

IN THE MATTER OF ARBITRATION BETWEEN

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES (AFGE), AFL-CIO, NATIONAL)
COUNCIL OF HUD LOCALS 222,)

Union,)

and)

U.S. DEPARTMENT OF HOUSING)
AND URBAN DEVELOPMENT,)

Agency.)

FLSA Overtime

GS-360 Positions/Employees

UNION'S CLOSING BRIEF

The Union, by and through its attorneys, Michael J. Snider, Esq., Jason Weisbrot, Esq., Ari Taragin, Esq., Snider & Associates, LLC and Union Council President Carolyn Federoff, moves the Arbitrator to rule in its favor and conclude that the employees at the GS-11/12/13/14/15 levels were improperly categorized by the Agency as Exempt from the overtime provisions of the Fair Labor Standards Act (FLSA) and were properly non-exempt at all relevant times between June 2000 and present.

The Agency failed to present any evidence relating to GS-360-14 or GS-360-15 employees, and has since the hearing ceded all GS-360-11, 12 and 13 positions by classifying their PDs as "non-exempt" from the FLSA. In addition, GS-360-11 and 12 employees in non-exempt positions testified that they do the same work as the GS-360-11/12 employees previously classified as exempt. Finally, the Agency did not present any evidence regarding GS-360-13 employees. The Union should prevail on all employees/positions in the 360 series.

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ISSUE

The joint issue in this matter is whether the Agency has proven that it properly exempted GS-360-11/12/13/14/15 bargaining unit employees from the Fair Labor Standards Act.

ARGUMENT

I. INTRODUCTION

The Fair Labor Standards Act provides for exemptions to the Act for “bona-fide executive, administrative, or executive” employees. See 29 U.S.C. 201 Sec. 13. These exemptions are defined and explained at 29 C.F.R. 541.100-402. These exemptions are further clarified for Federal Employees at 5 C.F.R. 551.205-207. Federal Employees who do not meet the criteria set forth in these locations are protected by the Fair Labor Standards Act.

OPM's implementing regulations provide that every single federal 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. **5 CFR § 551.202**

According to 29 C.F.R. 541 Sec. 200-203, an administrative employee is one “whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.” See 29 C.F.R. 541 Sec. 200(a)(2-3) “To meet this requirement, an employee must perform work directly related to the running or servicing of the business,” as distinguished, for example, from working on a

production line or selling a product in a retail or service environment. See 29 C.F.R. 541 Sec. 201(a).

In 5 C.F.R. 551 Sec. 206, the administrative exemption is clarified for Federal employees.

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 work time in a representative workweek on administrative functions and work that is an essential part of those functions to meet the 80-percent test.

[62 FR 67247, Dec. 23, 1997; 63 FR 2304, Jan. 14, 1998]

II. THE AGENCY FAILED TO PROVE THAT IT MADE A PROPER CLASSIFICATION DETERMINATION OF SERIES 360 INVESTIGATORS AT ANY TIME BASED ON ACTUAL JOB DUTIES.

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. 5 CFR §551.202(d). 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. 5 CFR §551.202(d).

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 Ordnance 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. County 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 unmistakably 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. *Magana 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 process 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:

§ 551.202 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).

- A. The Agency did not meet its burden of proving that the series 360 employees are exempt under the administrative exemption.

The Agency had the burden of proof in this matter. The Agency did not meet its burden of proof with regard to the classification process, as defined by the OPM or DOL regulations. 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).

This is especially clear when comparing the 1989 version of the OPM regulations to its 1999 counterpart. The 1989 OPM regulations provide that:

In all exemption determinations, the agency shall observe the principles that-

- (a) Exemption criteria shall be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.
- (b) The burden of proof rests with the agency that asserts the exemption.
- (c) All employees who clearly meet the criteria for exemption must be exempted.

5 C.F.R. 551.202

The 1999 OPM regulations supplemented the former instructions:

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 [and is, thereby, eligible for overtime pay].

5 C.F.R. 551.202 (a) - (d)

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 FLSA. Then, the Agency *stipulated* that it was relying upon keeping employees exempt based *solely* on their position descriptions, (“PD”), also in violation of the FLSA.

The Federal Circuit has held that position descriptions may not be relied upon for an FLSA determination. ***Berg v. Newman***, 982 F.2d 500 (Federal Circuit 1992). Rather than specific job duties and day to day job duties must be analyzed, and must clearly support the exemption. See also ***Department of the Navy, Naval Explosive Ordnance, Indian Head, Maryland and AFGE Local 1923***, 57 FLRA 280, June 21, 2001.

Clear testimony of the record revealed that the Agency’s classifiers ***never*** examined the actual job duties of employees to determine exemption status. OPM’s own written guidance on performing FLSA classifications states clearly that the determination must be made on actual job duties. The Agency violated the FLSA *per se*.

Berg also held that although reliance upon Department of Labor-issued regulations is a shield from liquidated damages, the same is not true of reliance upon OPM regulations or guidance (even if the Agency had relied upon same). Therefore, the Agency cannot avoid liquidated damages by merely relying on OPM regulations or guidelines. Furthermore, reliance upon grade, which the Agency stipulated to, is a per

se violation of the Fair Labor Standards Act. That was addressed by the court in ***AFGE v. OPM***, 821 F.2d 761 (D.C. Cir. 1987).

Furthermore, an Agency's failures during the pendency of the Grievance to review the classifications have been discussed previously. The FLRA quoted Arbitrator Mollie Bowers with approval, in her finding that 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, in that case, 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.

- B. The Agency admitted that it never made a classification determination based on the actual job duties of series 360 investigators as required by OPM regulations and policy.

The Agency stipulated that its initial classification was based solely on grade level. The Agency also stipulated that the subsequent classification, performed after the instant grievance was filed, was based solely on the position descriptions provided for each grade level. The Agency further stipulated that at no time during the classification process did the Agency make a determination based on actual job duties of investigators. Based on these admissions, all the employees in the bargaining unit have been presumed to be non-exempt for the past sixteen years.

The FLSA and regulations provide that an employee is non-exempt unless the Agency makes a **valid, correct and contemporaneous** determination that that employee is properly exempt under the administrative, professional or executive exemptions. That determination must be based on the actual job duties of that particular employee. The Agency failed to make any proper classification of each employee over the past sixteen years. The Agency now, however, wishes to hang its hat on a “no harm, no foul” defense.

The Agency contends that it is inconceivable that process would trump substance in the classification of employees. Therefore, if the employee is currently exempt based on his or her actual job duties in the record then there was no past harm. But this argument is counter to the FLSA, OPM and DOL regulations that all support process over substance in the presumption that employees are non-exempt. A presumption is a proposition that can be taken as true without any facts to support. The Agency has the burden to overcome this presumption by properly classifying employees.

The Agency never did properly classify employees; therefore, the Arbitrator can very reasonably conclude that each employee was non-exempt during the entire relevant time period of this Grievance.

- C. The testimony of Ms. Thrash proved that the Agency did not make a proper classification of series 360, GS-12 investigators.

The Agency provided one witness to testify about the classification process. Ms. Marlene Thrash was a Human Resources Specialist at the GS-13 level who had worked at HUD for only fifteen months. T1. at 23 (September 29, 2005). She stated that at HUD her primary duties are as a staffing and classification specialist. *Id.* at 24. She testified that in 2001, she was given an assignment to classify employees at various grade levels based on position descriptions provided by the Agency. *Id.* at 50. Ms. Thrash stated that she never asked any employee about his or her actual job duties. Her determination was solely based on the position descriptions provided by the Agency. The Agency did not verify the accuracy of the PD's, relied upon PD's that were created in anticipation of litigation and in one case provided a PD that was authored months after Thrash's determination.

Ms. Thrash identified Agency Exhibit One as a document that was the analysis used to make a determination during the classification of GS-12 EO Specialists in FHEO under the FLSA. *Id.* at 25. On Voir dire, Ms. Thrash explained that she created the document in February, 2005, **after** the instant grievance was filed. *Id.* at 29. Ms. Thrash identified Agency Exhibit Two as the position description for the field EO Specialist position that she used to determine "what the employees in the position perform." *Id.* at 31. Yet, Ms. Thrash admittedly did not examine the actual job duties of any investigators. Ms. Thrash did recognize Agency Exhibit Three as the "document

she used to determine the headquarters positions, what duties they perform at headquarters, for the EO Specialist position.” *Id.* at 37. Ms. Thrash also recognized Agency Exhibit Four, a copy of the information she got off the internet that gives the definition for FLSA categories. *Id.* at 38. The document was dated February, 2005. *Id.* at 39.

Ms. Thrash testified that she conducted an analysis because she was given an assignment to determine the FLSA determinations for EO Specialists, GS-12. *Id.* at 50. She performed the analysis by obtaining copies of position descriptions for the GS-12 employees from HUD. *Id.* at 40. Ms. Thrash explained that she got the FLSA definitions from the internet. *Id.* Ms. Thrash then stated that she “reviewed the position descriptions and determined what the major duties were for these employees, and compared it to the definitions.” *Id.* While Ms. Thrash determined that the GS-12, 360 investigators were exempt based on the FLSA definitions of the administrative exemption, she admitted that she did not examine or analyze the actual job duties of the employees, as required by OPM or DOL regulations. Ms. Thrash testified that the GS-12 investigators meet the first prong of the primary duty test of the administrative exemption because the PD requires the incumbent “to prepare reports. These reports are used to develop the policy or program requirements for the position.” *Id.* at 43. Ms. Thrash even cites to the position description which explains that: “The work requires the development of recommendations to change management policies and practices where improvement is needed.” *Id.* However, the first prong of the primary duty test requires that the work performed significantly affects the formulation or execution of management programs or policies, not simply policies affecting that position.

Ms. Thrash testified that the GS-12 investigators meet the second prong of the primary duty test because the introduction to the PD “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.” *Id.* at 44. The second prong of the primary duty test requires that the work involves management or general business functions or supporting services of substantial importance to the organization serviced.

The OPM guidelines define general business functions as:

- (i) Providing expert advice in specialized subject matter fields, such as that provided by management consultants or systems analysts;
- (ii) Assuming facets of the overall management function, such as safety management, personnel management, or budgeting and financial management;
- (iii) Representing management in such business functions as negotiating and administering contracts, determining acceptability of goods or services, or authorizing payments; or
- (iv) Providing supporting services, such as automated data processing, communications, or procurement and distribution of supplies.

Ms. Thrash did not testify that the investigators perform any work that involves general business functions. In fact, Ms. Thrash did **not** even testify as to the **actual** day to day job duties of any series 360 employee(s).

Ms. Thrash testified that the GS-12 investigators meet the intellectual and varied element of the non-manual work test because Agency Exhibit Three states: “a requirement for expert skill and fact-finding, analysis, problem-solving, and writing.” T. at 44. Based on these facts, Ms. Thrash concluded that the “incumbents perform some type of analysis in doing their jobs, so I feel it's non-manual in nature and it is of an intellectual nature. But this does not address the OPM or DOL regulations and definitions of the varied and intellectual element of the non-manual work test.” *Id.* With

regard to specialized or technical knowledge or special training, Ms. Thrash explained that it is specialized because the experience can only be obtained at HUD. *Id.* at 45.

Yet, Ms. Thrash's testimony overall is not material and very unpersuasive because she admittedly relied solely on the unverified and incorrect position descriptions when she made her determinations. On cross examination, Ms. Thrash explained that she made her determinations relying solely on the positions descriptions provided by the Agency and the OPM regulations, described in Agency Exhibit Four, that she pulled off the internet. *Id.* at 48. She **did not interview** any supervisors, any employees or any individuals that completed the classifications previously. *Id.* at 48-49. Ms. Thrash's testimony is strictly limited to GS-12 investigators. She did not examine the 360 series position at the GS-9/11/13/14/15 levels. *Id.* at 49-50.

Ms. Thrash testified that she was given the assignment by Mr. Louis Anderson, a supervisor in one of the branches of Personnel. *Id.* at 50. Mr. Anderson provided an example of the format and told Ms. Thrash to complete the classification determination. *Id.* Ms. Thrash explained that the example was from another classification previously performed at HUD. *Id.* at 51. Ms. Thrash admitted that she had only been at HUD for ten months when she was given the assignment. *Id.* Ms. Thrash testified that when she completed the classification, she wrote it out first in her own handwriting, but no longer has those handwritten notes. *Id.* at 51-52. Ms. Thrash testified that she did not consult with anyone when she made her determinations and that she did not know whether Mr. Anderson reviewed the decision. *Id.* Ms. Thrash admitted that she did not consult the DOL regulations when she made her determinations. *Id.* at 53. Ms. Thrash admitted that she did not have any case law to review. *Id.* at 53.

Ms. Thrash testified that she received the position descriptions from Ms. Deborah Harrison, from the Fair Housing, Equal Opportunity Office. *Id.* at 54. After examining Joint Exhibit Seven, Ms Thrash explained that Ms. Harrison works under the Assistant Secretary for Administration, Chief Information Officer. *Id.* Ms. Thrash did not know where the 360 series employees were located on the organizational chart in Joint Exhibit Seven. *Id.*

Ms. Thrash testified that she was not familiar with a document entitled, "How to make exemption status determinations under the Fair Labor Standards Act." *Id.* at 56. Ms. Thrash had never seen Union Exhibit One. *Id.* at 57. Ms. Thrash admitted that she did not "verify the accuracy of the position description" because she did not interview the incumbent and supervisor. *Id.* Ms. Thrash was not familiar with the proposition that FLSA exemption status must be determined based on day to day job duties that the employee actually performs rather than duties described in the PD. *Id.* at 58. After examining Union Exhibit Four, Ms. Thrash admitted that: "The designation of an employee as FLSA exempt or non-exempt ultimately rests on the duties actually performed by the employee." *Id.* at 59. Ms. Thrash admitted that the OPM regulations require that the actual job duties be inspected. *Id.* While Ms. Thrash did review the position description, she did not verify the accuracy of the actual job duties performed by investigators. *Id.* Ms. Thrash does not have any actual knowledge that series 360, GS-12 employees perform any duties listed in Agency Exhibits Two or Three. *Id.* at 59-60.

Ms. Thrash explained that she was familiar with the position classification evaluation statement attached to Agency Exhibits Two or Three, but used the "Factor

Evaluation System” form instead. *Id.* at 60-61. The former document is just a summary of the points for each factor, while the evaluation statement contains the detailed explanations of the classification process. *Id.* at 61. Ms. Thrash did not know if HUD employees verify their position descriptions on a regular basis or that they even received a copy of the PD. *Id.* at 62. Ms. Thrash had no knowledge of whether anybody at HUD verified the accuracy of their determination with OPM or DOL. *Id.* at 62-64.

Ms. Thrash testified that the investigators carry out the mission of HUD. *Id.* at 66. Union Exhibit Two is a DOL opinion letter. Ms. Thrash testified that she never saw one before, but she was familiar with the production/administrative dichotomy or line/staff distinction. *Id.* Ms. Thrash further admitted that the investigators carry out the mission of HUD. *Id.* One of HUD’s main functions is to make sure that housing is free of discrimination. *Id.* Ms. Thrash admitted that series 360 employees could be considered line: “I don’t necessarily think they are administrative.” *Id.* at 69. Ms. Thrash was familiar with the mission statement in Union Exhibit Three. *Id.* at 73. One part of the mission is to ensure affordable housing, free from discrimination. *Id.* Ms. Thrash admitted that it is possible that investigators perform that function for HUD. *Id.* at 74.

