITRATION BETWEEN:

NATIONAL COUNCIL OF HUD LOCALS 222, AFGE, AFL-CIO,	)	
Union,	)	Issue: FLSA Overtime FLSA Exemptions
v.	)	
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,	)	
Agency.	)	

Union's Renewed Motion for Summary Judgment
Relating to Liability for GS-360 Employees and
Union's Motion for Summary Judgment on All Remaining Exempt Employees

The Union, by and through its attorney, Michael J. Snider, Esq., and Council President, Carolyn Federoff, Esq., request that the Arbitrator grant its **Motion for Summary Judgment** as a matter of law. The Union renews its **Motion for Summary Judgment** (first presented on November 3, 2005) regarding the issue of liability for GS-11/12/13/14/15 employees in the 360 (Equal Opportunity Specialist) series, and also files at this time a **Motion for Summary Judgment** for all remaining exempt employees.

Respectfully Submitted,

_____
Michael J. Snider, Esq.
Snider & Associates, LLC
Attorney for the Union

_____
Carolyn Federoff
President, AFGE Council 222

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Agency.	)

Memorandum in Support of
Renewed Motion for Summary Judgment (GS-360-11/12/13/14/15) and
Motion for Summary Judgment (All Remaining Exempt Employees)

Introduction

The Union, by and through its attorney, Michael J. Snider, Esq., moves the Arbitrator to grant its motion for summary judgment as a matter of law.

This action is before the Arbitrator on the Union's renewed Motion for Summary Judgment (GS-360s) and Motion for Summary Judgment (all remaining Exempt employees).

Summary Judgment motions are both allowed and used in arbitrations. See, e.g., ***AFGE, Local 1760 and Department of Health and Human Services, Social Security Administration, Office of Hearings and Appeals, Region II,*** 36 FLRA 212 (June 28, 1990); ***Elkouri & Elkouri: How Arbitration Works,*** 6th Ed., ABA, BNA (2003).

More importantly, Arbitrators have uniformly utilized the Federal Court's summary judgment standard when reviewing such motions during arbitration proceedings. See generally ***SSA vs. AFGE, Local 1336***, Document No. ARBIHS09312, KC-99-R-0006, LAIRS 22362 (01 Jul 1999)(arbitrator determined that a motion for summary judgment may be granted where there is no dispute regarding the material facts, or if only a question of law is involved); ***SSA vs. AFGE, Council 220***, Document No. ARBIHS08711 (27 Nov 1996)(arbitrator granted motion for summary judgment where the only issue was an interpretation of the Work Schedules Act). Additionally, the Federal Labor Relations Authority has upheld an arbitrator's discretion to entertain motions for summary judgment. ***See AFGE, Natl. Council SSA Fld. Operations Council vs. SSA***, 54 FLRA NO. 88, 0-AR-2912 (1998).

The availability of summary judgment helps a factfinder " 'to secure the just, speedy, and inexpensive determination of every action.' " ***Celotex Corp. v. Catrett****,* 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 1). Summary judgment is appropriate where there is no dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56 of the Rules of the United States Court of Federal Claims (RCFC); ***Anderson v. Liberty Lobby, Inc****.,* 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is material if it would affect the outcome of the suit. ***Anderson****,* 477 U.S. at 248, 106 S.Ct. 2505. The moving party bears the burden of showing that there is an absence of any genuine issue of material fact. ***Dairyland Power Coop. v. United States***, 16 F.3d 1197, 1202 (Fed.Cir.1994) (citing ***Celotex***, 477 U.S. at 325, 106 S.Ct. 2548).All doubt over factual issues must be

resolved in favor of the party opposing summary judgment. ***Mingus Constructors, Inc. v. United States***, 812 F.2d 1387, 1390 (Fed.Cir.1987).

The non-moving party, however, has the burden of producing sufficient evidence that there is a genuine issue of material fact in dispute which would allow a reasonable finder of fact to rule in its favor. *Anderson,* 477 U.S. at 256, 106 S.Ct. 2505. Such evidence need not be admissible at trial; nevertheless, mere denials, conclusory statements or evidence that is merely colorable or not significantly probative is not sufficient to preclude summary judgment. ***Celotex****,* 477 U.S. at 324, 106 S.Ct. 2548; ***Anderson****,* 477 U.S. at 249-50, 106 S.Ct. 2505; ***Mingus****,* 812 F.2d at 1390-91; *see also* ***Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.****,* 731 F.2d 831, 835-36 (Fed.Cir.1984) (in making a determination as to whether genuine issues of material fact exist, the court is not to accept a party's bare assertion that a fact is in dispute).

"The party opposing the motion must point to an **evidentiary conflict** created on the record by at least a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant." ***Barmag,*** 731 F.2d at 836**.** Summary judgment must be granted against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case and for which that party bears the burden of proof at trial. ***Celotex****,* 477 U.S. at 322, 106 S.Ct. 2548.

The US Court of Claims laid out the possible scenarios of proof and decision regarding FLSA cases in its recent opinion in **Adams v. U.S.** 65 Fed.Cl. 195 (Ct. Fed. Cl. 2005):

> ”Thus, there are several possible outcomes for the remaining claims of the six plaintiffs ***203*** carved out by defendant's cross-motion from the general body of GS-13 claimants in plaintiffs' motion for partial summary judgment. If defendant offers evidence of a valid administrative exemption to FLSA overtime requirements and plaintiffs fail to raise a genuine issue of material fact, summary judgment will be entered and that plaintiff's claims will be dismissed. Or, defendant may offer evidence of a valid administrative exemption but plaintiffs will have substantiated a genuine issue of material fact--in that scenario summary judgment will not be granted and that plaintiff's claims will remain to be resolved by trial or by settlement. Finally, if defendant's evidence of an administrative exemption is lacking a mandatory element of proof, or fails to address a period of employment that underlies a portion of that plaintiff's claims, summary judgment will not be granted to defendant for the claims for which defendant is not entitled to judgment as a matter of law. In that instance, plaintiffs' April 26, 2002 motion for partial summary will be granted for those claims for which defendant's allegations of proof are deficient, because, as stated in this court's opinion in *Adams III,* No. 90-162C and Consolidated Cases, slip op. at 27, defendant bears the burden of proof to overcome a presumption against applying the administrative exemption under FLSA.”

As the court pointed out, if the defendant’s evidence either lacks a mandatory element of proof or fails to address a period of employment underlying the Plaintiff’s claims, summary judgment is to be entered on behalf of Plaintiffs. That is because Defendants (the Agency, here) bears the burden of proof.

Summary Statement of this Motion

In this case, the Agency[1] totally failed to present any evidence regarding any Grievant(s) in the GS-360-11 positions, GS-360-14 positions and GS-360-15 positions. Accordingly, those positions are ceded by management for the entire time period of the Grievance, and prospectively.

