FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration Between	Grievance
NATIONAL COUNCIL OF EEOC LOCALS NO. 216, AFGE, AFL-CIO -and- UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION Case No. 071012-00226-A	Exempt/Non-exempt Status of Bargaining Unit Employees

OPINION AND AWARD OF ARBITRATOR

Background of the Dispute

The dispute in this matter arises from action taken by the United States Equal Employment Opportunity Commission ("EEOC" or "Agency") on March 6, 2006. On that date, the Agency notified the National Council of EEOC Locals No. 216 ("Union") in writing of its decision to change the status of certain positions under the Fair Labor Standards Act of 1938 (29 U.S.C. §201 *et seq*.) ("FLSA") from non-exempt to exempt. By letter from Joann C. Riggs, Assistant Director of the Office of Human Resources, to Gabrielle Martin, President of the Union, the Agency informed the Union that, effective April 1, 2006, it would be changing the exemption status of GS-1810-09, GS-1810-11 and GS-1810-12 Investigators and GS-301-12 and GS-301-13 Alternative Dispute Resolution ("ADR") Mediators, all of which are bargaining unit positions. Among the

Investigator-GS12 positions included in this decision was that of Investigator-GS12/State and Local Coordinator. In addition, action taken with respect to Investigator-GS9, GS11 and GS12 positions likewise included Bilingual (Spanish) positions, which, but for their language component, are identical to their non-bilingual counterparts. My analysis of the latter, therefore, will likewise govern the Bilingual (Spanish) positions.

Ms. Riggs' letter noted, among other matters, that "[t]his change is based on the results of an independent review conducted by the firm of Gene Rouleau & Associates (GRA) that determined these positions to be improperly designated as non-exempt." Enclosed with Ms. Riggs' letter were "copies of the position descriptions for the Investigator and Mediator positions that were reviewed by GRA and the written determinations for each position reviewed." The GRA review referenced in Ms. Riggs' letter was conducted in 2004, and it encompassed Position Descriptions originally written from 1988 to 1998.

By letter of March 20, 2006 Ms. Martin responded, in pertinent part, as follows:

> As you are aware, under the Fair Labor Standards Act, it is the employer's responsibility to correctly designate employees under that statute. As long as the employees listed in your March 6, 2005 [sic] memorandum are performing the work of the agency, the work is non-exempt under the FLSA. Any efforts to designate them as exempt would be a violation of the FLSA and the Union believes it would be an intentional violation of the FLSA. The Union believes that all employees in these positions directed to work in excess of 40 hours are entitled to payment of overtime compensation.
>
> Further, I have reviewed the evaluation of the Position descriptions which you provided. Nothing leads to the conclusion that under the law, the work and duties have changed to support a designation of "exempt" or, as described in the position descriptions, support a designation of "exempt."

On April 11, 2006 Angelica E. Ibarguen, the Agency's Chief Human Capital Officer, informed the various levels of Agency Management of the intended change of FLSA status for the Investigator and Mediator positions. She noted, in part:

> GRA determined that Mediators and Investigators meet the *administrative* exemption criteria outlined in 5 CFR 551.206. In order to meet the *administrative* exemption criteria, the regulation provides that the work must involve management or general business functions or supporting services of substantial importance to the organization serviced, must be of a specialized or technical nature that requires special training, experience and knowledge and must involve the exercise of independent judgment under only general supervision. Prior to the Priority Charge Handling Procedures (PCHP), Investigators and Mediators were thought not to exercise independent judgment and the positions were designated as non-exempt. However, PCHP procedures now require that these positions exercise independent judgment. [Emphasis supplied]

After soliciting the Union on its desire to engage in impact and implementation bargaining, which it did not request, the Agency delayed implementation of its action to May 14, 2006.

On May 11, 2006 Ms. Riggs again wrote to Ms. Martin, advising her that the Position Descriptions and audit findings provided by GRA that had been attached in Ms. Riggs' March 6, 2006 letter were incorrect. In her May 11, 2006 letter, she provided Ms. Martin with "the correct position descriptions used by GRA in its audit."

The Union's April 14, 2006 Step 1 grievance, as amended, alleges that the Agency has willfully violated the parties' collective bargaining agreement ("Agreement"), federal law and regulations, and a June 6, 1995 Settlement Agreement, by its designation of the relevant positions in the Agency's Headquarters, District, Field, Area and Local offices, as exempt from the payment of overtime compensation, under the FLSA's Administrative Exemption. It seeks a redesignation of the positions as nonexempt, along with monetary relief. The grievance was processed by the parties through Step 3 without resolution. A further allegation of the Union, that the Agency intentionally "suffered and permitted" certain bargaining unit employees to work overtime without proper compensation, is, by agreement of the parties, to be heard before me in a separate proceeding.

Article 31 ("**Overtime**") of the Agreement, Section 31.05 provides, in part: "Overtime work must be authorized in advance; however, all required or approved work performed outside the basic work week shall be compensated in accordance with applicable overtime laws and regulations of OPM [Office of Personnel Management]…." Section 31.06 provides, in part: "Non-exempt employees who work overtime shall be paid at the rate of one and one-half (1-1/2) times the rate of regular pay or within regulatory limits…." Section 31.07 provides, in part: "All bargaining unit employees classified as non-exempt under the Fair Labor Standards Act shall be compensated in accordance with applicable laws and regulations for work performed as overtime…."

The FLSA, at 29 U.S.C. §213(a), excludes from its maximum work hours requirement "any employee employed in a bona fide executive, administrative, or professional capacity…." It authorizes OPM to administer the wage and hour provisions of the FLSA in the Federal sector. OPM has, in furtherance of this authority, issued regulations at 5 CFR Part 551. In particular, it sets forth its administrative exemption criteria at 5 CFR §551.206, which provides in full as follows:

> 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 while-collar pay systems) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions to meet the 80-percent test.

Subsection (d), above, is, by its terms, not applicable in this case, as it applies only to GS5 and GS6 positions. In addition, subsection (a)(3), the third element of the "Primary duty test," is not before me for consideration, as the Agency acknowledges that none of the positions at issue satisfies this requirement for exemption.

The following definitions, among others, are included in 5 CFR §551.104:

Discretion and independent judgment means work that involves comparing and evaluating possible courses of conduct, interpreting results or implications, and independently taking action or making a decision after considering the various possibilities. However, firm commitments or final decision 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. [Emphasis supplied]

…

Essential part of administrative or professional functions means work that is included as an integral part of administrative or professional exempt work. This work is identified by examining the processes involved in performing the exempt function. For example, the processes involved in evaluating a body of information include collecting and organizing information; analyzing, evaluating, and developing conclusions; and frequently, preparing a record of findings and conclusions. Often collecting or compiling information and preparing reports or other records, if divorced from the evaluative function, are nonexempt tasks. When an employee who performs the evaluative functions also performs some or all of these related steps, all such work (for example, collecting background information, recording test results, tabulating data, or typing reports) is included in the employee's exempt duties.

…

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).

…

Management or general business function or supporting service, as distinguished from production functions, means the work of employees who provide support to line managers.

(1) these employees furnish such support by—

(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.

(2) Neither the organizational location nor the number of employees performing identical or similar work changes management or general business functions or supporting services into production functions. The work, however, must involve substantial discretion on matters of enough importance that the employee's actions and decisions have a noticeable impact on the effectiveness of the organization advised, represented, or serviced.