Ms. Thrash testified that she was not familiar with Union Exhibit Four, the strategic plan for HUD for fiscal year 2003-2008. *Id.* at 74-75. Ms. Thrash explained that one of the six subheadings of “HUD’s Strategic Goals” was “Ensure Equal Opportunity in Housing.” *Id.* at 76. Ms. Thrash admitted that “Equal Opportunity” means eradication of discrimination and that one of the three objectives is “to resolve discrimination complaints on a timely basis.” *Id.* at 77. Ms. Thrash admitted that the

series 360 investigators are responsible for the enforcement of the Fair Housing Act; “they look at discrimination complaints.” *Id.*

Ms. Thrash admitted that she does not know what types of guidelines the EO Specialists use on a day to day basis, except for what is written in the position description. *Id.* at 78. Ms. Thrash did not review or examine any of the guidelines listed in the PD. *Id.* at 79. Ms. Thrash does not even know what the final product of work looks like, let alone what it is used for. *Id.* Ms. Thrash explained that she concluded that the work was of “great significance, since the consequences of errors on their part would be costly for the Agency.” *Id.* at 81.

Ms. Thrash incorrectly assumed that something very costly to the Agency must significantly affect it. Ms. Thrash further incorrectly assumes that the job duties are highly complex and demanding because errors would be costly in terms of litigation from discrimination complaints. *Id.* at 81-82.

The regulations provide that the classification must be performed for each employee based on their actual job duties. It is clear from the testimony of Ms. Thrash that a proper classification determination was never made regarding series 360 employees. She did not verify the accuracy of the position description provided by the Agency. She never interviewed an incumbent or supervisor about the actual day to day job duties of an investigator.

III. THE AGENCY FAILED TO PROVIDE SUFFICIENT EVIDENCE TO PROVE THAT THE ACTUAL JOB DUTIES OF THE SERIES 360 EMPLOYEES SATISFY THE ADMINISTRATIVE EXEMPTION UNDER THE FLSA.

The Union attempted to pin down the specific exemption that the Agency relied on to make its classification. The Agency indicated that it relied either on the

administrative or professional exemption. The Agency did not present any evidence that supports an exempt classification under the professional exemption. Furthermore, in Joint Exhibit One, the Agency makes an admission that the employees at the GS-11 and GS-12 level are not exempt under the professional exemption. The Agency should be estopped from arguing now that these employees were exempt under the professional exemption.

OPM implementing regulations state that the designation of an employee as FLSA-exempt ultimately rests upon the duties actually performed by the employee. 5 CFR 551.202(h)(i). Moreover, it is the **employer's burden** to prove that the employees are exempt (***Corning Glass Works v. Brennan***, 417 U.S. 188 (1974)) and it is clear that exemptions are construed narrowly against the employer who seeks to assert the exemptions. The OPM regulations provide detailed descriptions of the general types of duties or work that is defined under the administrative exemption. The Agency did not provide sufficient evidence to overcome its burden in this matter.

In this case, the Agency¹ 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 GS-13 positions that were testified about. 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, however, 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.

Further, the Agency has failed to present evidence about the vast majority of the five (5) years of job duties performed by the employees. Instead, it limited its testimony to job duties performed from the middle 1990s and earlier, and duties performed during the last few weeks or months. By testifying only about those time periods, the Agency has ceded all other time periods.

- A. The Agency testimonial evidence has very limited material or probative value because the witnesses were not current series 360 incumbents or first-line supervisors that would have actual knowledge of day to day job duties.

Mr. May is the General Deputy Assistant Secretary in the Office of Fair Housing and Equal Employment. T2. at 20 (October 11, 2005). He has served in that capacity since November, 2002. *Id.* His duties include the management of staff and budget and representing the department with the communities. *Id.* at 21. He is an exempt employee under the administrative exemption.

Mr. May testified that he had intimate knowledge of the duties and roles of GS-360 Equal Opportunity Specialists based on his work in that series between 1975 and the middle 1990s. *Id.* Mr. May testified that “the 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.” *Id.* at 23-24. Mr. May further testified that persons in the 360 series 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.” *Id.* at 24. Yet, on Voir dire examination, Mr. May admitted that he is not the first line supervisor of any GS-360 employees at the 13 level and below. *Id.* at 26-27. He is the third or fourth line supervisor of the employees at the GS-13 level and below. *Id.* His testimony is therefore not material to the actual job duties performed by those employees on a day to day basis. *Id.*

When asked about supervisory controls, Mr. May answered that at the GS-12 level 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.” *Id.* at 27-28. When asked about guidelines, handbooks or manuals, Mr. May corroborated the testimony of most witness regarding the Handbook, as well as the statutes and the regulations that pertain to each of our laws that are administered at HUD. *Id.* at 29-31. Mr. May admitted on direct examination that 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.” *Id.* at 29-30. The employees are merely expected to “interpret and execute the statute with what the statute requires.” *Id.* at 30. Furthermore, Mr. May testified that the Handbook “sets out the procedures that are required for a -- for an investigation. The specialists are not authorized to operate -- or to supplement their judgment differently than what the handbook and the statute requires.” *Id.*

When asked how complex the work of EO Specialists was, Mr. May stated that the work graduates to a greater degree of complexity the higher the grade level that the Specialist occupies. *Id.* Mr. May testified that at the GS-12 level, employees are

expected to conduct investigations with a multiplicity of issues or persons to be interviewed. *Id.* at 30-31. When asked about the impact, if any, on Agency enforcement policy of investigations, Mr. May stated that depending on the type of case, the impact on could be none at all or it could be very extreme. *Id.* at 31. He went on to state that a complex case may have a profound impact on the department's responsibilities. *Id.* However, when further examined on the proportion of cases based on multiplicity of issues, Mr. May admitted that the "great majority" of cases are single issue cases. *Id.* at 55. Furthermore, impact on the department's responsibilities does not equate to impact on enforcement policy. The primary duty test requires that the employee's work significantly affect the formulation or execution of management programs or policies. Mr. May's testimony regarding impact on responsibilities of HUD does not address the requirements of the primary duty test under OPM or DOL guidelines.

On cross examination, Mr. May corroborated testimony regarding the investigative plan and the model or guide provided in the Handbook. *T.* at 35. He stated that it must be approved by a supervisor. *Id.* Mr. May further testified about the numerous levels of review after a cause or no cause recommendation is submitted; there were at least three within FHEO. *Id.* at 35-36. He also stated that all cases, except those "administratively closed," must go through a level of review by counsel. *Id.* at 36. However, 360 investigators cannot independently close a case. *Id.* at 54.

Mr. May confirmed that he knows Mr. James Sutton, who sent the cover e-mail in Union Exhibit Seven to Atlanta FHEO Directors and Principals. *Id.* at 37. Mr. Sutton is the Director of FHEO Region 4 and is under the supervision of Mr. May. *Id.* at 38. Mr. May is currently his second line supervisor, but sometimes is his first line supervisor. *Id.*

Mr. May did recognize the HUD Closures form in Union Exhibit Eight and confirmed that it was distributed to all 360 employees to use. *Id.* at 39. He did not have any knowledge about the time that these documents were e-mailed to employees. *Id.* Mr. May did recognize the Conciliation Agreement, Title 8 Form in Union Exhibit Nine and confirmed the form is typically used by investigators. *Id.* at 40-41. There are other examples or guidelines that employees may also use. *Id.* at 41. Mr. May did recognize Union Exhibit Ten and confirmed that it was an amendment of a complaint form letter. *Id.* Mr. May testified that is one of many forms that investigators are expected to use.

Mr. May did recognize Union Exhibit Eleven, a final investigative report, and confirmed that it shows some of the levels of review that are expected. *Id.* at 41-42. Mr. May did not recognize Union Exhibit Twelve, the "Investigative Plan," but confirmed that it is one type of investigative plan that may be used for housing investigations. *Id.* at 42-44. He testified that there are different models that can be used by investigators. *Id.* Mr. May admitted that any deviation from those have to be approved by a supervisor in instances where there has been an examination of the plan. *Id.* at 43. Mr. May was not familiar with Union Exhibit Thirteen, but was familiar with the section of the act described on the document. *Id.* at 45. Mr. May was familiar with similar documents that have checklists for investigators to use. *Id.* See *also* Union Exhibits 14-25. Mr. May did recognize Union Exhibit Fourteen, entitled "Subpoena," and confirmed that it is a model provided to EO Specialists. *Id.* at 45-46.

Mr. May did recognize Union Exhibit Fifteen, an example of a UFAF accessibility checklist. *Id.* at 46. Mr. May was familiar with Union Exhibit Sixteen, for measurements and comments on exterior and common areas accessible elements. *Id.* The citations to

numbers on the left are either referring to the Handbook or accessibility guidelines. All of the documents are provided for the investigator's use. *Id.* at 46-47. Mr. May did testify that "it is expected that once the investigator leaves the office and they are actually on a field investigation, it is expected that they use their judgment to make critical determinations about whether or not they should use, in all instances, these documents and these guides or should they make adjustments based on what they are seeing in the investigation." *Id.* at 47. Yet, Mr. May did not have any knowledge about whether Atlanta GS-13 investigators deviated from the drinking/fountain water cooler elements described in Union Exhibit Seventeen, "Exterior Common Elements, Accessible Elements, Drinking Fountains/Water Coolers," though he was familiar with that document. *Id.* at 47-48.

Mr. May testified that he knows Mr. Todd Richardson and was familiar with the pilot program overview that he put together as a power point presentation. *Id.* at 49-50. The overview is Union Exhibit Thirty-One, and describes FHEO standards. On page three, it states that there were "less than 50 cause determinations for Fiscal Years 2000 through 2004 each year." *Id.* at 50. The next page talks about GAO recommendations and observations. *Id.* Page five identifies problems with the current process, identified by HUB directors. *Id.* One suggestion was "relying on TEAPOTS system or fields, rather than relying on personal ability to analyze case." *Id.* at 51.

Mr. May 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.” *Id.* at 52. Yet, Mr. May does not qualify the degrees of “independent thought and judgment” based on grade levels. Furthermore, Mr. May did not provide one example of a situation that renders the guide documents not useful or where investigators are expected to revise the investigative approach. Contrary to the Agency's contention, when a new witness is identified during the course of an investigation or interview, the EO Specialist does not employ independent discretion and judgment merely by adding the witness to the list of potential interviewees. *Id.* at 53. In addition, the investigator is expected to collect relevant documents, data and records as they become known. It does not require the exercise of independent discretion or judgment.

Ms. Tapscott is a supervisory EO Specialist and second line supervisor to Peggy Johannsen. *Id.* at 62. She stated that she is familiar with the work of investigators in both the enforcement and program sides. *Id.* at 62-63. Ms. Tapscott testified that when an investigator completes their review it is forwarded to Ms. Debra Bouziden, the first line supervisor of Ms. Johannsen. *Id.* at 64. Ms. Bouziden did not testify during the hearings. After Ms. Bouziden sends the review back for corrections or additional information it is forwarded to Ms. Tapscott. *Id.* at 64-66. After Ms. Tapscott reviews the findings and any corrections that are needed are made, the report is forwarded to general counsel in the Miami office. *Id.* at 66. Ms. Tapscott explained that the package is then signed off and sent to Atlanta Regional office. *Id.*

When asked what level or to what extent Ms. Johannsen works independently, Ms. Tapscott responded that as a GS-12 employee:

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.

Id. at 63-64.

Ms. Tapscott testified that Ms. Johannsen receives her assignments from the clerical staff. *Id.* at 64. The investigators manage their own caseloads relatively independently. *Id.* Nonetheless, Ms. Tapscott explained that: "They work very closely, however, with -- with their supervisor." *Id.*

Ms. Tapscott testified that reports regarding reasonable cause for discrimination require a lot of crossing the t's and dotting the i's. *Id.* at 65. She stated that Ms. Johannsen does a good job at making sure that all of the elements of the investigation are undertaken. As a supervisor, Ms. Tapscott makes sure that the report meets all the requirements. *Id.* at 66. She explained that there are checklists to make sure that everything required is in the file. *Id.* at 67-68. Ms. Tapscott testified that the checklists are in the investigator's manual and came from Atlanta. *Id.* They are used to ensure that all the elements of the investigation have been met. *Id.* at 68-69. The checklists are very detailed and require limited independent discretion and judgment. *Id.* at 70.

Ms. Tapscott testified that "the regulations and statutes require a variety of things take place in the implementation of the fair housing laws. Not only the 100 day timely investigative procedures, but also that the complainant is interviewed and all of their

witnesses are interviewed, that -- that the respondent is interviewed and that their witnesses are interviewed, that an investigative plan has been developed, that comparative analysis has been sought, that an on-site investigation -- takes place.” *Id.* at 68-70. All of this is required by and outlined in the Handbook and checklists. When asked how far the checklists go in telling the Specialists how to do their job, Ms. Tapscott responded that it reflects where in the Handbook clarifying information may be and provides any additional guidance that the investigator needs. *Id.* at 70. She stated that the Handbook is very descriptive and describes what happens in all phases of the investigation. *Id.* “That handbook, in addition to other items that have been provided by -- by our regional director, or at our national trainings that are offered, and in conjunction with guidance given by first line or second line supervisors, helps investigators to hone their skills, to make sure that they are investigating properly.” *Id.* at 70-71.

When asked about independent discretion and judgment employed by Ms. Johannsen, Ms. Tapscott explained that Ms. Johannsen initiates a substantial amount of independence because the work product is hers and she sets her own schedule for investigating complaints. *Id.* at 72-73. But this is not what the OPM and DOL regulations define as independent discretion and judgment. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in the light of all the facts involved in the employee’s particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction

or supervision. Factors to consider include, but are not limited to, 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. While the fact that an employee's decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment, the exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

Just because Ms. Johannsen “operates as an independent investigator, assigning her time to the cases and charges that she has,” does not mean she employs independent discretion and judgment. *Id.* at 73-74. In fact, Ms. Tapscott admitted that her discretion to run the case is “based on the regulatory requirements in the handbook....” *Id.* at 75-76.

On cross examination, Ms. Tapscott testified that Mr. Sutton is her supervisor and she recalls getting the e-mail regarding document format for cases from him on or about September 30, 2005. *Id.* at 77. She stated that the documents were “the guidance that Mr. Sutton gave us as to how he would like to see it happen. I assumed that they were forms that were being used nationally.” *Id.* She testified that Mr. Sutton

instructed her to install the documents on the share drive for access to all employees and it was a requirement that they be used by investigators. *Id.* at 78.

Ms. Tapscott admitted that she does not supervise any GS-14 or GS-15 investigators. *Id.* She stated that all the testimony about Ms. Johannsen would also apply to GS-13 employees. *Id.* Ms. Tapscott testified that when she identifies deficiencies in the investigation she sends it back for correction or more information. When asked what percentage of investigations are sent back for some additional work, Ms. Tapscott testified that “we might send back maybe 15 - 20 percent of our investigations for additional documentation.” *Id.* at 83. Ms. Tapscott further testified that a GS-12 or GS-13 EO Specialist closes approximately six to twenty cases per year, depending on the other work they are required to complete. *Id.* at 83-84. According to Ms. Tapscott, an employee that does 90% investigations will close anywhere from twelve to 20 cases per year. *Id.* at 84-85. Ms. Tapscott admitted that a finding of cause occurs only in approximately five percent of the cases. *Id.* at 85.

Ms. Tapscott contradicted the testimony of another Agency witness regarding the multiplicity of issues. Mr. May testified that the “great majority” of cases are single issue, while Ms. Tapscott stated that most of the cases she reviewed had more than one issue.

Ms. Tapscott testified that she directly supervised six employees and indirectly supervised about twenty employees. *Id.* at 87. Ms. Tapscott admitted that she spends very little time directly observing Ms. Johannsen. *Id.* Ms. Tapscott does not have any material knowledge about the actual day to day job duties that Ms. Johannsen performs. Only a very small percentage, approximately 1 or 2% of the work that Ms. Tapscott reviews is produced by Ms. Johannsen. *Id.* at 87-88.