Further, management has failed to present any evidence regarding GS-360-14 or GS-360-15 employees, or any nexus between those positions and the GS-12 and 13 positions that were testified about. Those positions are ceded by management for the entire time period of the Grievance, and prospectively.

Further, the Agency has failed to present evidence about the vast majority of the five (5) years of job duties performed by the Grievants, instead limiting its testimony to the present duties or past few weeks or months, ceding all other time periods.

Finally, the Agency has admitted to facts which enable the Arbitrator to find in favor of the Union on all remaining bargaining unit positions/employees at the GS-11 and above levels.[2] Accordingly, those positions are ceded by management for the entire time period of the Grievance, and prospectively.

[1] The Arbitrator requested that the Agency provide Position Descriptions (PDs) for GS-13, 14 and 15 employees in the 360 series. These documents were never entered into the record, never identified as Agency or Joint exhibits and the Union was not given an opportunity to object to them, and we urge the Arbitrator to ignore them.

[2] The Agency has ceded all GS-10 and below employees/positions in a settlement agreement.

Renewed Motion for Summary Judgment for GS-360 Employees

The issue in this case is "Whether the Agency has proven that it properly exempted GS-360-11/12/13/14/15 bargaining unit employees under the FLSA."

The burden is upon the Agency not only to prove that it properly exempted the Grievants (ie, GS-360 11 through 15 employee) but to also (perhaps as part of that burden) to timely and properly state ***which*** exemption the employees were properly exempted under, and to show that it **made** a decision to exempt those employees. The "decision" to exempt is what is being measured, not the end result.

The defendant must establish through "clear and affirmative evidence" that the employee meets every requirement of an exemption. ***Roney v. United States of America,*** 790 F.Supp. 23, 26 (D.D.C.1992). The exemptions are to be narrowly construed. **Arnold v. Ben Kanowsky , Inc.**, 361 U.S. 388, 392, 80 S.Ct. 453, 4 L.Ed.2d 393 (1960); **Douglas v. Argo-Tech Corp.**, 113 F.3d 67, 70 (6th Cir.1997). Here, rather than showing that it made a decision to exempt employees that could be fairly reviewed for merit, the Agency stipulated that it originally classified employees based solely on grade level, which constitutes a per se violation of the Fair Labor Standards Act ("FLSA"). Then, the Agency stipulated that it was relying upon keeping employees exempt[3] based solely on their position descriptions, ("PD"), in violation of the FLSA.

[3] The Agency conducted clandestine "reviews" which were not provided timely to the Union. These documents are worthless as evidence, as the Arbitrator noted in his ORDER regarding the Union's 7114 RFI that the documents were most likely "prepared in expectation of litigation and lack material and probative value." The Union concurs and urges that the documents be discounted as evidence.

Clear testimony of record revealed that the Agency's classifier(s) never examined the actual job duties of employees to determine exemption status.

In light of the above, the Union is entitled to Summary Judgment as a matter of law. Even if the remaining testimony and evidence were weighed, however, it is clear that the Union must prevail. Even giving all reasonable inferences to the non-moving party in this case, the facts established so far show that the job duties of the relevant employees do not satisfy the administrative exemption primary duties test or the discretion and independent judgment test.

Applicable Law on the Burden of Proof and Administrative Exemption

Based on the FLSA, DOL regulations and OPM guidelines, exemption status must be construed narrowly and applied only to employees who clearly fit within the terms and spirit of the law. Accordingly, the burden of proof rests with the Agency to show that each employee was properly classified. If there is ***any reasonable doubt*** with regards to the exemption status of a particular employee then that employee should be classified as non-exempt.

In order to be classified as an administratively exempt employee, the **actual job duties** must be inspected – not one's grade or PD (unless the PD is agreed to by the Union as being accurate; see ***United States Dep't of the Navy, Naval Explosive Ordinance Disposal Tech. Div., Indian Head, Md.,*** 56 FLRA 280 (2000) and ***Department of the***

Navy, Naval Explosive Ordnance, Disposal Technology Division, Indian Head, MD and AFGE, Local 1923, 57 FLRA 280 (June 21, 2001)).

Exemptions to the FLSA are to be narrowly construed in order to further Congress' goal of providing broad federal employment protection. ***Madison v. Resources for Human Development, Inc.***, 233 F.3d 175 (3rd Cir. 2000); ***Mitchell v. Lublin, McGaughy & Assoc.***, 358 U.S. 207 (1959); ***Roy v. Country of Lexington, S.C.***, 141 F.3d 533 (4th Cir. 1998).

Employers who claim that an exemption applies to their employees have the burden of proof, ***Corning Glass Works v. Brennan***, 417 U.S. 188 (1974).

The Agency also must show that the employees it claims are properly exempt from the FLSA fit "plainly and unmistakenly within [the exemption's] terms." ***Auer v. Robbins***, 519 U.S. 452, 117 S.Ct. 905 (1997). The employer has the burden of establishing by affirmative evidence all the necessary requirements of the exemption. ***Johnson v. Volunteers of America***, 213 F.3d 559 (10th Cir. 2000).

An employer must prove that the employee is exempt by "clear and affirmative" evidence, ***Aaron v. City of Wichita, Kan***., 54 F.3d 652, 657 (10th Cir. 1995).

FLSA exemptions are an affirmative defense that must be pleaded and proved by the defendant. ***Fife v. Harmon*** , 171 F.3d 1038 (5th Cir. 1999); ***Jones v. Giles***, 741 F.2d 245, 248-49 (9th Cir. 1983).

Defendants must raise an affirmative defense, such as an FLSA exemption, early in the process. A Defendant may raise an affirmative defense, such as an FLSA exemption late in the process only if the delay does not prejudice the plaintiff. ***Magna v. Com. of the Northern Mariana Islands***, 107 F.3d 1436, 1446 (9th Cir. 1997); citing **Rivera v. Anaya**, 726 F.2d 564, 566 (9th Cir. 1994).

OPM Regulations provide at 5 C.F.R. §551.202(b): "Exemption criteria shall be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption." At §551.202(c) it provides: "The burden of proof rests with the Agency that asserts the exemption." At §551.202(d) OPM provides: "An employee who clearly meets the criteria for exemption must be designated FLSA exempt. If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be designated FLSA nonexempt." (emphasis added) This means that any employees who do not **clearly** meet the exemption may not be exempted. Reasonable doubt is not a heavy burden for the Union to meet.

OPM's regulations clearly state that the designation by an Agency of a position as exempt is what is being measured, and **that designation** may only be made under clear and limited circumstances:

> **§ 551.201 Agency authority.**
> The employing agency may designate an employee FLSA exempt only when the agency correctly determines that the employee meets one or more of the exemption criteria of this subpart and such supplemental interpretations or instructions issued by OPM.