…

Primary duty typically means the duty that constitutes the major part (over 50 percent) of an employee's work. A duty constituting less than 50 percent of the work may be credited as the primary duty for exemption purposes provided that duty—

(1) Constitutes a substantial, regular part of a position;

(2) Governs the classification and qualification requirements of the position; and

(3) Is clearly exempt work in terms of the basic nature of the work, the frequency with which the employee must exercise discretion and independent judgment, and the significance of the decisions made.

…

Work of an intellectual nature means 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.

> *Work of a specialized or technical nature* means 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.

Furthermore, these regulations set forth the express standards to be applied in reaching exemption determinations, and by which I am bound here. In 5 CFR §551.202 ("**General principles governing exemptions**"), the affected agency is required to 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.

The June 6, 1995 Settlement Agreement between the parties, referenced in the grievance, represented a resolution of the Union's April 1993 grievance that had challenged the Agency's designations of certain bargaining unit positions at the GS-11 and above level as exempt under the FLSA. This Settlement Agreement set forth the parties' agreement that certain positions, among them the positions of Investigator, GS-1810-11 and GS-1810-12, were nonexempt for purposes of the payment of overtime. The Investigator-GS9 position, as noted by Ms. Riggs, was not part of the 1995 Settlement Agreement, but was included in the Agency's 1996 Guidance Document, and was then classified non-exempt. It did not encompass ADR Mediator positions, which were not in place at the Agency until 1998, at which time they were classified as exempt.

Shortly thereafter, on September 19, 1995, Ms. Patricia Johnson, then Director of Human Resources Management Services, issued a Memorandum to upper Management

of the Agency, its purpose being "to clarify and change EEOC's overtime policy." That Memorandum confirmed the non-exempt FLSA status of all three relevant Investigator positions (the ADR Mediator position not being addressed because it did not yet exist).

In January 2002, the parties executed a Memorandum of Understanding in which they agreed to redesignate GS-301-12 and GS-301-13 ADR Mediators from exempt to non-exempt under the FLSA. By the terms of the Memorandum of Understanding, these positions, among those at issue in the current dispute, would be eligible, as of September 7, 2001, to receive overtime compensation under the Agreement.

The Agency had asked GRA in 2004 to examine the FLSA status of several Position Descriptions. These included (as set forth by their respective Union Exhibit numbers):

- **U5A** – the 1988 Position Description for Investigator-GS9, then certified as non-exempt under FLSA;
- **U5B** – the 1988 Position Description for Investigator-GS11, then also certified as non-exempt under FLSA;
- **U5C –** the 1993 Position Description for Investigator-GS12, then certified as exempt under FLSA and later designated non-exempt in furtherance of the 1995 Settlement Agreement;
- **U5D –** the 1988 Position Description for Investigator-GS12/State and Local Coordinator, then also certified as exempt under FLSA and later designated non-exempt in furtherance of the 1995 Settlement Agreement;
- **U5E** – the 1998 Position Description for ADR Mediator-GS12, then certified as exempt under FLSA and later designated non-exempt in

furtherance of the 2002 Memorandum of Understanding, along with U5F, below; and

- **U5F** – the 1998 Position Description for ADR Mediator-GS13, then certified as exempt under FLSA, and later designated non-exempt in furtherance of the 2002 Memorandum of Understanding, and also so noted on the Position Description "per Acting HR Director Memo [dated] 2/6/2002."

GRA's 2004 review of these Position Descriptions, conducted by GRA Senior Associate Bruce Oland, yielded recommended changes in the FLSA designations of Investigator-GS9, Investigator-GS11, Investigator-GS12, ADR Mediator-GS12 and ADR Mediator-GS13 from non-exempt to exempt. Thereafter, in 2005 and 2006, the Agency revised its Investigator and ADR Mediator Position Descriptions, with the exception of the Investigator-GS12/State and Local Coordinator Position Description, deemed by the Agency's Classifier John McCrory in April 2007 to have undergone no material change since 1988. These revised determinations were implemented by the Agency in late 2006 and early 2007.

The parties were at odds over GRA's 2004 review, as well as the Agency's March 6, 2006 notification to the Union, having been premised on older Position Descriptions, and the fact that the Agency, as noted above, had later revised Investigator and ADR Mediator Position Descriptions. As a consequence, in early 2007 the Agency again directed GRA to conduct FLSA reviews of these positions. These reviews, again conducted by Mr. Oland and dated April 2007, reaffirmed these positions' FLSA designation as exempt.

Both parties produced numerous fact witnesses, including incumbents of relevant positions, and each offered expert witnesses in FLSA-related issues. The Union produced Paul Katz as its expert, and the Agency produced Mr. Oland as its expert. Mr. Katz's expert testimony was offered in support of his findings that the positions at issue should all be found non-exempt for FLSA purposes, and that of Mr. Oland was offered in support of his findings that all such positions should continue to be deemed exempt. The testimony of these fact and expert witnesses will be considered, as appropriate, in the **Discussion and Findings** section of this Opinion.

The Position Descriptions At Issue

The record before me contains Positions Descriptions that range in time from as far back as 1988 to as recently as 2006. As noted above, GRA's 2004 review and determinations concerning the relevant positions' FLSA status reflected judgments on Position Descriptions that predated the year 2000.

In the current dispute the Agency asserts its reliance on GRA's April 2007 determinations concerning the exempt/non-exempt status of these positions as of the 2005-06 revision of their Position Descriptions. Thus, the Agency does not rely on GRA's 2004 recommendations, inasmuch as they were premised entirely on pre-2000 Position Descriptions. The only exception to this involves the Position Description for Investigator-GS12/State and Local Coordinator, where the Agency asserts that the 1988 Position Description for this position has undergone no material change since that time.

Furthermore, I note (and the Agency acknowledges) that GRA, or any outside contractor, can make recommendations, but it is without authority to make a final FLSA exempt/non-exempt determination.

Regulatory Criteria

Under the previously referenced regulations issued by OPM that administer the wage and hour provisions of the FLSA in the Federal sector, there is a presumption that an employee is FLSA non-exempt. Exemption criteria are to be narrowly construed, and reasonable doubts are to be resolved in favor of non-exemption, with the burden of proof resting with the Agency.

As set forth in 5 CFR §551.206, the administrative exemption criteria, a finding of exemption under the FLSA must meet all three principal tests: (1) the "Primary duty test"; (2) the "Nonmanual work test"; and (3) the "Discretion and independent judgment test." A fourth criterion, the "80-percent test," applies only to GS5 and GS6 positions and is, therefore, not relevant here. The "Primary duty test" is satisfied if any one of three descriptors of an employee's work is met. The "Nonmanual work test" is satisfied if either of two descriptors of an employee's work is met.

Issues

The Union deems the following to be at issue:

(1) Whether the Agency incorrectly designated the positions of Investigator GS-1810-9/11/12 (including Bilingual Investigator), Mediator GS-301-12/13, and Investigator/State and Local GS-

1810-12 as exempt under the Administrative exemption in violation of 5 CFR §§551.201, 551.202 and 551.206 as administered by Article 31 of the Agreement; 29 U.S.C. §213; and 5 U.S.C. §4432; and

(2) Whether the Agency's designation of the positions as exempt from the payment of overtime compensation is an intentional breach of the June 6, 1995 Settlement Agreement and an intentional violation of the January 29, 2002 Memorandum of Understanding.