When asked by the Arbitrator what happens if an investigator finds probable cause, Ms. Tapscott responded that: "No. No. They make -- they make no determinations like that. All the determinations with regard to whether or not a case – a complainant has any kind of discrimination is determined at the Atlanta level." *Id.* at 90. The investigators merely indicate to the Regional Office whether there is probable cause to believe discrimination occurred or not. *Id.* Ms. Tapscott explained it best when she stated that EO Specialists "recommend based on the facts and the findings of their investigation. They can recommend that discrimination did, in fact, take place, or that they do not feel that it *did*." *Id.* at 93-94. That is merely a diligent and accurate fact-finder.

Mr. James Sutton testified about the e-mail that he sent on September 30, 2005 to Atlanta FHEO Directors and Principals. T2. at 98. The e-mail message states "Subject - New Region 4 FHEO Document Formats, Effective Immediately." *Id.* Mr. Sutton stated that though the document is addressed to all supervisors it was supposed to be limited to people doing investigations under the Fair Housing Act. *Id.* at 99. Mr. Sutton further testified that the Act requires the department to complete investigations within 100 days and "since the beginning of [Mr. Sutton] tenure here in Atlanta as the regional director for FHEO, I have been trying to find ways to assist my staff in meeting that 100 day time line...." *Id.* Mr. Sutton attempts to suggest that the documents were solely generated through the relief effort concerning Hurricane Katrina to expedite the process for potential complaints; yet, the documents were last revised in 2001. *Id.* at 99-101.

Mr. Sutton testified that he is familiar with Ms. Mathis, an EOS in Region 4. *Id.* at 102. Mr. Sutton is the Region Director and supervises the Director of the field office to whom Ms. Mathis reports. *Id.* He does not have any knowledge of her actual duties on a day to day basis. Mr. Sutton testified that at some point, her work, and the work of all employees in Region 4 “pass by my desk in some form or fashion...work has to eventually be funneled to me and/or to general counsel for concurrence on the final determinations that are made on all cases.” *Id.* at 103. Mr. Sutton testified a lot about how investigators make recommendations for cause or no cause and recommendations for conciliation. *Id.* at 102-106. But he cannot testify as to Ms. Mathis’ day to day activities and how she performs her duties. Furthermore, Mr. Sutton admitted that he has only been working at HUD for “a year and some months,” and has very limited knowledge about the specific training that Ms. Mathis had. *Id.* at 108. Mr. Sutton explained that investigators make intellectual judgment calls or discretionary judgment because they review files and make determinations with regard to jurisdiction. *Id.* at 105. Mr. Sutton testified that an EO Specialist in Region 4 has an extensive knowledge of rules, regulations and laws. *Id.* at 106. He stated that investigators should have a command of Section 504 of the Rehabilitation Act and Section 109 of the Americans With Disabilities Act. *Id.* Mr. Sutton explained that the investigators manual was recently revised by HUD and that the investigators operate pursuant to those handbooks and regulations. *Id.* at 109.

On cross examination, Mr. Sutton explained that he is normally the third-line supervisor of Ms. Mathis because there would be an employee called the enforcement branch chief or the program operations and compliance branch chief that would serve

as her first line supervisor. *Id.* at 110-111. Therefore, on an organizational chart, Mr. Sutton is actually Ms. Mathis' third line supervisor. *Id.* at 111. Mr. Sutton cannot testify as to Ms. Mathis' work during any period prior to 2004. *Id.* He cannot testify as to how many investigations or compliance reviews Ms. Mathis completed in 2004. *Id.*

Mr. Sutton testified that the directive to install the e-mailed documents or templates onto the share drive was not from headquarters, but was his directive. *Id.* at 113. He stated that he only sent the templates to Region 4, but that headquarters sent the packet to all the regional directors. *Id.* Mr. Sutton admitted that though the packet was sent in anticipation of Hurricane Katrina, the documents were intended to "to assist [investigators] in addressing the 100 day time line that we have to address in our investigations under the Fair Housing Act. [Mr. Sutton] was going to try to get them some tools to help -- help them do their work easier or more efficiently." *Id.* at 114.

Ms. Barbara Knox testified that she has been the Director of the Office of Fair Housing and Equal Opportunity for Region 5 since 1998. *Id.* at 178. Prior to that, she served as the Director of the Fair Housing Enforcement Center for Region 5 between 1994 and 1998. *Id.* Ms. Knox explained that her primary duties include supervising the administration of the various civil rights laws and authorities that HUD is responsible for, including the Fair Housing Act of 1968, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and Section 109 of the Housing and Community Development Act of 1974. *Id.*

Ms. Knox testified that she has personal knowledge about the performance expectations of GS-12 EO Specialists because she began at HUD working in that series and became a supervisor of EO Specialists, including investigators at the GS-12 level in

1977. *Id.* at 178-179. She is currently a third line supervisor of GS-12 investigators. *Id.* at 179. Ms. Knox testified that the GS-12 position is expected to have knowledge of fair housing and other civil rights law, as well as theories of proof. *Id.* at 180-181. She explained that GS-12 investigators must be familiar with case law, apply theories to data and make recommendations whether there is cause to believe the law was violated. *Id.* at 181. When asked how effective the recommendations must be from GS-12 investigators, Ms. Knox testified that the recommendations are expected to be "error-free" and require no additional investigation. *Id.* at 181-182.

Ms. Knox stated that the GS-12 investigators receive the most complex cases. *Id.* at 182. When asked about supervisory controls placed on GS-12 investigators, Ms. Knox testified that employees report to a first line supervisor and Branch Chief, but they are expected to operate with minimal supervision. *Id.* at 185. She further explained that the lower graded levels, i.e. GS-11 investigators, require more supervisory oversight. *Id.* But a GS-12 EO Specialist is 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. *Id.* at 185-186.

Ms. Knox testified that the Handbook is very general, but is fairly detailed in terms of educating investigators on procedures. *Id.* at 187. She explained that the Handbook calls for judgment of investigators because an investigator cannot simply read the Handbook and complete an investigation. *Id.* She stated, for example, that judgment is required when determining whether enough questions were asked when interviewing a witness. *Id.* at 188.

Ms. Knox testified that the data analysis and application of theories of proof are when the work and duties of GS-12 employees are intellectual *Id.* at 190-191. She further stated that investigators have to read case law, determine if it is applicable to a particular case and complete the final recommendation report. *Id.* at 191.

Ms. Knox testified that the work product of investigators has a great impact on HUD because the determination affects the rights of individuals, specifically the Complainant. But the work does not impact the programs of HUD that are material and relevant to the primary duty test.

On cross examination, Ms. Knox stated that she is the third line supervisor of 40-45 investigators. *Id.* at 194. Ms. Knox was a second line supervisor of GS-12 investigators between the mid-80's and 1994. The last time she was a first line supervisor of GS-12 investigators was in the mid-80's. *Id.* at 194-195. Ms. Knox is the first line supervisor of two GS-14 investigators, Ms. Bernadette Jones and Ms. Cheryl Jeder². *Id.* at 195-197. Ms. Knox explained that due to a recent reorganization she is currently the first line supervisor of a GS-12 investigator, Mr. Tom Rujillo. *Id.* at 198-200. Ms. Knox explained that she can testify about the day to day duties of GS-12 EO

² Ms. Jeder is not listed as a bargaining unit employee on the list provided by the Agency pursuant to this Grievance. See Joint Exhibit 4.

Specialists, because she observes the investigators that work in the Chicago office daily and she reviews the work. *Id.* at 200-201. Yet, Ms. Knox does not observe their daily activities each day because she spends about 15% of the time on travel and another 10% on leave. *Id.* at 201. She admitted she does not observe them doing their duties. *Id.*

Ms. Knox testified that she observes all 40-45 investigators in Region 5 because she knows the nature of the work and communicates with supervisors. *Id.* at 202. Ms. Knox did not know how many times the governor was interviewed in the last two years, or the mayor in the last three years. *Id.* As a third line supervisor she did not have the material knowledge to determine the actual job duties of the investigators. Even Ms. Knox admitted that the investigators and supervisors can better provide the former information. *Id.* Ms. Knox testified that the national average of complaints resulting in cause findings could be less than 3% per year. *Id.* at 205. Ms. Knox testified that Region 5 issued more than 40% of all cause findings nationally, yet she did not know what percentage of the overall complaints in Region 5 resulted in cause findings. *Id.* at 205-206.

- B. Every Agency witness testified that the series 360 EO Specialists carry out the mission and function of HUD.

In Segal I, the Arbitrator referenced a letter from Dole that explained the interplay of the primary duty test and whether the employee carries out the mission or function of the organization:

In determining whether a *public* employee's activities are 'directly' related to management policies or general business operations' of the employer, it is essential to consider the nature of the mission and functions of the government agency. In general, where employees of a State and local government agency are performing activities that carry out the ongoing mission and day-to-day

functions of the agency---rather than its management policies or the management policies of the State or political subdivision (such as the agency devoted to personnel activities for the entire local government)---such activities cannot be viewed as the types of duties contemplated by the Regulations for exemption. Where such an employee's primary duty consists of such nonexempt work, the employee cannot be found to be qualified for exemption as a bona fide administrative employee under section 541.2 of the Regulations, and must be paid in accordance with the minimum wage and overtime pay provisions of FLSA. (emphasis in original)

Mr. May testified that the mission of HUD is to “provide decent and safe and sanitary housing in a non-discriminatory way.” *Id.* at 33. Upon further questioning, Mr. May testified that the mission of FHEO is “to identify and eliminate discriminatory housing practices in the sale and rental, as well as financing, of properties...and the function of FHEO is to participate in activities, to receive complaints of allegations of discrimination, and to provide for the elimination, through the investigations, and to resolve housing disputes of discrimination.” *Id.* at 34. Mr. May admitted that the employees in the 360 series were part of the body of employees that directly carry out the mission and function of HUD and FHEO. *Id.* at 34-35.

When asked about the mission of FHEO, Ms. Tapscott testified that it is the elimination of housing discrimination and education of the community as to housing discrimination. She testified that the day to day function of FHEO is “to investigate housing discrimination complaints and to make sure that those individuals who are recipients of HUD federal financial assistance are implementing those programs without discriminatory activity.” *Id.* at 80. Ms. Tapscott admitted that the GS-360 employees are the individuals that carry out the ongoing mission and day to day functions of FHEO. *Id.* at 81.

Ms. Ray testified that the mission of Fair Housing is to ensure equal opportunity housing for all persons, regardless of race, color, religion, sex, national origin, familial status, or disability. T3. at 56. She further stated that the function of Fair Housing is to conduct investigations of housing discrimination complaints, compliance reviews and workshops and training sessions for industry partners. *Id.* at 56-57. She stated that series 360 investigators are employees that are performing the activities that carry out the mission and function of the Agency. *Id.* at 57.

Ms. Knox testified that the GS-12 EO Specialists are performing activities to carry out the ongoing mission of the Agency. T2. at 205-206. They do the day-to-day functions of the Agency. *Id.*

Ms. Bouziden stated that the mission of FHEO may be to eradicate discrimination in housing. T3. at 101. Furthermore, Ms. Bouziden agreed that the day to day function of FHEO is to investigate, conciliate and close cases. *Id.* She testified that the series 360 investigators perform activities which carry out the mission and day to day functions of FHEO. *Id.* at 101-102.

- C. The only Agency witnesses that were first-line supervisors were not credible and did not testify that the series 360 investigators performed any duties that fulfill the three-part administrative exemption test.

Ms. Ray testified that she is the center director for FHEO in Louisville. T3. at 32 (November 3, 2005). She has held that position since May, 2005. She stated that her primary duties were to manage the FHEO offices in the region, which includes acting as the liason between the regional director and employees, reviewing all cases and compliance reviews completed by EO Specialists and providing guidance to carry out day-to-day responsibilities and duties. *Id.* At 32-33. Additionally, Ms. Ray explained that

she ensures that local and national management goals are met, she maintains the budget for the center and evaluates the performance of the employees. *Id.* Prior to holding this position, Ms. Ray was the lead EO Specialist in the Jackson, Mississippi field office; she conducted investigations and compliance reviews. *Id.* at 34.

Ms. Ray testified that she was first line supervisor of Ms. Mathis. *Id.* at 35. Ms. Ray testified that the primary duties and responsibilities of Ms. Mathis were to investigate housing discrimination complaints by conducting interviews, as well as collecting data and documents. *Id.* at 35-36. Ms. Ray testified that the investigative plan is a tool that helps guide the planning stage of the investigation. *Id.* at 36-37. It helps identify the documents and questions that need to be asked. *Id.* at 37-38. Ms. Ray explained that the investigative plan is not a one-size-fit-all document, but rather is a living document that needs to be changed and updated during the course of the investigation if new witnesses or documents are identified. *Id.* at 37-39.

Ms. Ray stated that she did not review the investigative plan until the completed case file was submitted. *Id.* at 39. This testimony contradicts the testimony of other Union and Agency witnesses that stated the supervisor must approve the plan prior to conducting the investigation.

Ms. Ray testified that the Handbook is the instructions and guidelines on how to investigate complaints. *Id.* at 40. When asked if it presumed independent thought, Ms. Ray testified that it is a guide that can be adapted to fit particular situations on a case-by-case basis. *Id.* When asked about the level of supervision exercised over EO Specialists, Ms. Ray stated that it can be limited depending on the grade level. *Id.* at 40-41. Investigators are expected to work independently and make conclusions based on

the information that they gather. *Id.* at 41-42. At the GS-12 level, Ms. Ray testified that there should be limited supervision and the report should be 100% complete when submitted. *Id.* at 41. This does not address any of the definitions provided by the DOL or OPM regulations with regard to independent discretion and judgment. Ms. Ray did not testify as to how the decisions by the investigators significantly affect management programs and policies.

On cross examination, Ms. Ray admitted that she has only been Ms. Mathis's supervisor since May, 2005. *Id.* at 44. She supervises 12 other employees throughout Kentucky, South Carolina, North Carolina and Tennessee. *Id.* One employee Ms. Ray supervises is Ms. Linda Hooper, a GS-9 non-exempt series 360 investigator. *Id.* at 44-45. Another is Mr. Willie House-Bey, a GS-12 non-exempt series 360 investigator. *Id.* at 46-47. Prior to May, 2005, Ms. Ray was a bargaining unit employee in a career ladder GS-13/14 EO Specialist position. *Id.* at 48. Ms. Ray did not testify that any of these non-exempt employees performed different duties or work than the investigators that are classified as exempt.

Ms. Ray explained that in addition to using skill and knowledge to perform investigations, EO Specialists use the Handbook, a very detailed outline to put together the investigative plan. *Id.* at 48-49. She testified that investigators can deviate from the Handbook without approval from a supervisor. *Id.* at 49-50. Though it does not state that anywhere in the Handbook or any other document that Ms. Ray received, she testified that she knows it is true because that is the nature of the job. *Id.* at 50. The Handbook refers to the templates for the investigative plan contained in TEAPOTS that investigators are expected to use. *Id.* at 50-51.

The Handbook provides that the investigative plan must be completed for every investigation and placed and maintained in the proper section in the case file. *Id.* at 51. Furthermore, it states that: "the investigator and his or her supervisor may use the investigative plan section in TEAPOTS in a flexible manner." *Id.* at 51-53. This language is clear on its face and provides that the TEAPOTS templates can be flexibly used by the investigator with the supervisor. See Section 8024.01, Chapter 7, page six. Ms. Ray admitted that the investigator's supervisor is supposed to review the plan prior to beginning the investigation and that supervisor had access to TEAPOTS at any time to determine what changes if any need to be made to the plan. *Id.* at 53-54.