To be more clear, OPM's regulations clearly state that the determination/designation by an Agency of a position as exempt is what is being measured, and **that designation** must be "correctly determine[d]." Since the Agency in this case did not "correctly determine[]" that the GS-360-11/12/13/14/15 employees met "one or more of the exemption criteria," it cannot claim "no harm, no foul" in this case:

> **§ 551.201 Agency authority.**
> The employing agency may designate an employee FLSA exempt only ***when the agency correctly determines that the employee meets one or more of the exemption criteria of this subpart*** and such supplemental interpretations or instructions issued by OPM.

(emphasis added).

§ 551.202 General principles governing exemptions.
In all exemption determinations, the agency must observe the following principles:

> (a) Each employee is presumed to be FLSA nonexempt unless the employing agency correctly determines that the employee clearly meets one or more of the exemption criteria of this subpart and such supplemental interpretations or instructions issued by OPM.
>
> (b) Exemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.
>
> (c) The burden of proof rests with the agency that asserts the exemption.
>
> (d) An employee who clearly meets the criteria for exemption must be designated FLSA exempt. If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be designated FLSA nonexempt.

Similarly, Arbitrator Henry Segal stated in one of the first major arbitral decisions in the federal sector on the administrative exemption (between AFGE and SSA):

> "FLSA exemptions *must be narrowly construed* and applied *only to employees* who are *clearly within the terms and spirit of the exemptions*" and at (2) provides that "The burden of proof rests with the employer who asserts the exemption. Thus, *if there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be ruled nonexempt.*" (emphasis supplied) As noted *supra* these directives are also contained in 5 CFR § 551.202 (a) through (c). (The OPM letter specifically states that the above principles have been firmly established by "numerous judicial precedents.") The Supreme Court has also held that FLSA exemptions must be narrowly construed. *Arnold v. Ben Kanowsky, Inc.,* 361 US 388, 392, 80 S. Ct. 453, 456, 4 L. Ed. 2d 393 (1960) Accordingly, as there is at least a reasonable doubt with respect to whether the employees meet the first criterion for primary duty, the exemption should not be applied based on the first criterion.

American Federation of Government Employees and Department of Health and Human Services, Social Security Administration, Baltimore, MD

LAIRS 20393, 91 FLRR 2-1249 (May 3, 1991)(Segal I)

Argument on Renewed Motion for Summary Judgment

In this case, the Agency failed to meet its burden of proving that the relevant bargaining unit employees were administratively exempt. An FLSA exemption is an affirmative defense that must be proven by the Agency. *See* **Fife v. Harmon**, 171 F.3d 1038 (5th Cir. 1999); *See also* **Jones v. Giles**, 741 F.2d 245, 248-49 (9th Cir. 1983). There was no testimony supporting the proper classification of employees at HUD. The Agency has been requested to name the specific exemption(s) relied upon to exempt employees from the FLSA. Its Response was that, initially, there was no information available concerning

The Agency admitted that it violated the FLSA when it classified employees solely based on grade level and PD, rather than focusing on the actual job duties.

An exempt status determination that relies solely on grade level constitutes a per se violation of the FLSA. *See* **AFGE v. OPM**, 821 F.2d 761 (USCA, DC Cir. 1987).

Similarly, the Federal Circuit held that position descriptions cannot be relied upon to make FLSA exempt status determinations. *See* **Berg v. Newman**, 982 F.2d 500, 503 (Fed. Cir. 1999). Berg has been cited with approval by the FLRA. *See* ***United States Dep't of the Navy, Naval Explosive Ordinance Disposal Tech. Div., Indian Head, Md.,*** 56 FLRA 280 (2000) and ***Department of the Navy, Naval Explosive Ordnance, Disposal Technology Division, Indian Head, MD and AFGE, Local 1923,*** 57 FLRA 280 (June 21, 2001)).

Other courts have held the same way as the Federal Circuit and FLRA. *See* **Ale v. Tennessee Valley Authority, upheld on appeal,** 269 F.3d 680 (6th Cir. 2001)(Decision to discount vague resumes and position descriptions in deciding whether employees were exempt from overtime wage requirements under Fair Labor Standards Act was not clearly erroneous, given that statements in resumes and position descriptions did not directly contradict employees' testimony concerning their day-to-day job activities, and there was no reason to give documents special weight.):

> At trial, the defendant offered resumes, position descriptions, and performance evaluations in an attempt to prove that the plaintiffs were *bona fide* executive and administrative employees who are not entitled to overtime under the FLSA. After considering this evidence, the magistrate judge discounted it because he found that this evidence contained generalities and was too vague to support a determination that any of the plaintiffs are exempt. The judge pointed out that it is necessary to focus on the employees' day-to-day activities in order to determine whether these employees are subject to administrative or executive exemptions.
> …
> On appeal, TVA argues that the magistrate judge's factual findings are clearly erroneous because they are not based on the FLSA regulations which govern this case. Specifically, the defendant argues that the magistrate judge erroneously applied the Office of Personnel Management ("OPM") exemption standard which requires the employer to demonstrate that an employee "frequently exercises discretion and independent judgment" in his "normal day-to-day work" in order to prove that a given employee is an exempt administrator. *See* 5 C.F.R. § 551.206(c). According to the defendant, this standard is more rigorous than the DOL "short test" for administrators, which requires only that an employee's "primary duty include discretion and independent judgement."
>
> A fact finder's incorrect view of the law may render factual findings clearly erroneous. *See Zimmerman v. H.E. Butt Grocery Co.,* 932 F.2d 469, 471 (5th Cir.1991) (findings of fact may be clearly erroneous when they are "influenced by an incorrect view of the law"). However, we are not convinced that the magistrate judge applied the wrong standard in this case. Although the judge cited *Berg v. Newman,* which involved the interpretation of OPM standards, there is no indication that he applied the more rigorous OPM standard in this case. J.A. at 57-59 (citing 982 F.2d 500 (Fed.Cir.1992)). Rather, the magistrate judge merely referred to *Berg* as illustrative of the requirement that the TVA establish

entitlement based on actual "day-to-day" job duties as opposed to vague job descriptions. *Id.* He stated:

> The key to a determination of whether an employee is covered by an exemption to the FLSA overtime requirements does not depend on an employee's general characterization of his or her job in a resume designed to enhance the employee's duties and responsibilities in an effort to obtain a job, or an employer's general characterization of a particular job. What is important is what an employee **actually** does on a day-to-day basis.

J.A. at 58 (emphasis in original).

There is ample statutory and case law authority to support the magistrate judge's position that courts must focus ***689*** on the actual activities of the employee in order determine whether or not he is exempt from the FLSA'sovertime regulations. 29 C.F.R. § 541.103, which describes primary duty, states that "a determination of whether an employee has management as his primary duty must be based on all the facts in a particular case." In addition, section 541.207(b), which describes the exercise of discretion and independent judgement, notes that "the term must be applied in the light of all the facts involved in the particular employment situation in which the question arises." 29 C.F.R. § 541.207(b). Both of these DOL regulations indicate that the determination of whether an employee is exempt is an inquiry that is based on the particular facts of his employment and not general descriptions. *See also Brock v. Nat'l Health Corp.,* 667 F.Supp. 557, 565-566 (M.D.Tenn.1987) (to ascertain exemption status it is necessary to examine closely duties and actual work performed).