The Agency raises an additional issue – namely, that the Union's allegation of an Agency violation of the 2002 Memorandum of Understanding is untimely, and thereby waived, inasmuch as it was not raised in the grievance by Step 2, pursuant to Section 41.07, Step 2 of the Agreement.

Positions of the Parties

The Union contends here that, by adopting the GRA recommendations – namely that the positions of Investigator GS-1810-09, GS-1810-11 and GS-1810-12 (including Bilingual Investigator), ADR Mediator GS-301-12 and GS-301-13, and Investigator GS-1810-12/State and Local Coordinator should be deemed exempt from the payment of FLSA overtime under the administrative exemption set forth in 5 CFR §551.206 – the Agency has violated the Agreement, along with Federal law and regulations. It contends further that, by the Agency's actions, it has intentionally breached both the June 6, 1995 Settlement Agreement and the January 2002 Memorandum of Understanding. It seeks

redesignation of the positions at issue, all overtime compensation lost, liquidated damages and attorney fees and costs.

The Agency contends first that incumbents in the relevant positions meet the requirements necessary under the regulations in order to qualify under the administrative exemption, and, therefore, are not subject to FLSA overtime payment. It contends further that, based on its having directed GRA to conduct updated FLSA reviews of revised 2005 and 2006 Investigator and ADR Mediator Position Descriptions, it properly relied on GRA's exemption designations, inasmuch as they are based upon incumbents' current job duties as reflected in their current Position Descriptions. Furthermore, it argues that the Union's assertion that the Agency violated the terms of the parties' 2002 Memorandum of Understanding is now untimely under Section 41.07, Step 2 of the Agreement.

Discussion and Findings

The Agency's mission is the elimination of employment discrimination by enforcing applicable Federal laws and regulations prohibiting such discrimination in the private, public and Federal sectors. Resolution of charges arising under these mandates requires the efforts of, among others, both Investigators and ADR Mediators.

My analysis of the exempt/non-exempt determinations of the six positions at issue will be as follows: I will first set forth what I find to be the fundamental nature of these positions. I will then examine the various positions within each of these two categories, and assess to what extent they are similar and to what extent they differ. Finally, based on these findings, I will conclude which, if any, of these positions should be deemed to

have met the OPM administrative exemption criteria set forth in 5 CFR §551.206(a)-(c), in light of the definitions set forth in 5 CFR §551.104.

I note further that, in my review of the record, I have consulted the materials provided by counsel in their Post-Hearing Briefs and will make reference to them as appropriate.

I. THE AGENCY'S ARGUMENT OF UNTIMELINESS

The Agency contends that the Union, in failing by Step 2 of the grievance procedure to allege that the Agency violated the terms of the 2002 Memorandum of Understanding, it has waived this argument.

This issue is not, in my view, comparable to a failure to plead the violation of a document, or a provision in a contract, which, if properly invoked, may preserve a substantive right otherwise lost. The 2002 Memorandum of Understanding is a fact. It is a document the implementation of which caused ADR Mediators-GS12 and GS13 to be redesignated from FLSA exempt to FLSA non-exempt. It was not, nor could it be, an agreement or a promise to maintain this status indefinitely, or even for a fixed period of time, since, if presented with changes in the ADR Mediator positions significant enough legitimately to warrant FLSA reclassification, the Agency would be required to do so, consistent with 5 CFR §551.202(i), which declares that FLSA status "rests on the duties actually performed by the employee." In such an event, the 2002 Memorandum of Understanding would be no impediment to such action.

The parties have litigated this matter in pursuance of allegations made in the Union's grievance relating to the FLSA status of specific bargaining unit positions, and based on testimony and documentary evidence of relevance thereto. Based on the above,

I conclude that a ruling on the issue of the alleged untimely pleading of the 2002 Memorandum of Understanding is neither necessary nor of assistance.

II. INVESTIGATOR

A. INVESTIGATOR-GS9, GS10 AND GS 12 (INCLUDING BI-LINGUAL)

The Investigator is a field office position under the Office of Field Programs (OFP). An incumbent performs a broad range of EEOC investigative functions that include the receipt, review and assessment of charges and complaints alleging employment discrimination, conducting all aspects of the investigation. These include, when appropriate, settlement or conciliation activities.

Nicholas Inzio, Director of OFP, explained that OFP provides guidance to offices on carrying out the Agency's policies in conducting investigations, mediations, conciliations of private sector charges, and hearings of Federal sector cases. He referenced Investigators (and Mediators as well) as "front-line positions" who deal directly with charging parties. (In the **Discussion and Findings** section of this Opinion, I will address the parties' dispute over the meaning of the quoted phrase.) In addition, and with particular relevance to requirements of the "Primary duty test," Mr. Inzio expressly stressed additional duties expected of Investigators. These include outreach, training and technical assistance aimed principally at private sector employers, and involvement in working groups within the Agency that, as he described, "provide recommendations to management in terms of … policies that EEOC should pursue" in areas such as intake, training, information technology and the Agency's relationship with state and local agencies.

My sense of Mr. Inzio's picture of the Investigator position is that, while he acknowledges the daily job responsibility of receiving and processing charges from members of the public and non-EEOC employers, he is attempting also to present, as a nearly co-equal "primary" job responsibility, the Investigators' role (and that of the ADR Mediator as well) in promoting the Agency's services in this regard within the larger community. He rightly acknowledges the "receiving and processing" aspect of the Investigator position as "a significant job duty, " but, in so doing, does not conclude that such work effectively defines the position in terms of the "Primary duty test."

As Mr. Inzio acknowledged, the GRA determinations of 2004 performed by Mr. Oland at the Agency's request (specifically, for the purposes of this section dealing with Investigators – Exhibits U4H, U4G and U4Q) did not then rest on new or recent Position Descriptions; rather, they were premised on the pre-2000 Position Descriptions. (I will turn later to an examination of the Investigator-GS12/State and Local Coordinator). All of these pre-2000 Position Descriptions had been designated by the Agency as non-exempt. Nonetheless, as Mr. Inzio maintained, the Agency had made the correct determination, even in light of the 1995 Settlement and the 2002 Memorandum of Understanding (the latter addressing only ADR Mediators), that all three Investigator positions – GS9, GS11 and GS12 – should no longer be designated non-exempt under FLSA. In this respect, I note Mr. Inzio's belief that the Investigator job function has undergone significant change since the institution in 1996 of the Agency's Priority Charge Handling Procedures, whereby charges that are filed undergo a "triage" process that attempts to assign an initial priority level.

Furthermore, with respect to 5 CFR §551.206(c), the "Discretion and independent judgment test," I note Ms. Ibarguen's April 11, 2006 letter to Agency Management, which addresses the institution of the Priority Charge Handling Procedures and her perception that, prior to that time, "Investigators and Mediators were thought not to exercise independent judgment" and that, as a consequence, "the positions were designated as non-exempt." She went on to credit the Priority Charge Handling Procedures as now requiring the exercise of independent judgment. While Mr. Inzio appeared to share this position, he went on to acknowledge that the exercise of discretion and independent judgment alone would not be sufficient to transform an Investigator position from "non-exempt" to "exempt."