The Handbook provides that: "One of the most important decisions an investigator makes in planning an investigation is determining the scope of the investigation." T3. at 54-55. See Section 8024.1, Chapter 7, page 8. Ms. Ray agreed with that statement and that it was a critical decision. T3. at 54. The Handbook further provides that: "The investigator must make these decisions on a case-by-case basis in consultation with his or her supervisor." *Id.* at 55. This language is clear and unambiguous and demonstrates that the critical decisions with regard to the plan and investigation must be made by the investigator and supervisor, in consultation.

Ms. Ray explained upon further examination that the Handbook is not strictly enforced in the "real world." *Id.* at 57-58. She stated the investigative plan has a very limited impact on the substance of an investigation and very few investigators have completed one on the TEAPOTS system. *Id.* at 58. She explained that investigators often make modifications to the plans on-the-spot because a new witness or document is identified without any approval from a supervisor. *Id.* Yet, none of this testimony is

corroborated by the provisions of the Handbook or the testimony of Union witnesses that stated they use the TEAPOTS system and obtain approval from their respective supervisors.

Ms. Debra Bouziden is currently the Enforcement Branch Chief, a GS-14 employee in Miami, Florida. *Id.* at 65-66. She testified that her primary duties are to handle investigations and to oversee work of employees at Jacksonville, Orlando and Tampa. *Id.* at 66. Ms. Bouziden is the first-line supervisor of Ms. Johannsen, a GS-12 EO Specialist. *Id.* Ms. Bouziden testified that Ms. Johannsen's duties and responsibilities are to conduct investigations of fair housing, to serve as a team member on compliance reviews, to serve on conciliation teams and to respond to inquiries about fair housing laws. *Id.* at 66-67.

Ms. Bouziden explained that an investigative plan is a document that the investigator drafts after conducting a preliminary analysis of the case and identifying what information they need in order to investigate the allegations made by the complainant. *Id.* at 68-69. The investigator must determine what evidence is needed, which witnesses will be interviewed, what comparative data is needed and the pertinent rules and regulations. *Id.* at 68-69. Ms. Bouziden explained that investigators must determine whether an on-site visit is necessary. *Id.* at 69. The investigative plan is a roadmap "that we are [using] to try and achieve the goal of completing the cases within 100 days." *Id.* at 70.

Like they may send -- part of the investigative plan might be that they send out a document request, okay, and they give somebody 20 days to respond. Okay. So it is kind of their road map. They kind of have a down time of 20 days and so that they know that from this plan they have made. And so then they can help -- that can help them to adjust their workload and move on to another case maybe during this 20 day down time, while they are trying to obtain things, or that they can do something else during that down time on that particular

case. It's a road map for how to help them stay on track in how they are going to work through the case.
Id. at 70-71.

Ms. Bouziden contradicted the testimony of other Agency witnesses, when she testified that the investigative plan must be entered into the TEAPOTS system. "It is a requirement for the case to go to Atlanta for closure." *Id.* at 71.

Ms. Bouziden testified that she did not assist the investigators draft the investigative plans. *Id.* at 72. However, she did explain that she might discuss a specific question regarding whether to interview a witness or if evidence is relevant. *Id.* Ms.

Bouziden testified that the Handbook provides guidance:

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.
Id. at 73.

When asked to what extent the Handbook presumes that independent thought will be exercised by investigators, Ms. Bouziden explained that it is a tool for issues under fair housing, but each case is unique. *Id.* at 73-74.

Ms. Bouziden testified that as the first-line supervisor, she reviews each determination finding and conducts a weekly conference call with the Regional Office to report on the status of each and every case. *Id.* at 74-75. To prepare for the conference call, Ms. Bouziden explained that she confers with the investigators to determine an expected closure date, and just a brief summary of where they are on the case and what they plan to do over the next week. *Id.* at 74-75. Ms. Bouziden testified that she will discuss issues in specific cases with the investigators because "sometimes you can just talk to somebody about it and some lights will go on about some ideas about how to

do something better. So anything that is really unique to an individual case, they might come to me with that, and we might make an appointment with legal." *Id.* at 75.

Ms. Bouziden testified that the goal is to close the case within 100 days and investigators monitor that time frame. *Id.* at 76. Ms. Bouziden testified that the final work product submitted is expected to be complete with interviews, comparative data, rules and regulations that have been obtained. *Id.* at 76-77. There must also be a determination in the final investigative reports and a recommendation for closure. *Id.* at 77.

Ms. Bouziden stated that the types of issues that investigators encounter are diverse because they might have several calls about conciliation attempts on one day and several contacts with regards to interviews, document review and data collection on another day. *Id.* at 77-78.

Ms. Bouziden testified that there is not a guideline of production standards in terms of numbers of cases per month or year that must be closed. *Id.* at 79-80. Her interpretation of production standards, however, is very narrow considering that investigators have 100 days to close a case and cases are continually being filed on a daily basis. In other words, if an investigator is assigned two cases on one day then he/she has a production standard of two cases in 100 days.

On cross examination, Ms. Bouziden explained that she directly supervises approximately four EO Specialists. *Id.* at 81-82. She has only been in her position since March, 2005 and all of her testimony directly related to supervising GS-12/13/14 investigators only over the last year. *Id.* at 89.

While she stated that the investigative plan and Handbook are very detailed and a guideline to timely close cases, Ms. Bouziden testified that investigations did not have to be conducted just as the handbook is written. *Id.* at 83-84. Yet, she did not have anything in writing from a supervisor or management that the investigation does not have to be conducted pursuant to the Handbook. *Id.* at 84-85.

She stated that when the Handbook uses the word “must” it is optional “because of the fact that we conduct investigations according to the particular uniqueness of that case.” *Id.* at 84-85. For instance, the Handbook provides that: “In 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.” *Id.* at 85. See Section 8024.01, Chapter 7, page 5. It further states that: “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.” T3. at 86. See Section 8024.01, Chapter 7, page 5. Ms. Bouziden testified that these provisions were optional. T3. at 84-87.

Ms. Bouziden testified that it is a requirement for a case to be complete that an investigative plan be reviewed by the supervisor in TEAPOTS. *Id.* at 87. Ms. Bouziden stated that if an investigator had to tape record an interview then he/she would have to consult with the supervisor and regional counsel. *Id.* at 88. She did not know whether that would be allowed, yet the Handbook provides three pages on tape recording interviews. *Id.* at 87-88. See Section 8024.01, Chapter 7, pages 24, 25 and 26.

She testified that investigators do not exactly have input into budget submissions at HUD, except to project travel. T3. at 89. Ms. Bouziden testified that series 360 EO Specialists make a recommendation of closure, but the Handbook provides a limited amount of reasons that a case can be closed. *Id.* at 90-91. The investigators cannot deviate from the types of closures provided in the Handbook. She admitted that the investigators should consult with their supervisor if there is a situation without precedent. *Id.* at 91.

Ms. Bouziden testified that she received aging reports that show the average age of cases being processed by investigators. *Id.* at 92-93. She explained that she uses this information to report to the Regional Office about the status of each case. *Id.* at 92-93. She must consult and correspond with the investigators regularly to prepare for these weekly conference calls. *Id.* at 93. She testified that no pressure is out on investigators to close cases over 100 days, but Ms. Bouziden will jump in to try to conciliate a case. *Id.* at 94. She explained that there is an understanding in the office that she is available to conciliate cases because that is her strength. *Id.* She stated that there are times she will handle an issue or conciliation and input data into the TEAPOT system for an investigator. *Id.* at 96.

Ms. Bouziden testified that she knows that a case is complete because the TEAPOTS system provides all the documents and data that are required for a case to be complete. *Id.* at 97. The information is input into the TEAPOTS system and the final determination is printed out. *Id.* at 97-98. The documents and actual data are tabbed and a summary is also created; the TEAPOTS system provides two documents - the final investigative report and the determination. *Id.* at 98. Ms. Bouziden testified that the

EO Assistants also help prepare the file or complete data entry or typing. *Id.* Ms. Bouziden further explained that the Handbook addresses the contents of a completed case file. *Id.* at 99. The chapter regarding the contents of a case file is fifteen pages, single spaced and it provides a sample table of contents.

Ms. Bouziden testified that she is consulted often in the conciliation process of cases. *Id.* at 103. She explained that an investigator may be stuck and conciliations sometimes require creativity or a new point of view. *Id.* at 104. She also has co-mediated on issues with investigators. *Id.* She stated that sometimes investigators will seek help if they are stuck and other times she will assume the position to keep the settlement talks flowing. *Id.* Ms. Bouziden testified that an investigator prepares the conciliation agreement, but she will review the final agreement before it is sent out for final signatures. *Id.* at 105-106. In addition to the first line supervisor's review, Ms. Bouziden stated that it will also be reviewed by her first line supervisor before a written document is released. *Id.* at 106.

Ms. Bouziden explained that if a case is going to run over 100 days then a letter is issued to the complainant and respondent to that effect. *Id.* at 113. Ms. Bouziden knows on a weekly basis which cases are over 100 days because she gets a report from the Regional Office on all aged cases. *Id.* at 113-114.

Ms. Bouziden testified that it is a requirement that conciliation attempts are made for all fair housing complaints that are filed. *Id.* at 115. The most current version of the Handbook provides a sixty page chapter on conciliations and includes a sample conciliation agreement. *Id.* at 115. It also includes a damages worksheet and a list of 33 different types of phrases or words which can be used to describe the impact for

damages purposes, such as “angry, sad, humiliated, intimidated, [and] shocked.” *Id.* at 116-117. See Handbook, Page 11-59.

IV. THE UNION PRESENTED SUFFICIENT EVIDENCE TO PROVE THAT THE ACTUAL JOB DUTIES OF SERIES 360 INVESTIGATORS DO NOT FALL UNDER THE ADMINISTRATIVE EXEMPTION BASED ON OPM OR DOL REGULATIONS.

Arbitrators have decided very similar issues at other agencies. Most relevant to the case at bar are the series of decisions made by Henry Segal and David Vaughn concerning employees at the Social Security Agency. The Arbitrators looked at claims adjusters and computer programmers, among many other positions. The Agency claimed that these employees were exempt from the FLSA under the administrative exemption.

Of the many issues discussed in these decisions, three are particularly relevant to the case at bar. Firstly, the Arbitrators defined the meaning of “significantly affects the formulation or execution of management programs or policies” as used in 5 C.F.R. 551 § 206. Secondly, the Arbitrators drew a very clear line between “production” work and “administrative” work. If the duties of the employees are involved in the production function of the agency, they inherently fail the primary duty test of the administrative exemption. Thirdly, the Arbitrators used the actual duties performed by the employees to measure against the standard presented in the regulations. They gave little weight to the testimony of second-line supervisors who had little personal knowledge of the duties performed by the incumbents in question.

The arbitration known as “Segal I,” decided on May 3, 1991 by Arbitrator Henry Segal, concerned Claims Representatives and Claims Authorizers at the Social Security Administration. Claims Representatives determine whether applicants are eligible for

various programs that the Social Security Administration administers. They interview applicants and determine whether they meet the criteria for eligibility put forth in the rules and regulations. The Agency contended that these employees performed administrative functions, while the Union contended that their work was production work. The basis for this dispute lies at 5 CFR 551 § 206 (a) which differentiates between exempt administrative work and non-exempt production work.

The Agency contended that since the work of the Claims Representatives involves executing management policies, and furthers the goals of the Agency, these employees meet the primary duty test of the administrative exemption. The Agency placed great reliance on the end of OPM's definition of *formulation or execution of management programs or policies*, "or making significant determinations in furtherance of the operation of programs and accomplishment of program objectives." See Union Exhibit One. Arbitrator Segal was not convinced:

The Arbitrator believes such reliance is doubtful, because while the determinations of the employees in the two positions are significant, they are determinations made respecting eligibility of claimants, and not determinations made in furtherance of programs, etc. This is because as indicated by the testimony of the employees involved the policies and programs are set out for them in specific directives which they must follow and strive to apply uniformly and are not determinations made to further policies or accomplishments of program objectives. Page 20

It is clear that following policies is not synonymous with executing policies. Executing policies is a high-level activity that involves a certain amount of responsibility for the policies. It falls just short of actually making policy. Following policy is not "executing" policy. It is what employees have to do to not be insubordinate. Similarly, the Equal Opportunity Specialists do not execute policy, they follow policy.

The source of the distinction between production and administrative work is 29 CFR 541.201(a): "...an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line...." The Department of Labor has continued to rely on this distinction to determine eligibility for the administrative exemption. In a letter to several state Governors dated July 27, 1989, Secretary of Labor Elizabeth Dole wrote:

Activities contemplated by the Regulations as being 'directly related to management policies or general business operations' of an employer are those related to the administrative operations of a business, as distinguished from the basic tasks of the employer's business, *i.e.*, the 'production' work, or---in the case of a public employer---the mission and function of the agency. The exemption is limited to persons who perform work of substantial importance to the management or operation of the business of their employer or employer's customers, and includes 'white collar' employees engaged in 'servicing' a business or public agency. Examples of such activity include personnel administration, labor relations, research, planning, or assisting a management official in carrying out the executive or administrative functions of that official.

Administrative employees need not participate in the formulation of management policies or the operation of the business or agency as a whole, but include employees who affect policy or have the responsibility to execute it or carry it out---that is, employees who plan or direct the implementation of such policy. They include persons who carry out major assignments in the operation of the business or agency, or whose work affects operations to a substantial degree. In general, then 'administrative employee' refers to a person who is engaged in *staff* functions as opposed to the *line* functions of an employer.

In determining whether a *public* employee's activities are 'directly' related to management policies or general business operations' of the employer, it is essential to consider the nature of the mission and functions of the government agency. In general, where employees of a State and local government agency are performing activities that carry out the ongoing mission and day-to-day functions of the agency---rather than its management policies or the management policies of the State or political subdivision (such as the agency devoted to personnel activities for the entire local government)---such activities cannot be viewed as the types of duties contemplated by the Regulations for exemption. Where such an employee's primary duty consists of such nonexempt work, the employee cannot be found to be qualified for exemption as a bona fide administrative employee under section 541.2 of the Regulations, and must be paid in accordance with the minimum wage and overtime pay provisions of FLSA. (emphasis in original)

The Union presented this letter to Arbitrator Segal, who gave it considerable weight.

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. Segal I, at Page 23.

The mission of the Social Security Administration is distributing benefits and the Arbitrator found that the Claims Representatives and Claims Authorizers were carrying out that mission. In the case at bar, Agency witnesses have testified that the Equal Opportunity Specialists are carrying out the mission of the Department of Housing and Urban Development.

On January 10, 1995, Arbitrator M. David Vaughn wrote a decision concerning the FLSA status of another set of employees, Computer Specialists. This arbitration was a continuation of the one decided by Arbitrator Segal. The Computer Specialists in question were assigned programming projects by the Office of Systems Requirements ("OSR"). The Specialists were given particular specifications to meet, and then used their own skill and ability to meet them. Among the issues facing Arbitrator Vaughn were the position of the Computer Specialists relative to the "staff-line split" and a material dispute of fact as to the actual tasks performed by the Computer Specialists.

The Agency argued that Computer Specialists fill a "support position whose work is to support the claims representatives who work on the SSA's front lines." Vaughn, at page 14. The Union maintained that: "the [Specialist's] constitute the group of employees that do the production work of the operation. The [Computer Specialists] are 'production workers' of a huge 'factory' that 'turns out...Title II and Title XVI benefit decisions, benefits, updates, and redeterminations.'" Vaughn, at page 10.