A proper determination of exempt status must examine and analyze the specific job duties and daily activities of the particular employee. **Id**. The Agency concedes it did not follow the FLSA when it classified its employees.

It maintains, however, that the exempt status classification of all GS-360-11 to 15 employees are, nonetheless, correct. This is an invalid argument. OPM's regulations clearly state that the designation by an Agency of a position as exempt is what is being measured, and **that designation** must be "correctly determine[d]." Since the Agency in

this case did not "correctly determine[]" that the GS-360-11/12/13/14/15 employees met "one or more of the exemption criteria," it cannot claim "no harm, no foul" in this case:

> **§ 551.201 Agency authority.**
> The employing agency may designate an employee FLSA exempt only ***when the agency correctly determines that the employee meets one or more of the exemption criteria of this subpart*** and such supplemental interpretations or instructions issued by OPM.

(emphasis added). To reward the Agency for its complacency, willful ignorance of the law and failure to carry out any meaningful review in the last 2 years (since the filing of the Grievance) would be a gross miscarriage of justice. The Agency, despite bearing the burden of proof in this case, did not affirmatively name a single witness who could testify about actual job duties. The Union did. It should not be punished for putting on evidence. To the contrary – the Agency, having not made any correct determination, must lose on all GS-360 positions.

Noting an Agency's failures during the pendancy of the Grievance is not without precedent. The FLRA quoted Arbitrator Mollie Bowers with approval, in her finding an Agency shirked its responsibilities *since the Grievance was filed*:

> "In the intervening months since the formation of the original grievances into a class action case, the Agency had an obligation to have carefully reviewed each of the PD's for challenged positions. Such a review would have shown problem areas such as the conflict with OPM standards revealed here. Unfortunately, there seems to have been either no in-depth review or a review that was haphazard at best."

In support of its argument, the Agency presented some documents and testimony from various HUD employees, including one classifier and certain supervisors. The Arbitrator noted that the Agency documents, particularly employee PD's and classification

reviews, lack credibility due to the fact that the Agency prepared them in anticipation of litigation. The classifier, Ms. Thrash, testified that she made the exempt status determinations, after the grievance was filed, based solely on the job duties in the position descriptions. She admitted that she did not interview any employees to determine their actual job duties or to even compare the job functions in the PD's to the actual job duties of the employees. Accordingly, the Agency failed to prove that the employees' primary duties serve to significantly affect management programs or policies, involves general business functions or supporting services and/or requires significant participation in the administrative or executive functions of a management official.

Production/Administrative Work Dichotomy

Prior to reaching analysis of tests such as 'intellectual and varied' or 'discretion and independent judgment' (which the Agency would like us to consider first), the proper analysis is of the primary duty test. If the primary duty of a position is not administrative in nature, it does not matter how intellectual or varied the work is, or whether discretion or independent judgment is used therein. The position is simply non-exempt due to the ***nature of the work*** (as opposed to how the work is performed).

Arbitrator Henry Segal, in ***Segal I***, **supra**, clearly laid out an authoritative rule of thumb when finding valid the DOL regulation's description of the production/administrative work dichotomy (the former of which is non-exempt work under the primary duty test,

the latter of which could be exempt, but which would then be subject to the other tests, such as discretion and independent judgment):

> However, unlike the typical manufacturing facility where the line employee is the production worker, in this case the line employee is the claims adjudicator, and while it may not be customary to think of the employee producing the ultimate product of a facility as an administrative employee, in this case they plainly are.
> …
> Thus, the business or mission of the Agency must be determined, and the employees to be exempt must be performing activities to carry out its management policies rather than performing activities which carry out the ongoing mission and day-to-day functions of the Agency which would make the employees involved nonexempt. This analysis can readily be applied the two occupations involved, for as previously noted the mission of the Agency is to pay the benefits authorized by the social security laws and the duties of the two occupations are to deal directly with the claimants to see that the claimants, *who are qualified,* receive these benefits.

(***Segal I***). the Court of Claims likewise found this distinction helpful, in **Adams v. U.S.** 65 Fed.Cl. 195 (Ct. Fed. Cl. 2005):

> One of the most helpful distinctions that can be drawn between the administrative work described in section 551.206(a)(1) and other non-exempt work is that of "management functions" versus "production" work. *Adams I,* 27 Fed.Cl. at 14. Although this distinction is not simple to apply to an employee's primary work duty, the extensive discussion of this distinction in *Adams I, id.,* undisturbed by the Federal Circuit in *Adams II,* informs the court's analysis of section 551.206(a)(1). The analysis of 551.206(a)(2) in *Adams I,* 27 Fed.Cl. at 14-16, is also undisturbed by the Federal Circuit and helpful. Supporting service is distinguished from ****205*** production work in that it is substantially important work that impacts the effectiveness of the organization. **Id**. at 14-15 (citing Attachment to FPM Letter No. 551-7 at 9). Examples of supporting services include: providing support to line managers through: (1) expert advice in a specialized subject matter, such as that provided by management consultants or systems analysts; or (2) assuming aspects of overall management function in such areas as safety, personnel, or finance; or (3) representing management in business functions such as negotiating or administering contracts; or (4) providing supporting services, such as automated data processing.

As noted above, **all** of the Agency witnesses testified that GS-360 EOS's conducted job duties to carry out the mission and day to day functions of HUD and FHEO. Under the

very persuasive analysis of Segal I and Adams, this would render all GS-360's at HUD non-exempt under the primary duty test.

Other positions similar to those at issue in this case have been found to be nonexempt under the primary duty test.

Housing Inspectors

The court in ***Harris v District of Columbia***, 741 F Supp 254 (DC Dist. Col. 1990) later proceeding (DC Dist Col) 749 F Supp 301, held that supervisory housing inspectors who worked for a municipal government were not employed in a bona fide administrative capacity within the meaning of §13(a)(1) of the FLSA, finding that the employees' duties passed neither the "short" nor the "long" test, since they did not perform office or non-manual work directly related to management polices or general business operations of the employer.

The court stated that the work done while the employees were in the office, which seemed to be their primary duty, was largely clerical. The housing inspectors spent more than 20 percent of their time in the field doing inspections, said the court, pointing out that the interpretations (29 CFR § 541.205(a)) draw a distinction between activities related to the administrative operations of a business as distinguished from production. Housing inspections are the production of the housing inspection branch, declared the court; time that supervisory housing inspectors spent inspecting residences is work spent in the production of a unit. Under the interpretations quoted, this amount of time

spent in such production disqualified the employees from being administrative employees, concluded the court. Moreover, they did not exercise discretion and independent judgment, because they were sharply constrained in their power to act on their own or do much of anything without higher approval, added the court. The court stated that although the employees might arguably be said to assist an executive or other administrative employee regularly, the fact that their duties met none of the other criteria meant that they could not be considered to qualify for the administrative exemption.