I turn now to the role of Mr. McCrory, the Program Manager for Classification and Position Management, in this process. It is Mr. McCrory who, as the Senior Classifier, signed off on the 2005-06 redesignations, from non-exempt to exempt, of the three Investigator Position Descriptions and the two ADR Mediator Positions Descriptions. It was this redesignation that, in turn, led to Mr. Oland's action, on behalf of GRA, to reaffirm those redesignations in April 2007.

Mr. McCrory had been assigned at first, under the auspices of a committee, to determine whether Investigator Position Descriptions (those that were pre-2000) were up to date and accurate. (He was later tasked to do the same with ADR Mediator Position Descriptions, an inquiry deemed less critical at the time, since the numbers were smaller.) At the time he was first employed, GRA had already received its contract to review a number of Agency positions for analysis of their FLSA status. Mr. McCrory noted that

his focus was on the Investigator-GS12 position because, in his view, that best represented the "full performance level" for the Investigator job.

GRA, through Mr. Oland, had first taken steps to undertake examinations of the Investigator and ADR Mediator positions for the purpose of assessing their FLSA status. Taking the Investigator positions alone, Mr. Oland, in June 2004, pursuant to its contract with the Agency, had already prepared "Determination of Exemption Status under the Fair Labor Standards Act (FLSA)" documents that addressed, among other positions, the Investigator-GS9, GS11 and GS 12 positions. Putting aside the details of its analysis, it found that the FLSA status of all three should be changed from non-exempt to exempt. For his part, Mr. McCrory believed he may not have seen the 2004 Oland evaluations until some time in 2005.

In addition, GRA issued numerous Position Audit Report Advisories during the period from early- to mid-2005 that examined, among other positions, several individual Investigator-GS12 incumbents. These GRA audits uniformly found that the Investigator-GS12 incumbents were FLSA exempt. As the parties recognize, an outside contractor may recommend, but may not make, a classification determination. Mr. McCrory proceeded ultimately to certify the Investigator-GS9, 11 and 12 positions as exempt.

Looking further at Mr. McCrory's February 2005 certification of the Investigator-GS12 position as exempt, Mr. McCrory noted that, as part of his decision-making process, he viewed that position's primary purpose "to conduct investigations that lead to compliance in the application of the regulations and interpretations…and statutes that we enforce in EEOC relative to eliminating employment discrimination." With reference, therefore, to the administrative exemption criteria as defined in 5 CFR §551.104, Mr.

McCrory viewed these Investigator duties as constituting the "[f]ormulation or execution of management programs or policies," set forth as the first of the three subcategories of the "Primary duty test" in 5 CFR §551.206(a). He referenced specifically that provision in the definition in 5 CFR §551.104 stating that "[e]mployees 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,…"

In so concluding, Mr. McCrory made express reference to the job functions set forth under "Major Duties," many of which he viewed as reflecting squarely on the Investigators' duties that comprise "compliance." He went on to contend that Investigators' communications with the parties during the processes of settlement and conciliation constitute, for FLSA exemption classification purposes, "supporting services," as referenced in 5 CFR §551.206(a)(2) as a technical "specialized" service that is "embedded" in the position of the Investigator-GS12.

These references and others, including Mr. McCrory's reference to "discretion and independent judgment" (which Mr. Inzio himself noted will not aid in transforming a non-exempt position into an exempt one), are meant to apply, as Mr. McCrory expressly noted, not only to the Investigator-GS12, but to the GS9 and GS11 Investigators as well. Thus, compliance, as well as the other factors noted by Mr. McCrory, is a clear marking of what an Investigator does on a day-to-day basis. However, this was no less true when the Agency itself deemed all three Investigator GS levels to be non-exempt. There has never been a time when the responsibilities of compliance, in the sense of its including the planning and conducting of investigations, interviewing witnesses, analyzing

evidence, conducting settlement-related activities as appropriate, along with numerous others, has not defined the Investigator positions, whether GS9, GS11 or GS 12.

This element of "compliance" merits examination, and I will have further occasion to do so both in my review of the Investigator and ADR Mediator positions. I begin by following on what I have just noted in my comments on Mr. McCrory's view of what "compliance" means. That term, as I have characterized it when I referenced activities of Investigators such as the planning and conducting of investigations, interviewing witnesses, analyzing evidence, conducting settlement-related activities and the like, is a nearly perfect précis of what Investigators' day-in, day-out activities have been since the earliest times documented in this record. It is what Investigators do.

These "compliance" activities are *not* emblematic of exempt work, and this is not, despite the Agency's suggestion to the contrary, what OPM was saying in its October 16, 2006 Investigator-GS12 FLSA Defense Security Service decision. With due respect, I believe it is inaccurate to assert that "'compliance' work has been accepted by OPM as exempt work." What OPM decided in that case was that the incumbent "was not engaged in obtaining compliance with program policies or determining the accomplishment of program objectives." This direct reference to the subsection (a)(1) "formulation or execution of management programs or policies" leads to the full explanation of "compliance" as found in 5 CFR §551.104. It refers not to the daily activities in which Investigators engage. Rather, it explains that "[a]dministrative 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)." It is this work that I would suggest OPM views as "exempt."

I turn now to Shannon Breen, an Investigator-GS12 in the Denver Field Office, who offered a lucid explanation of the Priority Charge Handling Procedures for Investigators, and the distinction between "A," "B" and "C" cases. A "C" case is one the Agency concludes should be dismissed, after consultation with the charging party. A "B" case is one the Agency deems, after review of the initial allegations and evidence, needs further investigation. An "A" case is one that presents evidence strong enough to warrant a likely conclusion that reasonable cause for a violation of the law exists. A further delineation of the "A" cases includes an "A1" case, which is likely to proceed to litigation, and an "A2" case, which, though likely to result in a "cause" finding, is not likely to proceed to litigation. Findings of "cause" or "no cause" in a given case are made initially by Ms. Breen as the Investigator, although later reviewed by a supervisor.

Ms. Breen noted that she typically performs "intake" one week per month, a process wherein the Investigator meets with a charging party who wishes to file a charge of discrimination, listens to the facts constituting the alleged violation, advises the charging party of applicable laws, the Agency's jurisdiction and processes, and suggests the likely course of action. She went on to contrast settlement discussions, which is an attempt to resolve a charge before a determination is made, and conciliation, which follows a "cause" finding and then attempts a resolution, by which time the Agency is no longer a totally neutral party, but, rather, becomes more a public advocate.

The Agency, through Ms. Breen, presented certain of her activities that it argues is clearly exempt work. Among these was her work as Team Leader, where, while not

truly supervisory, she provides advice and guidance to lower-graded colleagues, assisting Management on systemic cases, large-scale actions with many class members, and participating in various outreach activities, including TAPS (Technical Assistance Programs) activity. While I acknowledge Ms. Breen's assessment of the worth of her Team Leader activities, it will later be noted, in my review of Mr. Oland's testimony, that he himself failed to see Team Leader activities as supervisory or management in nature. Ms. Breen went on to estimate her activities in conciliation and outreach as constituting about 25% of her work.

By these activities, the Agency draws my attention to the second of the three sub-elements of the "Primary duty test" at 5 CFR §551.206(a)(2), which addresses "management or general business functions or supporting services of substantial importance to the organization serviced…," defined further, in part, in 5 CFR §551.104 by noting that this work "must involve substantial discretion on matters of enough importance that the employee's actions and decisions have a noticeable impact on the effectiveness of the organization advised, represented, or serviced."