Arbitrator Vaughn, like Arbitrator Segal before him, found that employees who are involved with carrying out the mission of the Agency inherently fail the primary duty test of the administrative exemption. Arbitrator Vaughn broadened the definition of the mission of the Agency to include employees who have a production-style relationship with their management as production workers, even where their product never reaches the Agency's "consumers." He stated:

The OSR analysts are the staff; they [computer specialists] take the ideas developed by OSR and reduced to complete directions, and they turn them into blocks of computer code, which they return to OSR to be assembled into systems. The CSs are more analogous to line production workers than to policy or administrative employees. They produce blocks of code for use in what AFGE accurately characterizes as a "huge. . .'factory'" that "turns out. . .Title II and Title XVI benefit decisions, benefits, updates, and redeterminations." Vaughn, at page 25.

There was a material dispute in fact as to the actual duties performed by the Computer Specialists. The Agency based its contention on position descriptions and on the testimony of OPM experts, a SSA classifier, and the Deputy Director, Office of Programmatic Systems for SSA. The Union presented incumbents and witnesses who performed the duties in question on a daily basis. Arbitrator Vaughn was very forceful in his analysis:

The SSA supervisors who testified about the CS position did not, indeed *could not* have the same understanding of the position that the AFGE incumbents do. The SSA's witnesses simply are too far removed from the day-to-day work of the CSs to give meaningful testimony as to the work of the CSs. SSA's statement relating to the testimony of its witness, Mr. Putnam, demonstrates this typical, fatal flaw in the SSA's witnesses' evidence:

[Putnam] further testified that *based on his discussions with supervisors who explained what employees did based on the position description*, it was his opinion that employees were performing the primary duties over 50% of the time. [Reference omitted.]

The most credible and persuasive evidence as to the duties and character of the CS position is the testimony of the AFGE's witnesses who are incumbents in the CS position.

- A. The series 360 investigators do not satisfy the primary duty test because the work does not significantly affect the formulation or execution of management programs or policies, involve management or general business functions or supporting services of substantial importance to the organization serviced, or involve substantial participation in the executive or administrative functions of a management official.

“Primary duty” means the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s actual job duties on a day to day basis.

There are four distinct tests, each of which must be met. The primary duty test describes the duties which qualify for the administrative exemption. As in 5 C.F.R. 541, they define an administrator who is involved in the business function of an agency or division, as opposed to the production function. There are three basic duties which qualify: formulating or executing policy, management or general business, or participation in the executive or administrative functions of a management official. It is clear from the introduction to 5 C.F.R. 551.206 (*supra*) that an administrative employee is on the management side of the “staff-line split.” OPM has published a work aid entitled *How to Make Exemption Status Determinations under the Fair Labor Standards Act* which further clarifies these regulations. See Union Exhibit One. This publication defines “formulation or execution of management programs or policies” as:

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 Office of Personnel Management FLSA training material April 1998 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, (planning, developing, promoting,

coordinating, controlling, or evaluating operating programs of the employing organization or of other organizations subject to regulation or other controls).
Id.

Other positions similar to those at issue in this case have been found to be non-exempt under the primary duty test. 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. In that case, the court found that the employees' duties did not pass the "short" or 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. The court noted that the interpretations of the rules and regulations (29 CFR § 541.205(a)) draw a distinction between activities related to the administrative operations of a business and production work. Housing inspections are the production of the housing inspection branch, declared the court; therefore, time that supervisory housing inspectors spent inspecting residences is production work. Under the interpretations quoted, the court concluded that this amount of time spent in such production work prevented the employees from being administrative employees. Moreover, the court added that the employees 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. 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.

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 (CA NY 1993) 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, were ranked higher than 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.

The court in *Mulverhill v New York*, 1994 US Dist LEXIS 6743, (N.D. N.Y. 1994) 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. These employees were expected to investigate and detect violations of the laws, as well as protect and preserve the environment.

A deputy United States Marshal, working in courtroom and jury security, was held in *Roney v United States*, 790 F Supp 23 (D.C. Dist. Col. 1992) 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 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 OPM (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, because 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 non-manual 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 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 non-exempt 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.

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 valid 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 investigations, complete a Report of Investigation and make a recommendation. Those 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 in this matter. 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 binding evidence that the Grievants are wrongfully classified as exempt.³

Ms. Peggy Johannsen is a GS-12 EO Specialist in the HUD Office in Miami, Florida in the Office of Fair Housing and Equal Opportunity. T1. at 108-109 (September 29, 2005). Ms. Johannsen did not recall ever receiving a position description from the Agency. *Id.* at 110. Ms. Johannsen's primary duty is to investigate fair housing complaints. *Id.* She spends roughly 90% of her time conducting such investigations. *Id.* The remaining ten percent of the time, Ms. Johannsen helps other employees perform compliance reviews, as well as education and outreach. *Id.* at 110-111. As an

³ 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 in and of itself 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. After acquired evidence, however, clearly trumps even this potential Agency argument. See below, **Section V**.

investigator, Ms. Johannsen interviews the complainant and respondent, as well as witnesses. She collects documents and examines demographic information. *Id.* Then Ms. Johannsen makes a recommendation regarding reasonable cause to believe discrimination occurred and turns in the determination to her supervisor. *Id.* at 112. Ms. Johannsen testified that her supervisor is Ms. Debra Bouziden. *Id.* She believes that Ms. Bouziden is the Branch Chief, Enforcement Division. *Id.*

Ms. Johannsen testified that the other two GS-12 employees in her office also perform investigations at least 50% of the time. *Id.* at 112-113. One performs compliance reviews the other 50% of the time. *Id.* Ms. Johannsen testified that a compliance review is when a team of persons goes to an entity to see if they are meeting standards for housing. The employees actually physically measure some housing units to see if they meet standards. *Id.* at 115. "We have to measure if the grab bars are long enough. We also have to interview the managers there about their policies and procedure as it pertains to the regulations that they're supposed to be following. We have to interview some tenants, both disabled or non-disabled, and ask them about their experiences with their housing and as it relates to the laws." *Id.* at 115. If the compliance review only involves race then the employees do not measure anything but just interview relevant parties. *Id.* at 116. The employee then writes up a letter of findings that generally informs the entity to make some changes in order to comply with the law. *Id.* Ms. Johannsen explained that there is another type of program work that other employees 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. *Id.* at 116-117.

Ms. Mernie Mathis is a Housing Investigator in the 360 series, GS-12. *Id.* at 138.

The most recent position description that Ms. Mathis received was classified on July 14, 1997. *Id.* at 139. See Agency Exhibit 2. Ms. Mathis testified that she reviewed the PD and it is not completely accurate. T1. at 140. She explained that the PD states that investigators develop technical assistance, but she uses the guidelines provided by the Agency. *Id.*

Ms. Mathis testified that her primary duties are to investigate discrimination complaints. *Id.* at 140-141. She spends about 90% of the time doing investigations; the other ten percent is on program work. *Id.* at 141. She explained that when a case is assigned, investigators interview the complainant, respondents and witnesses and then compile all of the data and draft a determination report. *Id.* Ms. Mathis further testified that she uses a plan called the TEAPOT system, Title Eight Automated Paperless Office Tracking system, and an investigative plan from the guidelines. *Id.* at 142. The plan is a generic model that each investigator uses to gather information and data. *Id.* The completed plan is reviewed by supervisors before the procedures are followed. *Id.* Ms. Mathis explained that the plan can be updated if necessary, but it is once again reviewed by the supervisors. *Id.* at 142-143. Ms. Mathis also testified that on the program side, she did compliance reviews and was the FHAP monitor. *Id.* When she did compliance reviews investigators went out as a team and the supervisor has been with them. *Id.* at 144.

Mr. Martin Kiebert is a GS-13, EO Specialist in the Office of Fair Housing and Equal Opportunity at HUD. *Id.* at 162. Mr. Kiebert stated that he has held that position for 14 years and prior to that was an EO Specialist and investigator at EEOC. *Id.* Mr. Kiebert explained that he used to be in the Enforcement Support Division, where his primary duties included reviewing cases from the field and appeals from no-cause determinations. *Id.* at 163. Recently, he joined the systemic unit, where his primary duties include looking at novel and complex cases. *Id.* While Mr. Kiebert stated that he also participated in management and quality assurance reviews, he only did three last year and it did not make up a large percentage of his time (about 10%). *Id.* at 163-164.

Ms. Racesa Waheed is a series 360, GS-12 EO Specialist in the Office of Fair Housing and Equal Opportunity in New York City. T3. at 132. At the time she testified, Ms. Waheed had been a GS-12 for three to four weeks and was a previously a non-exempt, GS-11 investigator. *Id.* See Joint Exhibit 6. As a GS-11 EO Specialist, Ms. Waheed spent 90% of the time on FHIP monitoring and grant negotiations. T3. at 136. She had also been a non-exempt, GS-9 investigator prior to that. See Joint Exhibit, page 252. Ms. Waheed testified that her primary duties include investigations and helping with negotiations and monitoring of Fair Housing Initiative Program (“FHIP”) grants that the Agency awards to non-profit groups. T3. at 136-137. With regard to FHIP work, she explained that she receives quarterly reports from the grantees and organizations, and reviews the reports for the quarter to make a recommendation regarding payment for that work. *Id.* at 136-137. Ms. Waheed testified that she reviews and examines education and outreach events, testing, educational classes and tester

training. *Id.* at 137. With regard to the investigations, Ms. Waheed testified that she has assisted in an investigation, but mostly does FHIP and FHAP monitoring. *Id.* at 137-138.

As an assistant to an investigation, Ms. Waheed explained that she did word processing for the lead investigator and input data into the TEAPOT System. *Id.* at 143. Ms. Waheed testified that her work is usually waiting on her desk or mailed to her. *Id.* at 144-145. Sometimes, she responds to e-mail questions from the FHIP organization. *Id.* at 145. Ms. Waheed stated that she has daily contact with her first line supervisor, Mr. Robert Norrington. *Id.* She contacts her supervisor to update him on work, get approval for various issues and for any questions from FHIP organizations or the FHAP agencies. *Id.* at 145-146.

Ms. Waheed testified that other employees in her office do the same FHIP and FHAP work, including Ms. Maria Cestaro and Ms. Cristina Rodriguez. *Id.* at 146-147. See Joint Exhibit Five, pages 144, 200. Ms. Waheed also knows that Ms. Dinorah Velez does the same FHIP and FHAP work in the New Jersey Office. T3. at 148. See Joint Exhibit Five, page 214.

Mr. Willie House-Bey is a series 360, non-exempt GS-12 EO Specialist in the FHEO component of HUD in Baltimore, MD. T3. at 152-154. See Joint Exhibit Five, page 170. He testified that his primary duties include investigations of discrimination complaints on the enforcement side of fair housing and Voluntary Compliance Agreement (“VCA”) monitoring or reviews of housing authorities on the program side. T3. at 156-157. Mr. House-Bey testified that other employees in his office do the same work, including Ms. Victoria Haines, Mr. Curtis McMeekin on the enforcement side and

Mr. Vonzell Cummings, Ms. Phyllis Weinstein, Ms. Tracy Barrington and Ms. Linda Gray on the program side. *Id.* at 158-159.

Mr. 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. *Id.* at 161-162. He explained that he submits the final report to his supervisor and it goes to the attorneys in the Philadelphia Regional Office for the final determination. *Id.* at 162. Mr. House-Bey has daily contact with his first line supervisor, Ms. Debra McGhee. *Id.* He talks to her about investigations and she provides input or advice. *Id.* at 163.

While not a production standard, per se, Mr. House-Bey explained that there is a 100 day time limit before a case becomes aged and his supervisor is notified because the TEAPOTS system tracks the time. *Id.* at 163-165.

Ms. Vivienne Cardullo is a series 360, GS-13 EO Specialist in the FHEO component of HUD in Philadelphia, PA. T4. at 42. She has been employed at the Agency since 1991, and been a GS-13 for five or six years. *Id.* Her first line supervisor is Mr. Wayman Rucker. *Id.* Ms. Cardullo testified that her primary duties include conducting investigations of discrimination complaints. *Id.* at 43-44. The investigation requires an investigative plan and it is submitted to her supervisor for review and then reviewed by counsel. *Id.* at 44. Then, she conducts interviews of the parties and witnesses, gathers evidence and analyzes the documents to determine whether there is cause to believe that discrimination took place. *Id.* She compiles the data into a final investigative report and determination that is reviewed by her supervisor. *Id.* The

recommendation and final report are also reviewed by Mr. Rucker's supervisor and legal counsel. *Id.* The report can be returned for more interviews or amendments or even if there is disagreement with the determination. *Id.* at 44-45.

Ms. Cardullo testified that the difference between the work of a GS-11 or GS-12 compared with a GS-13 is the complexity of the case or number of issues. *Id.* at 46. All of the procedures that are required by the investigation are the same. *Id.* at 46-47. Ms. Cardullo explained that the 100 day goal for closing cases is strictly enforced for non-complex cases, but is more difficult to meet with complex cases. *Id.* at 56-57. She explained that headquarters recently issued a target goal for complex cases of 180 days. *Id.* at 69-70. She stated that there are weekly and monthly reports that are reviewed by investigators regarding aged cases. *Id.* at 57. According to her EPPI's, Ms. Cardullo explained that for a rating of fully successful she must close an average of 1.5 case assignments per month or 18 per year. *Id.* at 85-87. A rating of excellent requires the investigator to close 2.5 case assignments per month, or 24 per year. *Id.* at 83-84.

The parties further stipulated that Ms. Sherry Norton a field investigator in Jacksonville, Florida, would testify similarly to the other GS-12 investigators that testified. *Id.* at 209-210.

1. The investigators testified that they did not do any work that significantly affects the formulation or execution of management programs or policies.

Ms. Johannsen stated that she did not formulate any management policies. *Id.* She did not make any recommendations about changes to policy. *Id.* at 119. When asked if any part of her job requires her to recommend program improvements, Ms. Johannsen stated that it is not part of her job but she may raise an improvement with

her supervisor if she notices something. But she does not even think her first line supervisor would be able to implement the recommended changes. *Id.* at 119-120.

Ms. Johannsen did not prepare budget submissions. Rather her supervisor would make such submissions and might ask employees about their supply needs or expected travel to formulate the budget request. *Id.* Ms. Johannsen testified that she was never asked to provide information about program effectiveness. *Id.* Ms. Johannsen testified that she does not prepare reports about improving HUD's performance. *Id.* She does not make any recommendations regarding the same. *Id.*

Ms. Mathis testified that investigators do not have any involvement in formulating management policies or programs. *Id.* at 145-146. She does not have any role in preparing budget submissions. *Id.* at 146-147. Ms. Mathis testified that she does not assess program effectiveness. *Id.* at 147. She did not prepare reports regarding HUD office performance. *Id.* at 148.

Mr. Kiebert testified that he does not have any role in formulating management policies. *Id.* at 164. He has no role in budget submissions. *Id.* Mr. Kiebert stated that he did minorly participate in assessing HUD program effectiveness, but it is not a major duty. *Id.* He explained that he has done investigations in the past, but currently the investigators at headquarters do review work and technical assistance. *Id.* at 165. Mr. Kierbert testified that his work has been fairly varied over the past four years because he does not do 100% of the same thing each week. He has been in the systemic unit since January, 25, 2005. *Id.* at 166. Mr. Kierbert testified that he does not prepare reports or make recommendations about improving HUD's performance. *Id.* at 167.

Ms. Waheed testified that she did not formulate any management programs or policies. T3. at 138. She is not involved with any work on the Agency's budget submissions or proposals for new programs. *Id.* Ms. Waheed stated that did not assess program effectiveness. *Id.*

Mr. House-Bey testified that he did not have any input into the budget submissions at the Agency. *Id.* At 160. He does not prepare reports about improving HUD's performance. *Id.*

Ms. Cardullo testified that she did not formulate any management programs or policies. T4. at 45. She does not work on budget submissions or proposals. *Id.* She stated that she did not assess any HUD programs for effectiveness. *Id.* at 45-46.