Criminal Investigators

Holding that investigators for a state bureau of criminal investigation were not administrative employees under §13(a)(1) of the FLSA and regulations thereunder (29 CFR § § 541.2 et seq.), the court in ***Reich v New York***, 3 F3d 581 (1993, CA2 NY). rejected the employer's argument that the production/ administration dichotomy contained in the rules and interpretations of the Department of Labor is obsolete and found that, in applying that distinction, the investigators performed the very duties which constituted the production of the employer: preventing, investigating, and detecting violations of the criminal laws of the state. The investigators, while holding the lowest rank in the bureau, ranked superior to state troopers, the "front line" of the state police units. The court found that the investigators rank was comparable to that of a sergeant in the state police. The court found that, apart from supervising the investigations of state troopers, the investigators also investigated felonies and major misdemeanors involving organized crime, narcotics, and sex abuse, by reviewing crime scenes,

gathering evidence, interviewing witnesses, interrogating and fingerprinting suspects, making arrests, conducting surveillance, obtaining search warrants, and testifying in court. These duties, the court stated, constituted the "product" of the employer and not the "administration" of the employer. Focusing on whether the investigators' primary duty consisted of administrative responsibilities or production responsibilities, the court also rejected the employer's arguments that the investigators were administrative employees because other lower level officers reported to the investigators and because they enjoyed a high level of discretion concerning the conduct of each particular investigation.

Environmental Investigators

The court in ***Mulverhill v New York*** 1994 US Dist LEXIS 6743, (1994, ND NY) held that the exemption for persons employed in an administrative capacity contained in §13(a)(1) of the FLSA did not apply to Environmental Conservation Officers, Environmental Investigators, or Forest Rangers because such persons performed the production work of the department by which they wer employed, that is, investigating and detecting violations of the laws and protecting and preserving the environment.

Deputy US Marshal

A deputy United States Marshal, working in courtroom and jury security, was held in ***Roney v United States,*** 790 F Supp 23 (1992, DC Dist Col) not to be an administrative employee exempt from the minimum wage and maximum hours provisions under the FLSA. This case also applied the regulations of the Office of Personnel Management

with the same result. Finding that the services performed by the employee related to the day-to-day running of the courtroom, and that such services were the basic production services offered by the employer, the court held that such work did not involve policy determinations or operational management of the United States Marshals Service. The court noted that to call such services administrative would cause the exemption to swallow the rule in that the services of all law enforcement personnel would then cause such employees to be exempt administrative employees, a result not intended by the FLSA.

Border Patrol Agents (Investigators)

Border patrol agents employed by the Immigration and Naturalization Service (INS) were held not to be exempt administrative employees under the FLSA by the court in ***Adam v United States*** 26 Cl Ct 782 (1992). The employees, uniformed enforcement personnel of the INS charged with enforcing the immigration laws by policing the borders to prevent and detect the illegal entry of aliens into the country, were the most senior of four classifications of border patrol agents. Applying the regulations of the Office of Personnel Management (5 CFR § § 555.2 et seq.), which nearly mirror those of the Department of Labor (29 CFR § § 541.2 et seq.), the court found that because the conduct of investigations was the business of the employer such work did not qualify as administrative work, since then all such investigators would be administrative employees. Similarly, the court found that the investigative work performed by such persons was manual labor and did not qualify as office or nonmanual work under the regulations.

Likewise, GS-360 employees at HUD engage in manual work in the field when they do on-site investigations (a substantial portion of their time) and therefore the measuring, etc is not “non-manual work.”

The Agency made a big deal out of the use of the term “compliance,” used in the OPM Regulations regarding FLSA exemption. The precise use urged by the Agency in this case was specifically rejected by the Court in ***Grandits v. U.S.***, 66 Fed. Cl. 519 (2005):

> “The critical terms are defined by the OPM regulations:
>
> > *Formulation or execution of management programs or policies* means work that involves management programs and policies which range from broad national goals expressed in statutes or Executive orders to specific objectives of a small field office. Employees make policy decisions or participate indirectly, through developing or recommending proposals that are acted on by others. 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 of the Federal Government, or making significant determinations furthering the operation of programs and accomplishment of 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 of the employing organization or of other organizations subject to regulation or other controls).
>
> 5 C.F.R. § 551.104 (emphasis in original). The work of all Import Specialists, regardless of grade, could be said to involve "obtaining compliance" with Customs' schedules, regulations and policies. But not all Import Specialists also perform one or more of the phases of "program management" defined immediately above, such as "planning, developing, promoting, coordinating, controlling, or evaluating operating programs" for Customs. These "program management" functions distinguish the exempt administrative employee from the nonexempt employee performing production functions. Furthermore, OPM regulations explicitly distinguish the "management or general business function," from "production functions": "*Management or general business function* ..., as

> distinguished from production functions, means the work of employees who provide support to line managers." 5 C.F.R. § 551.104."

In short, the Agency has not proven that it properly exempted the GS-360-11/12/13/14/15 Grievants.

Substantial Comparative Evidence Supports A Finding of Non-Exempt

The FLRA has clearly stated that an Arbitrator is allowed to consider (and rely upon) similarly situated non-exempt positions, in making a finding regarding whether a position is properly exempt under the FLSA. See ***United States Dep't of the Navy, Naval Explosive Ordinance Disposal Tech. Div., Indian Head, Md.,*** 56 FLRA 280 (2000):

> The Agency's contention---that the Arbitrator is prohibited from considering and relying on exempt status determinations regarding other Equipment specialists who perform the same or similar duties---is refuted by the decision of at least one reviewing court. In this regard, the Seventh Circuit has made exempt status determinations, based in part on comparisons with other employees. in *Piscione v. Ernst & Young, L.L.P.,* 171 F.3d 527 (7th Cir. 1999) (*Piscione*), in deciding whether an employee's duties/activities satisfied the requirements for both the administrative and professional exemptions, the court compared the duties of the employee at hand with similar or analogous duties of employees in other cases. For instance, in determining whether the employee's duties and activities required the exercise of discretion and independent judgment under both the administrative and professional exemption criteria, the court relied on its finding that the employee's duties/skills were "similar to those" of "the plaintiff in *Spinden,*" who the Eighth Circuit found met this prong of the exemption tests. *Id.* at 537-38, citing *Spinden v. GS Roofing Prod. Co., Inc.,* 94 F.3d 421, 423-24, 428-29 (8th Cir. 1996) , *cert. denied,* 520 U.S. 1120 (1997). Additionally, the court concluded that "[c]omparing [the employee's] duties with the hypothetical employees used as illustrations in the regulations also clearly demonstrates that his primary duties directly related to the policies or general business operations of [the employer]."*Id.* at 542. In making such comparisons, the court noted that "[t]he analogy does not need to be perfect; the position needs only to be 'somewhat analogous' to an occupation exempted in the regulations."*Id.* at 542-43.