A few matters are worth noting here. First, as a general proposition, while Ms. Breen, as a witness, is an excellent example of an effective Investigator-GS12, the issue relevant to this case is the position, not how impressive the witness is as a representative of that position. Second, the Investigator-GS12 Position Description signed by Mr. McCrory in February 2005 is consistent in virtually every major respect with that of 1993, and which was deemed a non-exempt position since the 1995 Settlement Agreement (although such determinations do not dictate future assessments). Those major respects include, among other matters, the conduct of the investigation,

recommendations on appropriate courses of action, outreach, serving as Team Leader, engaging in settlement activities, and training and assisting lower-graded Investigators. I recognize, in this respect, Ms. Breen's perception of the value of her Team Leader activities in the context of its buttressing her FLSA-exempt job duties, but as the evidence later demonstrated, Mr. Oland's own view as the Agency's expert lent no support to this belief.

Moreover, Mr. Oland will later express his opinion that the current Investigator Position Descriptions are enhanced by duties such as case prioritization and recommending case dismissals, in aid of a finding of FLSA exemption under subsection (a)(2). This merits further examination. The Agency has argued that the Priority Charge Handling Procedures were a key element in its view that, only one year after the 1995 Settlement Agreement had caused Investigators-GS11 and GS12 to be reclassified as non-exempt, these positions had undergone change. While Mr. McCrory had characterized it in notes he took in February 2005 as constituting a big "judgment up front" factor, the fact is that, once this initial "triage" designation is made, it goes either to an Intake Supervisor or an Enforcement Supervisor. The key point is that it goes before a supervisor and this initial judgment is thus subject to immediate scrutiny. Even Ms. Breen spoke of the Investigator's limited authority in the Priority Charge Handling Procedure and the fact that she neither signs conciliation agreements nor issues dismissals, both of which functions are the responsibility of higher Agency Management. To deem these as "supporting services of substantial importance to the organization serviced," in support of subsection (a)(2), the Agency must first carry the burden of demonstrating that, in furtherance of 5 CFR §551.104, the work "involve[s] substantial

discretion on matters of enough importance that the employee's actions and decisions have a noticeable impact on the effectiveness of the organization advised, represented, or serviced." For the above reasons, I cannot conclude that the Agency has carried that burden.

The activities of Investigators involving the Priority Charge Handling Procedures and the recommendation of case dismissals also raise the subsection (c) criterion of "[d]iscretion and independent judgment." Indeed, the fact that these kinds of Investigator actions are subject to review (and potential reversal), as noted in 5 CFR §551.104, "does not mean that the employee is not exercising discretion and independent judgment of the level required for exemption." However, such work will not be deemed exempt in the case of "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." Applying this measure to these Investigator activities, I must likewise conclude that this Agency burden is not met.

Finally, as Ms. Breen herself noted, her job duties when she had worked in Chicago did not change from when she was an Investigator-GS9 to when she became an Investigator-GS11. Thus, the movement between relevant Investigator grades is not necessarily probative in the sense of whether such movements, by themselves, might constitute a boundary between a non-exempt and an exempt position. As I note below, in evaluating the testimony of Detroit Field Office Director, Gail Cober, this movement from Investigator-GS9 to Investigator-GS-11 to Investigator-GS12 is more gradual than illustrative of a bright line distinction. If anything, this is underscored in the testimony of Cynthia Pierre, Director of Field Management Programs for the Office of Field Programs,

where she observed that all three Investigator levels perform essentially the same work. This, she explained, is a function of the fact that cases are not assigned to a particular grade of Investigator.

Indeed, Ms. Cober described the difference between these positions as a gradient, with only a slight difference in the complexity of the work, and with the GS12 able to act as a supervisor when needed. The positions are further harmonized by their equal responsibilities to work on internal committees and perform outreach. Further, Ms. Cober was doubtless correct when she noted the importance of the IMS (the EEOC's internal recordkeeping system) to the proper functioning of the Agency. Nonetheless, recordkeeping as such, while certainly critical, is surely not of a kind with the higher-level activity that might be expected to have an impact on an exemption determination. In addition, while I give due weight to the significance of settlement-related activities in which Investigators at all three levels engage, which, as the Agency argues, may, under 5 CFR §551.206(a)(2), be of "substantial importance to the organization serviced," these are traditional responsibilities of Investigators, and were so when they were deemed by the Agency to be non-exempt.

I note in addition the testimony of Ms. Pierre that referenced a Compliance Manual for Investigators, one volume of which provides procedures, the other of which provides substantive interpretation of applicable laws. These procedural references include, for example, handling inquiries, intake, onsite visits, drafting settlement and conciliation agreements, attorney referrals and file disclosure requests. The substantive information includes guidance on the various theories of discrimination (such as disparate treatment and disparate impact), and sets forth guidance on handling threshold

jurisdictional issues as well as developing work plans for the various types of complaints. While I also understand Ms. Pierre's contention that Investigators enjoy some discretion with respect to how they proceed on their investigations, the fact remains, as Ms. Pierre acknowledged, that about 65 to 70 percent of Investigators' work is conducting investigations, an assessment offered with no accompanying distinctions among the work responsibilities for the GS9, GS11 and GS12 positions.

I turn now to an examination of the expert testimony of Messrs. Katz and Oland. For these purposes, the analyses performed both by Mr. Katz and Mr. Oland conform to the extent that they find that the positions at issue do not meet either the Executive Exemption nor the Professional Exemption criteria, and that all relevant findings will concern only the Administrative Exemption criteria (except, as previously noted, 5 CFR §551.206(a)(3)). Despite some initial difficulties in resolving whether Mr. Katz's opinions in his initial Report of April 12, 2007, initially resting on older Position Descriptions, were premised on relevant data, my analysis incorporates the appropriate information, which includes his June 13, 2007 Supplemental Report.

My consideration of Mr. Katz's and Mr. Oland's expert testimony with respect to all positions at issue (Investigators and ADR Mediators) incorporates, even when otherwise stated, the presumption of FLSA non-exemption, as set forth in 5 CFR §551.202(a).

Mr. Katz concluded that the Investigator-GS9, GS11 and GS12 positions should be found to be non-exempt, inasmuch as they uniformly failed to meet all three relevant criteria for administrative exemption. (While references in written materials speak frequently to "all four Administrative Exemption criteria," I will address the requirement

in terms of whether “all three” have been met, since the fourth, the “80-percent test,” is not applicable to this case.) In general, Mr. Katz concluded that all three Investigator positions, irrespective of the increasing complexity of the investigative duties from GS9 through GS12, were responsible for fact-finding, analysis, formulation of conclusions and working with the parties to seek resolutions of charges. The issue of complexity, as he viewed it, was relevant more for General Schedule classification purposes rather than for distinguishing between non-exempt and exempt positions.

Mr. Katz found that the Investigator-GS9 met only the “[work which is] specialized or technical nature that requires considerable special training, experience, and knowledge” test of 5 CFR §551.206(b)(2), and failed to meet any of the benchmarks demonstrating contribution to, or participation in, Agency policy or Management decisions, or engagement in functions reflecting intellectual skills, discretion and independent judgment. His conclusion was replicated concerning the Investigator-GS11 and GS12 positions, acknowledging that, with the latter, the duty of acting as trainer and acting supervisor, when called upon, is added but, as he viewed it, did not cause the position to be substantially different for FLSA exemption purposes. Mr. Katz found finally that the Investigator-GS12/State and Local Coordinator met only the subsection (c) “Discretion and independent judgment” test, as it bears no policy or Management responsibility and acts principally as an administrative liaison and monitor.