2. The investigators testified that they did not do any work that involves management or general business functions or supporting services of substantial importance to the organization serviced.

To meet the "directly related to management or general business operations" requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example from working on a manufacturing production line or selling a product in a retail or service establishment. Work "directly related to management or general business operations" includes, but is not limited to, work in functional areas such as tax, budgeting, auditing, marketing and research.

The "General Business function" is defined as:

- (i) Providing expert advice in specialized subject matter fields, such as that provided by management consultants or systems analysts;
- (ii) Assuming facets of the overall management function, such as safety management, personnel management, or budgeting and financial management;

- (iii) Representing management in such business functions as negotiating and administering contracts, determining acceptability of goods or services, or authorizing payments; or
- (iv) Providing supporting services, such as automated data processing, communications, or procurement and distribution of supplies.

Ms. Johannsen did not prepare budget submissions. Rather her supervisor would make such submissions and might ask employees about their supply needs or expected travel to formulate the budget request. *Id.* Ms. Johannsen testified that she was never asked to provide information about program effectiveness. *Id.*

Mr. Kiebert testified that he does not have any role in formulating management policies. *Id.* at 164. He has no role in budget submissions. *Id.* Mr. Kiebert stated that he did minorly participate in assessing HUD program effectiveness, but it is not a major duty. *Id.* He explained that he has done investigations in the past, but currently the investigators at headquarters do review work and technical assistance. *Id.* at 165. Mr. Kierbert testified that his work has been fairly varied over the past four years because he does not do 100% of the same thing each week. He has been in the systemic unit since January, 25, 2005. *Id.* at 166.

Ms. Waheed testified that she did not formulate any management programs or policies. T3. at 138. She is not involved with any work on the Agency's budget submissions or proposals for new programs. *Id.* Ms. Waheed stated that did not assess program effectiveness. *Id.*

Mr. House-Bey testified that he did not have any input into the budget submissions at the Agency. *Id.* at 160. He does not prepare reports about improving HUD's performance. *Id.*

3. The investigators do not do any work that involves substantial participation in the executive or administrative functions of a management official.

“Participation in the executive or administrative functions of a management official” is defined as:

the participation of employees, variously identified as secretaries, administrative or executive assistants, aides, etc., 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 employees must be delegated and exercise substantial authority to act for the supervisor in the absence of specific instructions or procedures, and take actions which significantly affect the supervisor’s effectiveness.

4. The investigators testified that they are line or staff employees that produce the final product of the Agency.

Ms. Johannsen testified that she is a line or production employee at HUD because she is not one of the people involved in human resources or administrative: "I would be more like the people who are getting the cars out." *Id.* at 125.

When asked about the staff/line dichotomy and comparing HUD to an auto manufacturer, Ms. Mathis stated that investigators are production workers because "we are the one that puts forth the work to meet the national objectives and HUD's objectives." *Id.* at 149-150.

- B. The series 360 investigators do not satisfy the non-manual work test because the work is not intellectual and varied, or specialized and technical.

Once the work has qualified as being of an administrative nature, the Non-manual work test must be satisfied. The regulations are very clear that not every “desk job” is non-manual. There are two aspects to the non-manual work test. To qualify, work can be either intellectual and varied, or specialized and technical.

The OPM guidelines define intellectual work as:

work requiring general intellectual abilities, such as perceptiveness, analytical reasoning, perspective, and judgment applied to a variety of subject matter fields, or work requiring mental processes which involve substantial judgment based on considering, selecting, adapting, and applying principles to numerous variables. The employee cannot rely on standardized application of established 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.

An exempt employee must be able to use his or her own reasoning, perceptiveness, *et al.* and not rely on (or be bound to) procedures, precedents, guidelines, *et al.* Even if the employee's work does not meet the above standard, it can still be considered "non-manual" in the event that it is specialized or technical. In OPM's words:

work which requires substantial 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 education.

Of course, this work which is specialized or technical must be performed in the accomplishment of tasks which meet the Primary Duty test. The mere fact that work requires this level of knowledge is not enough to qualify for the Administrative exemption.

Ms. Johannsen testified that she knows how to conduct an investigation by reading the Investigator's Handbook. The Handbook is very thick and the investigators receive training on chapters as they are revised or added. *Id.* at 117. Ms. Johannsen testified that she was sent to two investigator training sessions about two and a half years ago. *Id.* Ms. Johannsen also learned from her supervisors. *Id.* at 118. Ms. Johannsen also stated that she relied on laws and regulations. *Id.*

Ms. Johannsen explained that the procedures in an investigation are not particularly varied because she has to interview the complainant, respondent and relevant witnesses; gather tenant files and other documents; and analyze demographic information. *Id.* at 120-121. While each individual case and the people involved may vary, the work is not varied.

Ms. Johannsen testified that she uses a number of laws, rules and regulations, including the Fair Housing Act, Section 504 of Rehabilitation Act, and regulations under the Community Development Program. *Id.* at 126. She explained that she acquired her knowledge through a prior position at HUD in the Office of Public Affairs. *Id.* at 127. Ms. Johannsen worked to spread the message about fair housing and corresponded with "people in the Office of Fair Housing and Equal Opportunity who helped me to answer the questions and helped me to put out their message." *Id.* After she became an investigator, she learned by reading the law, instruction from her supervisor and training. *Id.* Ms. Johannsen explained that instruction from her supervisor arose when she asked for guidance on precedent of law as to whether a particular action had been determined to be a violation of the Act. *Id.* at 127-128.

Ms. Johannsen explained that the Handbook and guidelines provided very explicit examples of ways to do the job: "So there are examples given of what questions you should ask of complainants and respondents." *Id.* at 130-131. Ms. Johannsen testified that a lot of the cases are very similar and she uses some of the same for questions. *Id.* at 132. In fact, she explained that she used a format of questions that she may amend based on the situation, but "a lot of the questions were the same from case to case." *Id.*

Ms. Mathis explained that the work is not varied and does not require creativity because investigators simply follow the guidelines in the Handbook. *Id.* at 147-148. The Handbook is about two inches thick, very detailed and comprehensive. *Id.* at 148-149. Ms. Mathis stated that she is not allowed to deviate from the Handbook. *Id.* at 149. If there is a novel or complicated issue then Ms. Mathis refers to the regulations, then her supervisor, then to the program centers, and then to the legal office. *Id.*

Ms. Mathis testified that she did not have a thorough knowledge of the rules, regulations, and statutes. *Id.* at 151. She stated that she did not have a thorough knowledge of precedent and decisions from state and federal courts relating to fair housing regulations. *Id.* Ms. Mathis further testified that she did not have expert knowledge of problem-solving techniques and high-level skill in interpreting laws, executive orders, regulations, and court decisions. *Id.* at 152. She does have skills in fact-finding, analysis, formulating and presenting recommendations and negotiating resolutions, and in oral and written communications. *Id.* Ms. Mathis further explained that she has some skills in performing complex investigations because she worked a complex case. *Id.* at 152-153. Ms. Mathis testified that she did not have detailed knowledge about local government and business institutions, as well as social and economic factors that apply to FHEO. *Id.* at 153. She does have the ability to evaluate programs for compliance of civil rights in housing and draw conclusions. *Id.* Ms. Mathis testified that her work does not affect enforcement policy. *Id.* at 156.

Mr. Kierbert explained that cause findings are reviewed by his supervisor. *Id.* at 166-167. The reviews and investigations are the end product of his work. *Id.* Mr. Kierbert testified that he uses guidelines, including the federal guidelines and Handbook.

He is not allowed to deviate from the guidelines. *Id.* at 168. Mr. Kiebert stated that has a thorough knowledge of rules, regulations and statutes related to housing discrimination. *Id.* at 172. Mr. Kiebert stated that he considers his work to be complex. *Id.* at 172-173. However, Mr. Kiebert did testify that at least one investigator in his office only has high school diploma. *Id.* at 169.

Ms. Waheed testified that she received basic investigative training, including an on-line Government Technical Monitor (“GTM”) course, training in voluntary compliance agreements and three FHIP/FHAP conferences. T3. at 138-139.

The evidence demonstrates that the series 360 investigators at the GS-11/12/13/14/15 levels are non-exempt because they do not do non-manual work. The work is not intellectual and varied or specialized and technical. Just because an employee performs work at their desk does not necessarily mean the work is non-manual. The investigators do not use their own reasoning to make determinations or complete the work; rather they rely on procedures, precedents and guidelines. Even if the work itself was non-manual, the investigators would not meet the administrative exemption because the tasks accomplished do not meet the primary duty test.

- C. The series 360 investigators do not satisfy the discretion and independent judgment test because they do not exercise these with respect to matters of significance.

The final test which an employee must meet to qualify for the Administrative Exemption requires that the work must be done with Independent Discretion and Judgment. OPM defines this as:

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.

(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.

It is difficult to clearly quantify the concept of Independent Discretion and Judgment, and as such the guidelines are not clear-cut, leaving determinations as to whether a particular employee meets this test to the independent discretion and judgment of a classifier or arbitrator. The basic criterion that must be weighed is whether the employee is a decision-maker. If he or she makes decisions that meet the guidelines above, using his or her own talents, skills, and abilities, then a determination can be made. But if the employee does not make "significant" decisions, whether because he or she applies precedents instead of using a decision making process, or because the employee is simply not called upon to decide matters beyond his or her own work conditions, then the test is clearly not met.

The term "matters of significance" refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. Similarly, an employee who operates very expensive equipment does not

exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

When asked about deviating from the Handbook, Ms. Johannsen testified that she has to follow the law and while minor deviations may be made, major deviations require the consent by the supervisor. *Id.* Ms. Johannsen testified that an investigative plan is a tool that employees are instructed to use to outline the allegation and organizational map of the procedure to follow. *Id.* at 121. The investigator puts in the plan who they intend to interview, the questions that are going to be asked, the documents that are needed, as well as the elements of the law. *Id.* at 121-122. The investigator prepares the investigative plan and discusses it with their supervisor to get approval. *Id.* at 122. The investigative plan is created by using the outline in the Handbook. *Id.* There are only two possible recommendations that can be made when conducting 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." *Id.* at 122-123. The case could reach a settlement because there are other employees that work independently to try to conciliate cases. *Id.* at 123. The recommendation regarding probable cause that discrimination occurred does directly to her supervisor and if it gets approved it does up the ladder. *Id.* at 123-124. Eventually it goes to General Counsel in Miami and then the Regional Director's Office in Atlanta. *Id.* at 124. Ms. Johannsen does not even get the final determination with regard to her work. *Id.* Ms. Johannsen testified that if there is a new situation without any precedent then she asks her supervisor for help and if she did not know then ask an attorney

in the General Counsel's Office. *Id.* at 124-125.

When asked about how closely she is supervised, Ms. Johannsen stated that it depends on the time of the year, but currently management is attempting to reach certain goals and she is being closely supervised. *Id.* She added that she has had a couple of different first-line supervisors and each had different approaches to supervising employees. *Id.* at 132-133. Ms. Johannsen explained that close supervision entailed weekly meetings to discuss details of each cases and the status of the investigation. *Id.* at 133. It is an implied order to investigate the cases and employees are expected to follow the process and complete the determination timely. *Id.*

Ms. Johannsen explained that then there is a novel situation, she typically asked her supervisor for guidance or the attorneys in the Office of General Counsel. *Id.* at 134. She stated that she is assigned cases from her supervisor and each case is in a different stage of investigation. *Id.* at 134-135. There were production standards in her office and she was rated based on timeliness of closing cases; the cases were supposed to be closed within 100 days from the time it was filed. *Id.* at 135.

Ms. Mathis testified that the end product of an investigation is the determination report that goes through various levels of review. *Id.* She explained that the majority of the time the reports are changed to a certain; major changes are sent back for more investigation. *Id.* at 145. Investigators only make recommendations and do not have the final authority to make bindings conclusions; employees do not even sign the final report. *Id.* The recommendations are thoroughly reviewed in various levels of review before the Regional Director signs off. *Id.*

Ms. Mathis testified that there is not any flexibility to operate under the Handbook and investigators do not deviate from the Handbook. *Id.* at 155. She does not independently plan, direct and conduct her own work assignments. *Id.* at 155-156.

Mr. Kierbert explained that cause findings are reviewed by his supervisor. *Id.* at 166-167. The reviews and investigations are the end product of his work. *Id.* Mr. Kierbert testified that he uses guidelines, including the federal guidelines and Handbook. He is not allowed to deviate from the guidelines. *Id.* at 168. Mr. Kierbert stated that if there was a novel case or unique situation then he would investigate according to the direction of his supervisor and consult other resources, including the Office of General Counsel. *Id.* at 170

Mr. Kierbert explained that there are not many cases that he has worked on in which a finding of discrimination was the result. *Id.* at 171. The findings are recommendations that are sent to the supervisor. *Id.* Mr. Kierbert stated that probably between 95-99% of his recommendations are ultimately adopted. *Id.* at 171-172. Mr. Kierbert explained that people give him assignments and he decides how to prioritize his work. *Id.* at 172.

Ms. Waheed testified that she uses various guidelines including the payment standard provided by the Agency for FHAP monitoring and the negotiated contract in FHIP monitoring. T3. at 139. She explained that she is allowed to deviate from the payment schedule in the FHAP monitoring if she recommends a higher payment, but obtains guidance from the Agency and approval from her supervisor. *Id.* at 139-140. Ms. Waheed testified that any deviation requires her supervisor's approval. *Id.* at 140. Ms. Waheed stated that she has daily contact with her first line supervisor, Mr. Robert

Norrington. *Id.* She contacts her supervisor to update him on work, get approval for various issues and for any questions from FHIP organizations or the FHAP agencies. *Id.* at 145-146.

Ms. Waheed testified that 100% of her recommendations are based on established procedures and precedents. *Id.* at 140-141. She explained that she has worked at the Agency for three years and always followed the procedure. *Id.* at 141.

Mr. House-Bey testified that he uses various guidelines on the enforcement side including Title 8 cases, laws and regulations and the investigator's Handbook. *Id.* at 159-160. He explained that the Handbook is very detailed and investigators are not allowed to deviate because he must follow the guidelines and procedures. *Id.* at 160. Mr. House-Bey has daily contact with his first line supervisor, Ms. Debra McGhee. *Id.* at 162-163. He talks to her about investigations and she provides input or advice. *Id.* at 163.

Ms. Cardullo explained that the investigative Handbook is an extremely detailed guideline of procedures. T4. at 47. Investigators are not allowed to deviate from the Handbook without permission and her supervisor is a "stickler for doing things by the book." *Id.* Ms. Cardullo explained, for example, that if the investigator did not exhaust all the ways to find a witness then the supervisor will send it back for corrections. *Id.* at 47-49.

Ms. Cardullo testified that in formulating the investigative plan she must decide what questions to ask and what documents to request, but these are subject to review by her supervisor and the various levels. *Id.* at 49-50. Ms. 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 it may cause additional time to the process to put the case over 100 days. *Id.* at 50.

These changes include adding a bases or issue, allegation, or a respondent. *Id.* at 54.