> The Seventh Circuit's decision in *Piscione* illustrates that the determination regarding whether an employee's duties satisfy the requirements of the professional exemption in 5 C.F.R. § 551.207 may be based on an assessment of the employee's duties at issue with the same or comparable duties of other employees whose exempt status has been determined. Here, the Arbitrator's comparison of the duties of the specialists at issue with the duties of the twenty-one nonexempt specialists is consistent with the comparative analytical approach in *Piscione*. As previously mentioned, the Arbitrator concluded that the eight Equipment Specialists were nonexempt based on her specific findings that the knowledge requirements, supervisory controls and duties performed by the designated representatives were the same or virtually the same as other specialists who the Agency conceded did not meet the professional exemption criteria in § 551.207. Accordingly, we defer to the Arbitrator's findings as a sufficient basis for concluding that the employees at issue did not meet the criteria in § 551.207.

Similarly, in this case, the Union introduced evidence showing that the GS-360 employees at issue here should be found to be non-exempt from the FLSA due to comparisons with other non-exempt positions.

For instance, the Union introduced a DOL Opinion Letter demonstrating that Background Investigators are properly non-exempt under the FLSA. Those Investigators, like the GS-360 “Investigators” at issue in this case (ie, those Equal Opportunity Specialists who testified [and whose PD’s reflect accurately] that they spend 95% of their time performing investigations) perform the full range of investigation, complete a Report of Investigation and make a recommendation. These positions failed the primary duty test (*See* ***DOL Opinion Letter 2005-21*** (August 19, 2005) and regulations and cases cited therein).

Further, the Union introduced a Settlement Agreement between AFGE Council 216 and the Equal Employment Opportunity Commission, which showed that all Equal

Employment Specialists and Investigators were reclassified in 1995 by the EEOC as FLSA non-exempt, at GS-11 and 12 levels.

In addition, the Union introduced into evidence an Employee Listing of all Headquarters EEOC Employees, including two GS-360-13 non-exempt employees.

Even more on point, the Union introduced into evidence a number of GS-360 Position Descriptions of non-exempt employees at the Department of Labor. These documents described duties very similar to those testified to by the Grievants.

Finally, the Union pointed out (in the vein and spirit of ***United States Dep't of the Navy, Naval Explosive Ordinance Disposal Tech. Div., Indian Head, Md.,*** 56 FLRA 280 (2000)) that this same Agency – HUD – has itself classified GS-360-11 and GS-360-12 employees as FLSA non-exempt. Not only are the jobs, series and grades identical to the Grievants, but the testimony of record demonstrates that the non-exempt employees perform the same jobs as the exempt employees, in exactly the same way as the exempt employees. This is extremely persuasive, overly compelling and nearly binding evidence that the Grievants are wrongfully classified as exempt.[4]

[4] The only possible Agency argument – that the FLSA classifications of the GS-360-11/12 non-exempt positions/employees is erroneous – can just as easily be reversed. But since the burden is on the Agency to show a proper exemption by clear and convincing evidence "beyond a reasonable doubt," the potential of misclassification is enough to defeat the Agency's entire argument. In other words, enough of a doubt exists by the mere existence of these non-exempt GS-360-11/12 positions for summary judgment to be granted against the Agency on the remaining, exempt, GS-360-11/12 employees/positions.

In light of the above, the Union renews its Motion for Summary Judgment. The main reason given for not granting the Motion on November 4, 2005 was that the Agency had promised/proffered substantial rebuttal testimony. In fact, the Agency presented no rebuttal testimony. Accordingly, the Motion should be granted.

Motion for Summary Judgment for All Remaining Exempt Employees

The Union hopes this Motion is not viewed as premature. If there was any hope that future hearings would be fruitful to the process in any way, the Union would hold this Motion in abeyance. Due to recent revelations by the Agency, however, the Union believes that a Motion for Summary Judgment is ripe for all Bargaining Unit employees listed by the Agency as "Exempt" from the FLSA.

The Union requested on September 27, 2005 that the Agency provide certain information pursuant to §7114(b) of the Statute:

> "We also now request that the Agency identify which exemption it relied upon to classify each employee as Exempt from the FLSA at the time the decision was originally made to do so, and which exemption it now relies upon for each and every exempt employee/position."

The Agency's **Response** (November 1, 2005) mis-stated the Union's Request, but phrased it close enough that the Response (which is binding upon the Agency in this instance as an Admission) is quite relevant:

> In its supplemental emailed data request of September 27, 2005 the Union also asked for 1) The exemption originally relied upon by the Agency to exempt positions from FLSA coverage, 2) The exemption now relied upon to exempt positions and 3) Copies of the evening/weekend sign in/out sheets kept at the South entrance.

Management can respond as follows. With respect to the first item, management cannot identify specific exemptions used to exempt positions from FLSA coverage. With respect to the second item, Management relies on the Administrative and/or Professional exemptions. With respect to the third item, Management requests that the Union articulate a particularized need for the sign in/out sheets.

The Agency, when pressed at the Hearing on November 3-4, 2005, stated that it was unable to provide the specific exemption currently relied upon "for **each and every exempt** employee/position."

Since it is the Agency's burden to affirmatively plead (and prove) an exemption(s) for each and every exempt employee/position, it has effectively ceded all remaining exempt positions/employees.

The US Court of Claims laid out the possible scenarios of proof and decision regarding FLSA cases in its recent opinion in **Adams v. U.S.** 65 Fed.Cl. 195 (Ct. Fed. Cl. 2005):

> "Thus, there are several possible outcomes for the remaining claims of the six plaintiffs ****203*** carved out by defendant's cross-motion from the general body of GS-13 claimants in plaintiffs' motion for partial summary judgment. If defendant offers evidence of a valid administrative exemption to FLSA overtime requirements and plaintiffs fail to raise a genuine issue of material fact, summary judgment will be entered and that plaintiff's claims will be dismissed. Or, defendant may offer evidence of a valid administrative exemption but plaintiffs will have substantiated a genuine issue of material fact--in that scenario summary judgment will not be granted and that plaintiff's claims will remain to be resolved by trial or by settlement. Finally, if defendant's evidence of an administrative exemption is lacking a mandatory element of proof, or fails to address a period of employment that underlies a portion of that plaintiff's claims, summary judgment will not be granted to defendant for the claims for which defendant is not entitled to judgment as a matter of law. In that instance, plaintiffs' April 26, 2002 motion for partial summary will be granted for those claims for which defendant's allegations of proof are deficient, because, as stated in this court's opinion in *Adams III,* No. 90-162C and Consolidated Cases, slip op.

> at 27, defendant bears the burden of proof to overcome a presumption against applying the administrative exemption under FLSA."