Mr. Oland was asked in December 2006 by the Agency to revisit the FLSA exemption status of the Investigator-GS9, GS11 and GS12 positions, along with the ADR Mediator-GS12 and GS13 positions, all of which had been recertified in 2005 and 2006 as FLSA exempt. In this process, although Mr. Oland interviewed no incumbents, he

believed he had the advantage of performing desk audits on two ADR Mediator-GS13 employees and two Investigator-GS12 employees, thus giving him a better understanding of this work in 2007 (which he approached as a *de novo* review) than he had in 2004.

As Mr. Oland viewed the applicable regulations at 5 CFR §551.206(a), he believed that subsections (a)(1) and (a)(2) both carried a strong "compliance component" (as stressed earlier by Mr. McCrory) and expert advice functions that are addressed in the definitions set forth in 5 CFR §551.104. For example, in viewing the Investigator positions as among those seeking compliance with the Agency's policies, he referenced the (a)(1) component as explained in 5 CFR §551.104 where "[e]mployees 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." As I will stress again in my discussion of Mr. Oland's testimony about ADR Mediators, the subsection (a)(1) "formulation or execution of management programs or policies" language does not simply note "compliance." It sets forth as the applicable benchmark that "[a]dministrative 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)." This language, in my view, plainly refers to responsibilities that operate on a much higher plane of "policy" than do Investigators in the performance of their major duties.

Mr. Oland went on to link the (a)(2) component as explained in 5 CFR §551.104 where Investigators' providing "expert guidance with regard to the law" dovetails with "[p]roviding expert advice in specialized subject matter fields,…" which he apparently referenced in terms of advice to parties involved in a charge process that explains the value of achieving settlement, avoiding litigation, and the like. I note that, if this indeed is the link Mr. Oland makes between "expert advice" and the (a)(2) component, it is not buttressed by the "expert advice" reference in 5 CFR §551.104 to "that provided by management consultants or systems analysts."

Mr. Oland stressed an additional interpretive element – namely, that work appearing to be non-exempt in itself may be deemed exempt if embedded in exempt work. As noted in 5 CFR §551.104,

> …Often collecting or compiling information and preparing reports or other records, if divorced from the evaluative function, are nonexempt tasks. When an employee who performs the evaluative functions also performs some or all of these related steps, all such work (for example, collecting background information, recording test results, tabulating data, or typing reports) is included in the employee's exempt duties.

I do not view the record, and my findings therein, as revealing such exempt duties as to cause Investigators' otherwise non-exempt duties to be so embedded.

Mr. Oland went on to find, in addition, that all three Investigator positions in his 2007 evaluations (as well as the two ADR Mediator positions, as will be noted later) met both nonmanual work test elements set forth in 5 CFR §551.206(b)(1) and (b)(2) in their planning and executing of complex investigations, the discretion employed therein and in their bringing to bear interpersonal skills that facilitate their conciliation efforts. In this respect, Mr. Oland expressed the opinion that the Investigators' level of skill was of such sophistication that OPM's decision to place them in the 1810 job series was, by itself,

probative on the matter of FLSA exemption. Here, Mr. Oland himself appeared to acknowledge that he was, in a manner of speaking, placing the rabbit in the hat, as he recognized that he was straying beyond the pure consideration of a position's actual duties.

In order to find the Investigator positions exempt, it was, of course, necessary to find that they likewise met the "Discretion and independent judgment" requirement in 5 CFR §551.206(c), and Mr. Oland did so. Among the factors he deemed most critical in reaching this determination were, as I view them, two in number. One was the Investigators' ability, beginning in 1996 with the introduction of the Priority Charge Handling Procedures, to elect not to proceed with certain charges deemed to be without real merit. Another was the introduction of the conciliation element, a step that would come into play in some cases after a "cause" finding was made.

I believe this approach, perhaps inadvertently, significantly undersells what Investigators were able to do, and were responsible for doing, when, for example, the Investigator-GS12 was certified in 1993. The discretion on which Mr. Oland now places such a high premium was, in my view, clearly reflected in 1993 when the position was responsible, among many other duties, to "[a]nalyze…highly sensitive and complex cases assigned for investigation and prepare…a written plan identifying the bases and issues involved, the applicable theories of law, the scope of the investigation, potential sources of evidence, the types of evidence required, and the investigative techniques to be employed." Virtually the same language is found for the Investigator-GS11 and, for less complex cases, the Investiator-GS9, both of which were certified in 1988. All three were even then placed in the 1810 job series. In addition, Mr. Oland acknowledged that the

“Team Leader” concept, stressed earlier by Ms. Breen, failed to qualify as a supervisory or management function. In fact, that activity likewise was found in the Investigator-GS12 1993 certification.

Furthermore, settlement discussions and the crafting of settlement agreements were already matters for which the Investigator was responsible, and well before the parties agreed, in the 1995 Settlement Agreement, to deem the Investigator-GS11 and GS12 non-exempt for FLSA purposes. Conciliation, although it may have come later, and likewise figured after the “cause” finding, is a process qualitatively related to settlement, the intent of which is, like settlement, resolution in lieu of further action.

In Mr. Oland’s comparative evaluation of the Investigator-GS9, GS11 and GS12, and with certain observations he found more applicable to the Investigator-GS9 position, he viewed this series to be of a kind. He correctly found the Investigator-GS9 to call for closer supervision, and, thus, have an impact on discretion and independent judgment in 5 CFR §551.206(c). Moreover, he believed the intellectual and skill elements in subsection (b) to be, in the case of the Investigator-GS9, “still being developed.” Then, as he turned his attention to the Investigator-GS12, what he found, in my view, were differences, such as they were, in degree only. These included serving as acting supervisor, which he acknowledged, would have no effect on the subsection (a) primary duty test, although it might have relevance to the subsection (c) discretion and independent judgment test. He did assert the significance, in his view, of the GS12’s providing advice and guidance to lower level Investigators.

I acknowledge the distinctions Mr. Oland has set forth. Nonetheless, I must credit the view, as earlier expressed by Ms. Cober, that movement between these three positions

is along a "gradient" and that there is, in fact, no sea change discernible from Investigator-GS9 through GS12. Indeed, and in this light, Mr. Oland's own observations of the Investigator-GS9 are strongly suggestive of a finding of FLSA non-exemption, and, as I will have further opportunity to do, I reference 5 CFR §551.202, which, among other mandates, compels a narrow construction of exemption criteria so as to find exemption only for "those employees who are clearly within the terms and spirit of the exemption."

I address, finally, the evidence offered by the Agency concerning the FLSA status of Investigator and Mediator Position Descriptions at other agencies. I have carefully reviewed this evidence, and, while the Agency acknowledges it is not dispositive in this case, it argues that it is persuasive in terms of its reflecting judgments consistent with its own here.

I must decline adopting this suggestion, as I believe the evidence to be of insufficient probative weight. From an evidentiary standpoint, the documents are unsupported by reliable first-hand testimony, such as the Agency has presented in support of its own Position Descriptions, and are thus incapable, in my view, of supporting an ultimate judgment on issues before me.