Ms. Cardullo testified that she must get her supervisor's approval for any changes to the investigation whether in the field or in general. *Id.* at 55. She explained that during the tracking of one case, the legal counsel identified another issue that was not identified in the complaint, but her supervisor decided to only investigate the two original issues because it would add time to the process. *Id.* at 51. Ms. Cardullo testified that the investigative plans of all GS-13 investigators are subject to the same approval chain. *Id.*

When asked if an investigator can deviate from the methods suggested in the Handbook with regard to locating an individual, Ms. Cardullo stated that the list is very comprehensive and pretty exhaustive. *Id.* at 63-65. Ms. Cardullo explained that investigators are evaluated or rated on conducting the investigation, preparing the final investigation report and the case file. *Id.* at 64. Ms. Cardullo explained that there is a section in the Handbook entitled "Time Frame for Completing the Investigation," and the 100 day limit is based on the statute. *Id.* at 68-69, 73-75. See Joint Exhibit at Chapter 7, pages 49 and 50. There are a series of checklists and fill in the blank documents to help track the progress of an investigation. T4. at 75. There are sample investigative reports. *Id.*

The evidence overwhelmingly demonstrates that the series 360 investigators do not have independent discretion and judgment, but rather follow the guidelines provided by the Agency. The investigators generally rely on the application of the regulations and precedent instead of using their skills to go through a decision making process.

Further, the investigators do not make any decisions with regards to matters of significance.

- V. JOINTLY SUBMITTED AFTER ACQUIRED EVIDENCE PROVES CONCLUSIVELY GS-360-11/12/13 ARE NON-EXEMPT EVEN ACCORDING TO THE AGENCY THE UNION EXHIBITS EXEMPLIFY THE FACT THAT THE SERIES 360 EO SPECIALISTS ARE NON-EXEMPT EMPLOYEES.

On February 8, 2006, the Parties submitted to the Arbitrator copies of Position Descriptions. These were numbered 171 to 180 in the lower left hand corner. The PDs were produced in response to a Union request for information, Motion to Compel and agreement between the parties. The PDs produced, listed below, constitute the entirety of those received by the Union. Of note is that each PD had attached to it a document labeled "HUD FLSA Evaluation." This document speaks for itself.

The conclusion is that HUD evaluated each of the PDs produced and concluded that the incumbents in those Position Descriptions labeled "non-exempt" were incorrectly exempt from the FLSA while encumbering those PDs, and should have been nonexempt. The further conclusion drawn is that the Agency admits liability on the exempt status for all positions and incumbents in those positions prospectively and retroactively.

Further, the Agency included on the HUD FLSA Exemption sheet boxes for certain tests, including the Primary Duty Test. It concluded, and admitted, that the GS-11, 12 and 13 employees fail this test and should be FLSA non-exempt.

The Agency produced these PDs:

<u>#</u>	<u>Series/Grade</u>	<u>Title</u>	<u>HUD FLSA Evaluation</u>
171	GS-360-11	Equal Opp. Specialist (Civil Rights Analys)	Non-exempt

		(Enforcement/ Compliance/ Program Operations) (HUB, Program Center, Local FHEO Sites)	
172	GS-360-11	Equal Opp. Specialist (Civil Rights Analys) (Enforcement/ Compliance/ Program Operations) (Regional Office, FHEO Centers, Local Field Offices)	Non-exempt
173	GS-360-12	Equal Opp. Specialist (Civil Rights Analys) (Enforcement/ Compliance/ Program Operations) (HUB, Program Center, Local FHEO Sites)	Non-exempt
174	GS-360-12	Equal Opp. Specialist (Civil Rights Analys) (Enforcement/ Compliance/ Program Operations) (HUB, Program Center, Local FHEO Sites)	Exempt
175	GS-360-13	Equal Opp. Specialist (Civil Rights Analys) (Enforcement/ Compliance/ Program Operations) (HUB, Program Center, Local FHEO Sites)	Non-exempt
176	GS-360-13	Equal Opp. Specialist (Civil Rights Analys) (Enforcement/ Compliance/ Program Operations) (Regional Office, FHEO Centers, FHEO Field Offices)	Exempt

The most surprising thing about these PDs and HUD FLSA Exemptions is that those PDs produced at the GS-12 level, ***both those found to be exempt and those to***

be non-exempt, are identical. Additionally, those PDs produced at the GS-13 level, ***both those found to be exempt and those to be non-exempt***, are identical.

For example, PD #173 is **identical** to PD #174. Both were created on July 9, 1997 by Susan M. Forward, and were classified on July 14, 1997. The Agency's decision on PD #173 (Non-exempt) is either 1) binding on the Agency, including for those incumbents in PD #174; or 2) sufficient to create enough doubt as to compel a finding that the incumbents in both PDs are FLSA non-exempt.

Similarly, PD #175 is **identical** to PD #176. Both were created on December 17, 1999 by Eve M. Plaza, and were classified on February 1, 2000. The Agency's decision on PD #175 (Non-exempt) is either 1) binding on the Agency, including for those incumbents in PD #176; or 2) sufficient to create enough doubt as to compel a finding that the incumbents in both PDs are FLSA non-exempt.

VI. UNION EXHIBITS EXEMPLIFY THE FACT THAT THE SERIES 360 EO SPECIALISTS ARE PROPERLY NON-EXEMPT FROM THE FLSA.

Union Exhibit #1 is the Office of Personnel Management FLSA training material dated April 1998. This exhibit is titled "How to Make Exemption Status Determinations Under the Fair Labor Standards Act - Prepare, Analyze and Conclude." In order to properly classify the employee, the classifier must prepare, analyze and conclude, using the specific instructions provided by the document. Detailed instructions are given for each category. The document then lists the complete Federal Regulations that are relevant. These are located between 5 CFR 551.202 and 5 CFR 551.207. Included areas are:

- a) General principles governing exemptions;
- b) Exemption of General Schedule employees;
- c) Exemption of Federal Wage System Employees;
- d) Executive Exemption Criteria;

- e) Administrative exemption criteria;
- f) Professional exemption criteria;
- g) 80- Percent Test; and
- h) Section 7(K) of the Fair Labor Standards Act, as amended.

All of this information was available to the Agency and Ms. Thrash when it reclassified the series 360 investigators. The document provides a very detailed analysis of the proper classification process that the Agency should have employed when making a declaration that the employees were non-exempt.

Union Exhibit #2 is an Opinion Letter from the U.S. Department of Labor dated August 19, 2005 and titled FLSA 2005-21. The letter consists of five pages and is signed by Alfred B. Robinson, Jr., Deputy Administrator. The letter is in response to a letter requesting an opinion concerning the applicability of the administrative exemption under Section 13 (a)(1) of the Fair Labor Standards Act to background investigators (Investigators) employed by the client (Company). In the letter, the Agency discussed the Investigators duties including the interview process. It states that at any given time, an investigator can have up to 10 cases. The investigator must also balance his/her time to strike a balance between getting a complete picture and "overkill." In the exhibit, the Agency specifically argued that the OPM found that the GS-12 investigators employed by the Department of Defense qualified for the administrative exemption. The letter dives a detailed description of the administrative exemption under the FLSA which is then followed by an analysis of whether investigators qualify for that exemption. The letter concludes: "Based upon a review of the information you have provided, it is our opinion that the company's investigators do not qualify as bona fide administrative employees under Section 13(a) (1) of the FLSA. Hence, the company's investigators are covered by the minimum wage and overtime provisions of the FLSA."

Some of the discussion in the letter included:

1) It is not sufficient that an employee makes decision “where and when to do different tasks, as well as the manner in which to perform them.” Citing *Clark v. J.M. Benson Co.* 789 F.2d 282, 297 (4th Cir. 1986)

2) “The phrase ‘discretion and independent judgment’ must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: 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, even if the employee’s assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.” 29 C.F.R. § 541.202(b).

3) “The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.” 29C.F.R. § 541.202(e). “An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly.” 29 C.F.R. § 541.202(f).

4) We believe that the activities performed by Investigators employed by your client are more related to providing the ongoing, day-to-day investigative services, rather than performing administrative functions directly related to managing your client’s business. From the information provided in your letter, it appears that the primary duty of the Investigator is diligent and accurate fact-finding, according to DSS guidelines, the results of which are turned over to DSS who then makes a decision as to whether to grant or deny security clearances. Such activities, while important, do not directly relate to the management or general business operations of the employer within the meaning of the regulations.

The letter is material because the employees at HUD perform similar functions as the investigators discussed in the letter. The primary duty of series 360 employees is accurate and diligent fact-finding. Furthermore, the series 360 EO Specialists carry out the mission and day to day function of the Agency.

Union Exhibit #3 is the HUD mission statement. The document 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 embrace high standards of ethics, management and accountability and forge new partnerships--particularly with faith-based and community organizations--that leverage resources and improve HUD's ability to be effective on the community level. The series 360 employee are carrying out the mission and day to day functions of the Agency as admitted by all of the Agency witnesses.

Union Exhibit #4 is the HUD Strategic Plan FY 03-04. The HUD strategic plan for 03-04 is approximately 66 pages long and is dated March 2003. The overall goal of the document is to describe HUD's newly realigned strategic goals and objectives for the next 6 years.

One of the strategic goals stated is to Ensure Equal Opportunity in Housing. The overview provides that:

part of HUD's core mission has always been to help families find affordable and decent housing. This mission will be fulfilled when all Americans have an equal opportunity to buy or rent housing that matches their individual needs. Unfortunately, discrimination against minorities and persons with disabilities exists. These include architectural barriers, refusals to rent or sell, denials of financing and a lack of housing options. These barriers have resulted in an exclusion of some individuals from the diverse housing opportunities that should be available to them. HUD is committed to ending the practice of discrimination through enforcement of fair housing laws as well as through educating lenders, housing providers, developers, architects, homeseekers, landlords and tenants about rights and obligations in complying with the laws. Working with state and local partners—as well as the private sector—the Department is involved in a cooperative effort to increase access to the nation's housing stock so that more Americans can afford to live where they want to live.

Union Exhibit 4, page 33.

This document also supports the notion that the series 360 EO Specialists perform the duties and activities that carry out the mission and day to day function of HUD.

Union Exhibit #5 is the HUD Fair Housing Act Information. Some of the Information included in this exhibit are the general procedures once a complaint is filed:

Complaints filed with HUD are investigated by the Office of Fair Housing and Equal

Opportunity (FHEO). If the complaint is not successfully conciliated, FHEO determines whether reasonable cause exists to believe that a discriminatory housing practice has occurred. Where reasonable cause is found, the parties to the complaint are notified by HUD's issuance of a Determination, as well as a Charge of Discrimination, and a hearing is scheduled before a HUD administrative law judge.

Union Exhibit #6 is a settlement agreement from AFGE council 216. This exhibit consists of a settlement agreement between the American Federation of Government Employees, National Council of EEOC Locals, No 216, AFL-CIO, and the U.S. Equal Employment Opportunity Commission. The settlement resolved all claims that arose from a grievance filed by the Union on April 16, 1993, challenging the classification of bargaining unit employees as exempt under the FLSA. As part of the agreement, the Commission agreed to deposit \$2,750,000.00 with Creative Risk Management. That amount represented the backpay that was accrued by the employees. The amount set forth in the agreement was to compensate employees in positions identified in "Exhibit A," which included GS-11 and GS-12 Equal Opportunity Specialists and Investigators. The agreement was signed on June 6, 1995 by Maria Borrero, Executive Director, Edward A. Watkins, President, National Council of EEOC Locals, No. 216, and Barbara B. Huchinson, Attorney. This exhibit demonstrates that HUD knew or should have known as early as 1995 that the non-exempt classification of GS-11 and GS-12 EO Specialists was not proper. The Agency did not perform another classification until after this grievance was filed, and even that classification failed to follow the guidelines, i.e. Union Exhibit #1.

Union Exhibit #7 is a series of emails from Carolyn Federoff to Mr. Norman Mesewicz and was courtesy copied to Mike Snider and Arbitrator Rodgers. The email was sent on Monday October 3, 2005 at 4:29 p.m. Included in the series of emails were

attachments sent by James N. Sutton, FHEO Region IV Director to ATL-FHEO

Directors and Principals. The text of the email reads:

The following documents were supplied to me by HQ this morning. They will be installed on the shared drive for access by everyone in Atlanta. They must similarly be installed on the sheared drives of all field offices.

Effective October 1, 2005, all NEW determinations and FIR's must be completed using the formats in the enclosed templates. Effective IMMEDIATELY, Region IV FHEO employees must commence utilization of the forms and formats prescribed in the files below to accomplish our work.

Please make sure to distribute these forms to your employees immediately upon receipt.

The attachments included various documents that are also part of this record:

- 1) Closure Form New
- 2) Interrogatory Form
- 3) Subpoena
- 4) UFAS- Dwelling Access Route
- 5) UFAS Dwelling Unit Parking
- 6) UFAS Public Offices
- 7) UFAS Signage-5
- 8) Conciliation doc
- 9) IP Form
- 10) UFAS Accessibility Checklist- Front page 4-22-04
- 11) UFAS Dwelling-Unit-Common- Space-Dumpster-Picnic
- 12) UFAS Elevators
- 13) UFAS Public Restrooms
- 14) UFAS Stairs
- 15) Document Cover Sheet
- 16) Jurisdiction Selections
- 17) UFAS Doors
- 18) UFAS dwelling unit common space laundry
- 19) UFAS Misc-Tele
- 20) UFAS Ramp
- 21) Withdrawal Form
- 22) FIR and Determination Format
- 23) Notice of Amended Complaint
- 24) UFAS Drinking Fountains
- 25) UFAS dwelling unit interior route
- 26) UFAS parking
- 27) UFAS Route-2

Union Exhibit #8 is a HUD Closures form revised on August 30, 2000. This one page form includes areas for the investigator to fill in the blanks for a particular case:

- a) Case file name
- b) File number
- c) Relief Codes including- Code 16 Conciliation- Enforcement Action

- d) Date Conciliation began
- e) Date Conciliation Ended
- f) Dollar Amount
- g) Administrative Closures – Codes, 01, 02, 03, 04, 05, 06, 10, 18
- h) Comments
- i) Submitted by; and
- j) Approved by

This document exemplifies the type of work that the EO Specialists perform on a daily basis. Their work is primarily to serve as a diligent and accurate fact-finder and fill in the blanks of forms or checklists during the investigation of cases.

Union Exhibit #9 is a Title VIII Conciliation Agreement from the U.S. Department of Housing and Urban Development. It was approved by the FHEO Regional Director on behalf of the Agency. The Agreement is divided into subsections including:

- A) parties and subject property- name, role in case, description of subject property
- B) statement of facts- when it was filed, allegations, defense
- C) term of agreement- time period being governed
- D) effective date- binding contract effective on...
- E) general provisions- parties understand, respondent knows of affirmative duty not to discriminate
- F) once approved by FHEO Regional Director is binding
- G) it is a public document
- H) department retains right to investigate any other claim filed against respondent
- I) no amendment unless- all agree, must be in writing, must be approved by FHEO Regional Director
- J) Execution of document
- K) Complainant forever waives releases not to sue department or respondent arising out of case
- L) Same as K, but for Respondent
- M) Relief for Complainant – respondent agrees to pay
- N) Optional additional relief for complainant
- O) Relief in Public Interest- examples to tailor to your case
- P) Monitoring
- Q) Reporting and Recordkeeping
- R) Consequences of breach

Union Exhibit #10 is an Amendment letter from the U.S. Department of Housing and Urban Development. It is correspondence stating that during an investigation, the complaint was amended to cure technical defects. It is not a determination of merit.

The letter also informs the individual of his/her rights.

Union Exhibit #11 is a final investigative report. The report contains various sections including:

- 1) Jurisdiction
- 2) Parties and aggrieved persons
- 3) Case Summary
- 4) And a signature page

The signature spaces provided are the signature of the EEO Specialist, the Title VIII Branch Chief, the Director Program Office, and the Director. Attached to the report is another section for the evidence. Included is the HUD 903 Complaint, perfected 903 Complaint, Notifications, Documents from the Complainant, Documents from the Respondent, Other documents, 100 day letter, and a determination for reasonable cause. The section for the finding of reasonable cause includes the following sections:

- 1) Jurisdiction
- 2) Complainant's Allegations
- 3) Respondent's Defenses
- 4) Findings
- 5) Conclusions
- 6) Additional Information, and
- 7) Signature page for the Director

The document is is the final report that an investigator submits to his/her supervisor for review. The last page requires the signature of the Director because he has the final authority to bind the Agency do findings in the report. The report requires that the investigator conduct thorough and diligent fact-finding and fill-in the sections. The laws, statutes, and guidelines provided by the Agency outline the procedure that must be followed and the information that must be included in the final report.