As the court pointed out, if the defendant's evidence either lacks a mandatory element of proof or fails to address a period of employment underlying the Plaintiff's claims, summary judgment is to be entered on behalf of Plaintiffs. That is because Defendants (the Agency, here) bears the burden of proof.

OPM's regulations clearly state that the determination/designation by an Agency of a position as exempt is what is being reviewed by the Arbitrator, and **that designation** must be "**correctly determine[d]**." Since the Agency in this case did not "**correctly determine[]**" that the GS-360-11/12/13/14/15 employees met "one or more of the exemption criteria," it cannot claim "no harm, no foul" in this case:

> **§ 551.201 Agency authority.**
> The employing agency may designate an employee FLSA exempt only ***when the agency correctly determines that the employee meets one or more of the exemption criteria of this subpart*** and such supplemental interpretations or instructions issued by OPM.

(emphasis added). The Agency has stipulated that it "did it wrong," both by relying initially on grade and later upon PD, in its failure to reclassify employees as exempt. It now claims it is unable to identify which exemption is being relied upon to continue to classify each employee as exempt. Under these unique circumstances, it is appropriate to reclassify all bargaining unit employees as non-exempt.

Should the Agency choose to make an exemption determination in the future, that could then be challenged and reviewed. In the meantime, thousands of employees are suffering, and the Agency's ostrich-like litigation strategy cannot be rewarded.

Undisputably, the Agency has admitted to facts which enable the Arbitrator to find in favor of the Union on all remaining bargaining unit positions/employees at the GS-11 and above levels. We ask that he do so.

Respectfully Submitted,

___/s/_____
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Attorney for the Union

___/s/_____
Carolyn Federoff
President, AFGE Council 222

Certificate of Service

I certify that a copy of the foregoing was served upon the Agency via email.

Date: November 13, 2005

___/s/_____
Michael J. Snider, Esq.

JAN 9 2006

IN THE MATTER OF ARBITRATION BETWEEN

The U.S. Department of Housing and Urban Development
And
The American Federation of Government Employees
National Council of HUD Locals 222, AFL-CIO

Before Arbitrator Sean J. Rogers

HUD/AFGE FLSA Overtime Grievance

Agency Opposition to Union's Renewed Motions for Summary Judgment Relating to Liability for GS-360 Employees and Union's Motion for Summary Judgment on All Remaining Exempt Employees

The agency requests that the union's Motions for Summary Judgment in this matter be denied in their entirety. In support of its request, the Agency submits the following:

Standard For Summary Judgment

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. A fact is material if it might significantly affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247,248 (1986).

The party moving for summary judgment bears the burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the non-moving party must set forth evidence of specific facts showing the existence of a genuine issue for trial. *Anderson, 477 U.S.* at 242, 248-250. Only facts that may affect the outcome of the case under governing law are "material" *Anderson* 477 U.S. at 248.

The Arbitrator must resolve any doubts about factual issues in favor of the party opposing summary judgment. All favorable inference must be drawn in favor of the party opposing summary judgment. At the summary judgment stage, the arbitrator's function is not to weigh the evidence and render a determination as to the truth of the matter, but only to determine whether there exists a genuine factual dispute. *Anderson,* 477 U.S. at 248.

Union's Renewed Motion for Summary Judgment Regarding GS-360 Employees

The union has utterly failed to demonstrate that there are no genuine issues of material fact in this case. In fact, the union's motion ignores this (its) initial burden entirely. Accordingly, under *Anderson, supra.,* there is no burden to shift to the agency, and the

union's motion must be found to fail at the outset. Nonetheless, a review of the record in this matter is instructive.

The record clearly demonstrates that there are genuine issues of material fact concerning the FLSA status of the GS-360 positions. There are almost 500 pages of testimony taken over three days. Witnesses of the union and management contradict each other on key points related to the propriety of FLSA exemptions. Specifically, there is contradictory testimony in the record regarding production work versus administrative work, and the level of discretion and independence exercised by employed by GS-360 employees. A cursory review of the testimonies of agency witnesses Floyd May, Candace Tapscott and James Sutton versus the testimonies of union witnesses Nernie Mathis, Peggy Johannsen , Martin Kiebert and Barbara Knox make this plain. These are issues of material fact because they constitute, in part, the criteria by which FLSA status determinations are made. Thus, summary judgment is not appropriate in this case. Rather, a decision by the arbitrator based on the record and post hearing briefs is required.

As noted above, the union ignored, and failed to meet, its initial burden in seeking summary judgment. Its motion simply skips to a series of assertions in support of the position that the agency has not met its burden of proving the GS-360 FLSA exemptions. Thus, the union's submission is actually more of a post hearing brief rather than a valid motion for summary judgment. The assertions, as appropriate, will be addressed in order of appearance.

The union suggests that there is no evidence regarding the GS-11, 14 and 15 positions. In so suggesting it argues that the GS-360-13-15 position descriptions should be ignored by the arbitrator based on a technicality. The agency submits that those position descriptions are properly before the arbitrator, and, accordingly, should be granted their proper weight in this matter. The union also claims that management should be held culpable for not entering evidence for the preceding five years regarding the GS-360 jobs. Management produced the best evidence available.

The union then returns to its tired old mantra that an FLSA determination by grade is a *per se* violation of the statute, and then, somehow, reaches the conclusion, without citing any relevant authority[1], that the agency is foreclosed for all time from mounting any defense of itself in this case. Contrary to the union's position, the method of FLSA classification utilized by the agency is not the ultimate issue in this arbitration. The parties do not dispute that the wrong method was used. But we do dispute whether nonexempt employees were incorrectly classified as exempt. This fact is clearly material to determining if there was no harm. The union has not brought this grievance concerning classification just for classification sake. The right to overtime that is tied to the classification is the ultimate issue. If the wrong method was used, but a position was correctly exempted, there is no remaining issue regarding whether they were properly compensated for overtime work.

[1] Twice in its motion the union cites *AFGE v. OPM*, but this case is inapposite. It does not address the question of wrong method correct result.

A similarly incorrect technical argument is made by the union in its interpretation of 5 C.F.R. Section 551.201. It argues that, apparently, if an FLSA designation is incorrectly "determined", under that section, i.e., the wrong evaluation process was applied, the resulting "designation" cannot stand. This leads to preposterous results. Namely, that process trumps substance under the FLSA

Citing two FLRA cases, *Naval Explosive Ordinance Disposal Tec. Div Indian Head Md.*, 56 FLRA 280 (2000) and *Navy, Indian Head Md. V. AFGE Local 1923,* 57 FLRA 280 (2001), the union's motion also incorrectly asserts that position descriptions cannot be relied upon to make FLSA exempt status determinations. Rather than prohibit the use of position descriptions, both of those cases endorsed their use for FLSA issues. The underlying assumption was that they be accurate and corroborated by testimony of the incumbents. The agency submits that this is precisely what it has done for the GS-360 series in this case. The position descriptions were produced and their content was verified by relevant supervisory testimony.