I incorporate this conclusion by reference in my review of the record dealing with ADR Mediators.

Accordingly, for all the above reasons, I conclude that the Investigator-GS9, GS11 and GS12 Position Descriptions should be classified as FLSA non-exempt.

B. INVESTIGATOR-GS12/STATE AND LOCAL COORDINATOR

This position is responsible for handling all communications between the Agency and state Fair Employment Practices Agencies ("FEPAs"), the state anti-discrimination entities whose mission, on the state level, is equivalent to that of the EEOC federally, and which enforces parallel state Civil Rights laws and regulations. This responsibility includes, as set forth in the 1988 Position Description, ensuring that all investigations conducted and settlements negotiated by State and Local FEPAs are in compliance with EEOC standards, policies and applicable Federal laws, and, as noted by Ms. Pierre, functions in a fairly uniform manner nationwide. In addition, the incumbent serves as the District Office representative in negotiating contracts and work-sharing agreements with FEPAs. The work-sharing agreements, as Ms. Pierre observed, are sent as a template from Headquarters, and may vary from office to office. Unlike the other Investigator Position Descriptions here at issue, this position is not responsible for the actual conduct of investigations; this work is performed by the FEPA, although the incumbent undergoes review of cases that have been investigated.

As noted above, the Position Description was issued in 1988. It was then certified as FLSA exempt, and became non-exempt by virtue of the 1995 Settlement Agreement. It once again became exempt in May 2006, and remains currently exempt.

Darlene Moore, an Investigator-GS12/State and Local Coordinator from the Detroit Field Office since 1991, described her duties and her relationship with the Michigan Department of Civil Rights ("MDCR"), the principal FEPA with which she regularly deals, and which operates offices throughout the state. She found the Position Description to be an accurate reflection of her major duties, and that any changes have

been in the area of increased administrative tasks, such as coding, and the handling of file and closure documents.

Ms. Moore described several elements that comprise her job of monitoring contracts between the Agency and the MDCR. These include negotiation of the work-sharing agreements, signed by the District Director, review of cases handled by MDCR, and the funds to be expended when cases are completed. She is responsible for determining the number of contracts, and this is influenced by the number of intakes and case resolutions for which MDCR has been credited during the previous fiscal year. At a point when a certain number of cases have been completed, the MDCR will issue a voucher for the work, and Ms. Moore is responsible for ensuring that it is appropriate for payment. She also must recommend to Headquarters the dollar amount for contracts and, based on previous case resolutions, whether MDCR should undergo an upward or downward modification of expected case resolutions.

When she receives a case file that a FEPA has processed, she is responsible for ensuring that it has been administered in a manner consistent with the EEOC's own standards, so that the FEPA can therefore be given credit for it. She has no authority to waive or disregard those standards. Once this review is completed, she issues the appropriate closing documents, such as right-to-sue letters, which she stamps with the Director's signature. Her authority does not extend to changing the amount of money that a FEPA receives, as that is established at Headquarters for all FEPAs. If she concludes that a FEPA has not handled a case properly, she may remove the case from the FEPA's control, and is required to so advise the Director.

In addition to these responsibilities, Ms. Moore has occasion to offer training and guidance to MDCR personnel in areas such as jurisdiction and case processing. Her activities also include outreach, dealing on a regular basis with the NAACP as well as with the Native American community and the Tribal Employment Rights Office ("TERO"), and operating booths at job fairs. She also manages a contract with TERO, although the contract itself is generated by the Headquarters office.

Ms. Moore noted a specific example where, in her view, her liaison work with MDCR resulted in a significant impact on that agency's functioning. Because there had apparently been some confusion on the part of charging parties, on cases at MDCR, over the significance of a charging party's requesting a right-to-sue letter, Ms. Moore drafted a document outlining how this process works, so that a charging party would be clear on the impact of a right-to-sue letter. She presented the document to MDCR, they adopted it, and it helped eliminate the confusion.

When Mr. McCrory looked at the Investigator-GS12/State and Local Coordinator Position Description, he believed, as he testified, that it might need some review for accuracy, since it had been classified in 1988. He concluded, however, that the job duties had remained substantially unchanged.

Ms. Cober, who is Ms. Moore's direct supervisor as Director of the Detroit Field Office, stressed the discretion and independence with which she runs her program, and likened the Investigator-GS12/State and Local Coordinator position to that of an Investigator-GS12, with respect to the needed skills, knowledge and abilities. These factors, in Ms. Cober's opinion, include understanding of relevant statutes, evidence analysis, interaction with the public and effective communication.

Mr. Katz, in his April 12, 2007 statement, concluded that this position met the subsection (c) "Discretion and independent judgment test," but failed to meet any of the criteria in subsections (a) and (b).

Mr. Oland, in his 2004 review, determined that the position satisfied every criterion for administrative exemption, except for subsection (a)(3), and did not revisit the issue in 2007, inasmuch as the 2006 Position Description was not rewritten. He did note again the strong element of compliance, here as between State and Local FEPAs and the EEOC's own standards and policies, what he viewed as a subsection (a)(1) criterion as a function in aid of "formulation or execution of management programs or policies." He found the subsection (a)(2) element, involving "management or general business functions or supporting services of substantial importance to the organization serviced," satisfied as well, by virtue of the incumbent's authority to negotiate contracts (in the form of the work-sharing agreements) with FEPAs, along with their liaison responsibilities as between the FEPAs and EEOC, where they seek to achieve consistent application of program policy.

Mr. Oland noted further his opinion that both subsections (b)(1) and (b)(2) were likewise satisfied, in that the incumbent must be familiar with different laws as they apply to FEPAs in different state and local jurisdictions. He deemed these to require a high degree of intellect, as well as specialized knowledge.

In evaluating the appropriate FLSA status for the Investigator-GS12/State and Local Coordinator, the very same presumptions in favor of non-exemption set forth in 5 CFR §551.202(a) attach here as elsewhere. In this case, I find that the analysis takes a different turn. Surely, one principal difference between this position and the other three

Investigator Positions Descriptions examined is that this one does not incorporate the actual function of hands-on case investigation. However, in this case, I do not find that it detracts from the argument in favor of exemption; rather, I find that it enhances it.

The daily work of conducting investigations has been laid out here, and by the parties, in considerable detail. In the process, their importance has, I believe, been appropriately acknowledged. However, consistent with my earlier findings herein, that work was not of a kind sufficient to overcome the express presumption in favor of FLSA non-exemption. In this case, the considerably different duties in which the Investigator-GS12/State and Local Coordinators engage likewise require a different reading of 5 CFR §206 and the manner in which their terms are to be applied, as set forth in 5 CFR §104. My analysis will not include an examination of subsection (c), inasmuch as Mr. Katz agreed that this position satisfied that exemption criterion.

Subsection (a), as previously noted herein, the "Primary duty test," contains two elements, the satisfaction of either being sufficient to warrant a finding of exemption under subsection (a). The first of these, subsection (a)(1), is whether the incumbent "[s]ignificantly affects the formulation or execution of management programs or policies…." In their action of coordinating activities and programs as between EEOC and FEPAs, it may be argued that this is the nature of the activity contemplated by the Agency when it speaks of administrative employees "coordinating, controlling, or evaluating operating programs of the employing organization or of other organizations subject to regulation or other controls." Given this description, however, and given my analysis elsewhere in this Opinion of the concept of "compliance," I cannot conclude that the presumption in favor of non-exemption is overcome with respect to subsection (a)(1).