Union Exhibit #12 is the HUD Investigative Plan. The sections on this document include:

- 1) Jurisdiction- including- standing, timeliness, subject matter jurisdiction, jurisdiction over the respondent, and HUD assistance.
- 2) Parties and Witnesses both Complainant and Respondent

- 3) Proof Formula including:
 - a) allegation
 - b) overt
 - c) unequal treatment
 - d) disparate impact
 - e) prima facie- general- including protected class, C applied, C was qualified, C was denied, R rented to someone else not in the protected class of C
prima facie- reasonable accommodation- C has impairment, R knew of impairment, C needed accommodation that was directly related to the impairment, R knew of the need, and the accommodation was denied.
 - f) Facts required to prove or refute allegation
 - g) Records to examine and documents to obtain
 - h) Planned interviews and questions to be asked

The plan was testified about by every Union witness and outlines the investigation of a case. It is very detailed and must be approved by supervisors before a case is closed.

Union Exhibit #13 is the applicable sections of the Federal Fair Housing Act, including Section 804. That provision prohibits the following with respect to the sale or rental of housing if based on race, color, religion, sex, handicap, familial status, or national origin:

Refusing to sell or rent housing after a bona fide offer is made, or refusing to negotiate to sell or rent, or otherwise make unavailable or deny, a dwelling to any person; Discriminating against any person with respect to terms, conditions, or privileges of sale or rental of a dwelling, or with respect to the provision of services or facilities in connection with the sale or rental; Making any oral or written statement or advertisement with respect to a sale or rental of a dwelling that indicates any preference, limitation, or discrimination or an intention to make any such preference, limitation, or discrimination; Representing to any person that any dwelling is not available for inspection, sale, or rental when such dwelling is available; Inducing or attempting to induce for profit, any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a certain person or persons; Intimidation, and criminal physical interference or intimidation.

Union Exhibit #14 is a subpoena form. Included in the document is the case name, a command to appear and give testimony, and it is approved by the Director of FHEO. Attached are definitions, protections and duties, the penalty, and finally, the notice of service. While the Agency contends that the issuance of subpoenas is work that an EO Specialist performs that satisfies the primary duty test or independent judgment and discretion, it is clear from the document that the form requires approval by

the Director and is another example of the fill in the blank forms that are provided by the Agency. Most Union witnesses testified that did not even issue a subpoena in their day to day activities.

The following exhibits are a series of checklists that EO Specialists use during investigations or reviews of facilities. The exhibits are very similar and very specific with regard to the procedure the investigator must follow.

Union Exhibit #15 is the UFAS Accessibility Checklist. The checklist is dated as Draft on April 22, 2004. The top of the document has blank spaces for Facility name, address, phone number, name of reviewer, date of review, unit/apartment number/ and TDD/TTY number. The checklists provide that it should be used together with the UFAS Accessibility Standards 24.C.F.R. §40, Appendix (A) and the Fair Housing Act and the Americans with Disabilities Act of 1990 may also be applicable. The form provides that investigator must use a tape measure, smart level, door pressure gauge, and Camera to measure and examine the Exterior/Common Areas, Dwelling Unit, and Dwelling Unit Common Spaces/Facilities.

Union Exhibit #16 is the UFAS Work form for Exterior/Common Ares Accessible Elements with focus on doors and doorways. The document is similar to Union Exhibit #15, but provides spaces for the investigator to focus on different areas, including the door location, maneuvering space at door, door width, door w/ closer, door hardware, tactile warnings on doors to hazardous areas, and thresholds.

Union Exhibit #17 is the UFAS Work form for Exterior/Common Ares Accessible Elements with focus on drinking fountains/water coolers. This document provides

spaces for the investigator to focus on various areas including the drinking fountain location, sprout height, sprout location, controls, and protruding objects.

Union Exhibit #18 is the UFAS Work form for Dwelling Unit Accessible Elements with the focus on Accessible Routes. This document provides spaces for the investigator to focus on various areas including the accessible route location, surface, protruding objects, slope of route, grates, and curb ramps.

Union Exhibit #19 is the UFAS Work form for Dwelling Unit Common Spaces/Facilities with the focus on Dumpster, Picnic Areas- Accessible Route. This document provides spaces for the investigator to focus on various areas including the Dumpster-Picnic Area, Etc. location, trash receptacle/dumpster, picnic area, and playground.

Union Exhibit #20 is the UFAS Work form for Dwelling Unit Common Spaces/Facilities with the focus on Laundry Facilities. This document provides spaces for the investigator to focus on various areas including the door opening force, accessible door hardware, laundry location, maneuvering space at door, door width, and thresholds.

Union Exhibit #21 is the UFAS Work form for Dwelling Unit Accessible Routes with the focus on dwelling unit/interior route. This document provides spaces for the investigator to focus on various areas including the maneuvering space at door, door width, dwelling door hardware, thresholds, and floors. There is also space for:

- a) Bedrooms- bedroom door hardware, closets, outside spaces
- b) Bathrooms- bathroom door hardware, water closet, toilet grab bars, toilet paper dispenser, lavatory, lavatory controls, mirror, medicine cabinet, bathtubs, tub shower spray unit, tub grab bar.
- c) Shower- GB size and spacing, shower GB locations and sizes, shower stalls, shower seat, shower spray unit, shower controls

- d) Kitchen- clearance, clear floor space, kitchen counters/work space, kitchen pipes, kitchen sinks, kitchen oven, kitchen range/cook tops, kitchen refrigerator, refrigerator controls, approach, dishwasher, washer/dryer, appliance hardware and controls, controls, forward approach, and kitchen storage.

Union Exhibit #22 is the UFAS Work form for Dwelling Unit Accessible Elements with the focus on accessible parking. This document provides spaces for the investigator to focus on various areas including the accessible parking location and accessible parking.

Union Exhibit #23 is the UFAS Work form for Common Areas Accessible Elements with the focus on elevators/platform lift. This document provides spaces for the investigator to focus on various areas including the elevator/platform lift location, automatic operation, hall call buttons, hall lanterns raised characters on hoist way entrances, door protective and reopening device, door delay for car calls, floor plan of elevator cars, and elevator floor surfaces.

Union Exhibit #24 is the UFAS Work form for Common Areas Accessible Elements with the focus on miscellaneous. This document provides spaces for the investigator to focus on various areas including the telephones, telephone mount height, telephone volume control, telephone cord length, telephone books, protruding objects, assistive listening systems, and effective communications.

Union Exhibit #25 is the UFAS Work form for Common Areas Accessible Elements with the focus on public office or meeting rooms, recreational rooms, etc. This document provides spaces for the investigator to focus on various areas including the location of public offices, maneuvering space at door, door width, thresholds, door opening force, door hardware, tactile warnings on doors to hazardous areas, and business transactional counter.

Union Exhibit #26 is the UFAS Work form for Common Areas Accessible Elements with the focus on public restrooms. This document provides spaces for the investigator to focus on various areas including the public restroom location, maneuvering space at door, door width, door hardware, tactile warnings on doors to hazardous areas, door opening force, thresholds, toilet paper dispenser, urinals, lavatory, faucet control, mirrors, and dispensers/other elements.

Union Exhibit #27 is the UFAS Work form for Common Areas Accessible Elements with the focus on ramps. This document provides spaces for the investigator to focus on various areas including the ramp locations and handrails.

Union Exhibit #28 is the UFAS Work form for Common Areas Accessible Elements with the focus on signage. This document provides spaces for the investigator to focus on the signage elements, spaces, and characters.

Union Exhibit #29 is the UFAS Work form for Common Areas Accessible Elements with the focus on stairs. This document provides spaces for the investigator to focus on various areas including the stairs location, treads and risers, nosings, stairs, and handrails.

Union Exhibit #30 is a voluntary withdrawal form of a housing discrimination complaint. The document is one example of a way that a case can be closed at HUD. It requires the investigator to fill in the relevant information provided by the complainant and then must be approved. It does not allow the investigator to exercise independent judgment and discretion.

Union Exhibit #31 is the Pilot Program Overview form that was developed by Mr. Todd Richardson. The exhibit is a power point presentation that addressed the

problems with the current investigation process at HUD and ways to improve. Other topics included:

- 1) Is FHEO case processing as effective and efficient as it can be.
- 2) Number of Cause determinations by FY of Complaint
- 3) GAO-April 2004
- 4) Problems with current process identified by HUB directors
- 5) Outcomes for HUD inquiries filed in FY 2003 as of October 2004
- 6) FY 2003 inquiries-days to close cases
- 7) How we can identify the most efficient and effective approach
- 8) Goals for the pilot: a) efficient and effective case process and b) no change in core responsibilities of FHEO and OGC
- 9) Research approach
- 10) Research questions to be answered
- 11) Example table of estimating impacts of the pilot
- 12) Pilot design
- 13) What is Fort Worth current practice
- 14) What is Fort Worth current practice (2)

Union Exhibit #32 is a FOIA listing of the breakdown of FLSA exempt and non-exempt employees at the Social Security Administration by series. There are no exempt series 360 employees in the document.

Union Exhibit #33 is the position description for the series 360 Equal Opportunity Specialist, GS-13 at headquarters in Washington, DC. The document is Agency position number G2F093. The position is neither supervisory nor managerial and the duties listed are similar to those provided in the position description for GS-11 and GS-12 employees. The PD is signed by William A. Nardo, Human Resources Specialist and dated April 15, 2004. The PD is also signed by Harold M. Busch, Director, Division of Program Operations and dated April 15, 2004.

Union Exhibit #34 is the position description for the series 360 Equal Opportunity Specialist, GS-13, Washington, DC, Agency position number 5263. The position is checked off as new and is neither supervisory or managerial. Specifically, the position is classified as Non-exempt from the Fair Labor Standards Act. The PD is signed by

William A. Nardo, Human Resources Specialist on November 18, 1996. The PD is also signed by Harold M. Busch, Director, Division of Program Operations on April 25, 1996.

Union Exhibit #35 is the position description for the series 1810 Investigator, GS-11, Washington, DC, Agency position number H-5626. The position is checked off as new and is neither supervisory or managerial. The name of the employee is Ms. Palania Gonzales. Specifically, the position is classified as Non-exempt from the Fair Labor Standards Act. The PD is signed by Arlethia D. White, Personnel Management Specialist on September 20, 1988. The PD is also signed by James H. Troy, Director, Division of Program Operations.

All of the documents demonstrate, as set forth further herein, that the GS-360 employees at issue were improperly listed as exempt from the FLSA.

VII. VIOLATION OF RECORDS RETENTION LAW AND POLICY

The Agency violated laws and policy on Records Retention.⁴ In part, it shredded notes by Ms. Thrash and the other violations noted above. Records retention periods are generally based on a number of factors, including:

- 16 **Operational / Record User's Needs** - retention periods based on an organizational or record user's need to preserve records to protect the organization's rights, conduct business or facilitate records.
- 17 **Legal Requirements** - retention periods stated in statutes, regulations and rules establishing minimum periods for maintaining records. These periods can be enforced by government or third parties.

⁴See **Law, Records and Information Management**, Skupsky and Montana, Information Requirements Clearinghouse, 1994; **Disposition of Federal Records** - A Records Management Handbook, National Archives and Records Administration, 1992; **General Records Schedule**, Transmittal No. 7, National Archives and Records Administration, , August 1995; **National Archives Memorandum to Agency Records Officers**, NARA, November 30, 1995.

- 18 **Legal Considerations** - retention periods based on other legal considerations such as statutes of limitations, a legal duty to preserve records, pending litigation or tax or other audit.
- 19 **Historical** - retention periods to preserve records for public historical or research needs, or as part of an archive.

Clearly, records that are legally able to be destroyed under a record retention program are wrongfully disposed of if destroyed in anticipation of future litigation. See, e.g., **Carlucci v. Piper Aircraft Corp.**, 102 F.R.D. 472 (S.D.Fla 1984); **Lewy v. Remington Arms Co.**, 836 F.2d 1104 (8th Cir. 1988). Documents available to an Agency and not produced can form the basis for an adverse inference. **NOAA and NWSEO**, 30 FLRA No. 19 (1986), **AFGE Local 1923 and Department of the Navy, Naval Surface Warfare Center, Indian Head Division**, UG-33-00 at 29-30 (Kaplan, I., January 30, 2002).

The NARA guidelines on retention of Position Descriptions allow an Agency to destroy the records “2 years after position is abolished or description superseded.” (Transmittal No. 7 at 4). However, NARA requires federal Agencies to retain “Position Classification Standards Files” for a longer period of time:

7. Position Classification Files.

a. Position Classification Standards Files

- | | |
|--|---|
| <ol style="list-style-type: none"> (1) Standards and guidelines issued or reviewed by OPM and used to classify and evaluate positions within the Agency. (2) Correspondence and other records relating to the development of standards for classification of positions Peculiar to the Agency, and OPM approval or disapproval | <p>Destroy when superseded or obsolete.</p> |
|--|---|

(a) Case file.	Destroy 5 years after position is abolished or description is superseded.
(b) Review file.	Destroy when 2 years old.
b. Position Descriptions.	
Record copy of position descriptions that include information on title, series, grade, duties and responsibilities, and description related documents.	Destroy 2 years after position is abolished or description superseded.

Further, unauthorized disposition of Federal Records is against the law (44 U.S.C. 31-6) and may lead to a \$2,000 fine, 3 years of imprisonment, or both. 18 U.S.C. 2071.

Agency heads must report to NARA any unlawful or accidental removal, defacing, alteration or destruction of records in the custody of their Agency. See 36 CFR 1228.

NARA has noted in its official guidance that Agencies must consider pending litigation, statutes of limitations, and even litigation trends in the retention of records.

Disposition of Federal Records at IV-4.

The destruction of records once a party is on notice that the records are likely to be required in pending litigation, however, is clearly unauthorized and is subject to sanctions by a third party. **Vick v. Texas Employment Commission**, 514 F.2d 734 (5th Cir. 1975), **Telectron, Inc. v. Overhead Door Corp.**, 116 F.R.D. 107 (S.D.Fla. 1987).

CONCLUSION

The Agency has not met its burden. It has introduced no evidence regarding the positions at issue during the vast time frame covered by the Grievance. That information it did produce was neither probative nor controlling. It committed per se violations of the FLSA, and OPM's regulations require that such violations result in a finding against the Agency.

Furthermore, the Agency has produced documents indicating that it now cedes all GS-11, 12 and 13 employees in the 360 series (See After-Acquired Evidence Section). Non-exempt employees at the GS-11 and 12 levels testified that their duties were identical to employees who the Agency has misclassified as exempt. Other documents also compel a finding in the Union's favor, like the extremely detailed guidelines the EOS's have to follow, and from which they are not allowed to deviate, and PDs for nearly identical positions at the Department of Labor which are non-exempt. Other documents are equally compelling, such as the Department of Labor findings on investigators, cases on point for other investigators and the EEOC's wholesale reclassification of its Equal Employment Specialists as FLSA non-exempt.

In short, the preponderance of the evidence shows that all GS-360 employees are and have been misclassified. While technical experts, these employees are not FLSA exempt. It is time that they receive their proper compensation.

For the foregoing reasons, the Union requests that the Arbitrator find in its favor.

Respectfully Submitted,

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

Certificate of Service

I certify that a copy of the foregoing was served upon the Arbitrator and Agency via email and first-class mail.

Date: February 21, 2006

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