Similarly incorrect is the union's allegation that the agency did not properly identify the pertinent FLSA exemption(s) it claims for the GS-360 series. During an off the record discussion in the presence of the arbitrator, the agency advised the union that it relied upon the administrative and/or professional exemptions for all FLSA exempt positions, including the GS-360 series.

Further along, the union simply asserts that the GS-360 series does not perform administrative work within the meaning of the FLSA. This assertion is unaccompanied by any reference to the record in this case. There is reference to an arbitration award, but no nexus between it and this case is drawn.

The union submitted extensive data regarding "analogous" positions in other agencies and their FLSA nonexempt status. Apparently, this is supposed to mean that all of HUD's GS-360 employees must, by definition, also be nonexempt. The union also "concluded" that the compliance work of the GS-360 series at HUD does not support an FLSA exemption. These "conclusions" attempt to substitute the union's judgment for the arbitrator's and do not relate to the question of summary judgment.

The union's reliance on "comparative evidence" is equally tenuous. From a purely analytical standpoint, what happened at other agencies or what they may have posited regarding the FLSA status of certain positions may have some value, but the materiality is certainly highly questionable.

Lastly, the fact that certain GS-360-11 and 12 positions at HUD may have been classified FLSA nonexempt has no probative value whatsoever since individual positions in the same series and grade may differ in their duties and responsibilities.

Union's Motion for Summary Judgment for All Remaining Exempt Employees

This premature motion must be denied. It does not fit into the summary judgment analytical framework. The union cannot to meet its burden as the moving party to demonstrate that there are no issues of material fact. This is not surprising since there, as yet, is no factual record regarding the remaining employees.[2] Accordingly, this motion, as the earlier one, must be found to fail at the outset, and be denied.

The substance of the motion is just a wearisome rehash of certain assertions made by the union in its renewed motion. It again incorrectly asserts that the agency did not supply the exemptions it relies upon to support FLSA exemptions. As noted above, the union was advised it is the administrative and/or professional exemptions that the agency relies on.

The motion also revisits the old wrong method argument asserting again that use of grade as an FLSA coverage criterion precludes management from mounting any defense whatsoever. Here, again, the union provides no authority for this conclusion.

Lastly, the motion again exalts process over substance and supports the bizarre result of a properly exempt classified as nonexempt because of a procedural error. This cannot be construed as promoting the purposes of the FLSA, and, therefore, must be rejected.

The agency submits that the union's non-substantive, hyper technical, motion cannot be allowed to prevent the development of a factual record for the remaining exempt positions, and, accordingly, must be denied

Conclusion

In light of the foregoing facts, the agency requests that the arbitrator deny the instant motions for summary judgment in their entirety.

Respectfully submitted,

Norman Mesewicz
Agency Representative

Certificate of Service

I certify that a copy of the foregoing was served upon the union via Email. January 9, 2006.

[2] Assuming *arguendo* that a burden had shifted to the agency to demonstrate a genuine issue of material fact, the agency's position would be, as noted above, that an issue of material fact is the correctness of the FLSA exemptions as it runs to the concept of harm.

BEFORE
SEAN J. ROGERS
ARBITRATOR

In the Matter of Arbitration between:

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 222, AFL-CIO

Union

and

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Agency.

FLSA Exemption of GS-360 (Grade 11, 12, 13, 14 and 15) Equal Opportunity Specialist

DECISION AND ORDER ON UNION'S REQUEST FOR REPLY BRIEF TO AGENCY' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

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.*

Carolyn Federoff, Esq., President, AFGE Council 222 – *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 Agency.*

I. PROCEDURAL BACKGROUND

On November 3, 2005 during the merits hearing in the above-captioned matter, the American Federation of Government Employees, Council 222, AFL-CIO (AFGE or Union) filed a Motion for Summary Judgment (Motion) at the conclusion of its case-in-chief.

(Transcript (Tr) 165). On November 4, 2005, the parties' counsels presented oral arguments on the Motion. (Tr 7-31). The Arbitrator denied the Union's Motion without prejudice. The Arbitrator stated that the Union was free present its Motion at the conclusion of the Department of Housing and Urban Development's (Agency or HUD) case or with the Union's post-hearing brief. (Tr 31-34).

On November 13, 2005, the Union renewed and amended its Motion. The Union's amended Motion expands its November 3, 2005 Motion to include a Motion of Summary Judgment as regards all remaining classes of Agency-exempt bargaining unit employees under the Fair Labor Standards Act (FLSA).

On January 9, 2005 pursuant to the parties' agreement, HUD filed an Opposition to the Union's amended-expanded Motion.

On January 11, 2006, the Union requested leave to file a reply brief to HUD's Opposition to the amended-expanded Motion.

On January 12, 2006, HUD filed an opposition to the Union's request to file a reply brief to HUD's Opposition to the Motion.

II. THE UNION'S REQUEST FOR LEAVE TO RESPOND TO HUD'S OPPOSITION TO THE MOTION

HUD asserts a number of grounds in opposition to the Union's request to respond to the Agency Opposition to the Motion. HUD argues that the union, the Agency and the Arbitrator knew the Union would refile the Motion, yet the Union never raised or discussed a reply brief. HUD argues that all issues raised in the Motion have been or should have been fully argued, and there is no justification for further submissions. HUD argues that to prolong argument on the Motion would not promote arbitral economy, but would needlessly waste the parties' resources on redundant efforts. HUD argues that AFGE did not discuss its request to file a reply brief with the Agency before making the request to the Arbitrator. For these reasons, HUD requests that the Arbitrator deny the Union request to file a reply brief to HUD's Opposition to the Motion.

III. THE UNION'S MOTIONS AND REQUEST TO FILE A REPLY BRIEF

The Union's November 3, 2005 Motion and its November 13, 2005 renewed, amended and expanded Motion are substantive, comprehensive motions supported by argument and case cites. HUD's Opposition responds to the Union's Motion substantively and comprehensively. The record establishes that the parties' counsels did not discuss further submissions at hearing or during post-hearing conference calls and e-mail exchanges which included the Arbitrator.

Based on the parties' counsels agreement, post-hearing briefs are due January 31, 2006. The Union and HUD are not limited as regards any arguments each may choose

to present in their post-hearing briefs.

For these reasons, the Arbitrator finds that the parties' counsels did not agree to further submissions and none is needed by the Arbitrator to complete the record on the Motion and Opposition. However, the Arbitrator will not rule on the Motion until the parties briefs are received and reviewed as part of the Award.

V. DECISION AND ORDER

The Union's request for leave to file a reply brief to HUD's Opposition to the Motion is denied.

ORDER:

1. The Union's January 11, 2006 request for leave to file a reply brief to HUD's Opposition to the Motion is denied.

2. The Union's Motion to Dismiss and HUD's Opposition thereto will be considered with the merits of the grievance.

Sean J. Rogers

Sean J. Rogers, Esq.
Alexandria, Virginia
January 13, 2006