Subsection (a)(2) requires that the incumbent's work involve "management or general business functions or supporting services of substantial importance to the organization serviced…." Here, the incumbent's responsibility to "[n]egotiate…and monitor…contracts and work-sharing agreements" with FEPAs, as well as participating in the development of such agreements by providing information, data and case projections, is sufficient, in my view, to satisfy the aspect of subsection (a)(2) that speaks to "[r]epresenting management in such business functions as negotiating and administering contracts…." I find this to be so, even in light of Ms. Pierre's noting that work-sharing agreements begin as templates from Headquarters, because they remain subject to reworking as local conditions dictate. By such actions, in my view, these contributions "have a noticeable impact on the effectiveness" of the FEPAs.

Subsection (b) contains two elements, satisfaction of either of which will satisfy the "Nonmanual work test." The first, subsection (b)(1), calls for the performance of work that is "[i]ntellectual and varied in nature…," the second, subsection (b)(2), calling for work "[o]f a specialized or technical nature that requires considerable special training, experience, and knowledge."

Subsection (b)(1) is, in my view, not met. While, as a general proposition, this position requires a high degree of intellect in being able to understand and apply various laws of various jurisdictions, this category requires more depth and more breadth. It provides the following measure:

> 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.

Given such a standard, I am not persuaded that the presumption in favor of non-exemption is overcome with respect to subsection (b)(1).

Subsection (b)(2) requires that incumbents' work be "[o]f a specialized or technical nature that requires considerable special training, experience, and knowledge." I find that the incumbents meet this standard. As Ms. Moore has explained in some detail, and as the Position Description further enumerates, their responsibilities include the application of theories of employment discrimination under the laws of various jurisdictions and their legal precedents, and the ability to "respond…to requests from FEP agencies and the general public concerning the application and implementation of laws covering employment discrimination."

Given this standard, and reviewing its elaboration in 5 CFR §551.104, I recognize the incumbents to perform "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." In this respect, I note that the April 12, 2007 statement of Mr. Katz, which found this position not qualified for a subsection (b) administrative exemption, viewed the incumbents' functions as having been "administratively learned on-the-job and not through classroom study of management theories," offering this as a disqualifying reason. However, in reviewing OPM's own position on this knowledge component, it said much the opposite, when it found that "[t]his 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."

Accordingly, for the reasons set forth above, I conclude that the Investigator-GS12/State and Local Position Description should be classified as FLSA exempt.

III. ADR MEDIATOR

The ADR Mediator position, classified as FLSA exempt when it was created in 1998, became non-exempt as the result of the parties' 2002 Memorandum of Understanding, which encompassed both the GS12 and GS13 levels.

As described by Elizabeth Marcus, an ADR Mediator-GS13 in the Boston Area Office, an ADR Mediator is involved principally in mediating charges filed with the Agency. The process of mediation involves the parties to the dispute –charging party and respondent – coming together with the ADR Mediator, whereby the ADR Mediator acts with both parties, both separately and together, to reach an agreed-upon resolution of the charge. In so doing, the ADR Mediator is responsible for everything from the initial telephone calls, to scheduling and conducting the mediation session, to handling any follow-up activities needed.

An additional element of the ADR Mediator's activity, as Ms. Marcus described, includes her activities in the promotion of mediation, both internally and externally, as a tool for the resolution of charges. The internal aspect consists of contact between her and her staff, student interns, contract mediators, *pro bono* mediators, with Investigators and Trial Attorneys in her office. The external aspect consists of outreach – the process of carrying the message of mediation as a problem-solving tool – to outside groups such as plaintiffs' organizations, bar associations and unions.

As a process at the Agency, mediation comes into play after a charge is filed. Typically, unless the charge is deemed worthy of proceeding to litigation, it will

frequently be sent to mediation. If both parties agree to submit to the mediation process, an ADR Mediator is assigned. If the mediation process does not result in a mutually satisfactory resolution, the charge is returned for investigation. As Ms. Marcus described, the mediation process, apart from seeking resolutions of charges, has as a principal goal the promotion of communication between the charging party and the employer, so that problems, properly identified, can be prevented from recurring. Her job also includes providing guidance and counsel to Investigators about the mediation process. She estimated that 70% of her time is spent in actual mediation, while about 20% consists of promoting mediation in-house, and the remaining 10% engaging in external outreach to stakeholders.

Ms. Marcus touched also on an Agency initiative called Universal Agreements to Mediate ("UAM"), a program that is intended to target larger employers with numerous work locations. By this UAM program, these employers agree that, whenever they become involved in a charge, they agree to consider mediation as the mechanism for resolving the charge. She, along with her supervisor, Michael Bertty, the ADR Program Coordinator for the New York District Office, viewed the UAM program as promoting a more efficient charge handling process for the Agency because, among other reasons, it establishes a single employer contact.

Like Investigators, ADR Mediators perform outreach and become involved in training as well. In Ms. Marcus' case, she participates in training for state FEPA investigators. Her jurisdiction in New England encompasses five FEPAs.

With respect specifically to her mediation activities, these generate data input and recordkeeping requirements for the internal case tracking system, some of which she

delegates to an assistant and some of which she performs herself. In addition, she generates weekly reports that she forwards to Mr. Bertty.

By reference to certain experiences she addressed in cases she has handled, she concluded that her position had provided her an opportunity to provide "expert advice in specialize[d] fields." The significance of this, for purposes of my analysis, is that, if this premise is taken to be true, Ms. Marcus' ADR Mediator position might be deemed to satisfy the "management or general business functions or supporting services" criterion in 5 CFR §551.206(a)(2), as further defined in 5 CFR §551.104. From her testimony, it is clear that Ms. Marcus, in response to questions in this area, stressed, among other things, her familiarity with various laws, in particular the Americans With Disabilities Act ("ADA"). In this respect, there is no question that Ms. Marcus is an excellent example of what an ADR Mediator should be. I note further that Ms. Marcus has, on her own initiative, taken on student interns to act as mediators for class credit. The necessary caution here, however, is one I have previously sounded, and that is that I am dealing with positions, and not the specific talents or enterprise of any particular incumbent in those positions.

It was Mr. McCrory's testimony that, as I perceived it, presented the consistently strongest advocacy of the ADR Mediator position as being unquestionably FLSA exempt. He viewed it as a distinctly compliance-oriented position which, for that and other reasons, satisfied the "Primary duty test" in that it exerted a strong impact on the "formulation or execution of management programs or policies." Indeed, he went considerably further, arguing that literally all the duties of the ADR Mediator

(presumably without distinction as between the GS12 and GS13 positions) qualified it as an FLSA exempt position, meeting all the benchmarks set forth in 5 CFR §551.206.

In doing so, and by deeming the ADR Mediator position the "poster child for exempt work," Mr. McCrory was at some pains to distance himself from Mr. Inzio's own characterization of the ADR Mediator as one who performs the "front-line work" of the Agency (although in fairness to Mr. Inzio, I did not view his description as denoting ADR Mediators to be solely "production employees"; rather, he referenced their direct contact with charging parties). I would presume further that he would likewise distance himself from the Agency's own action in 2002 that recognized the ADR Mediator-GS12 and GS13 as FLSA non-exempt. I also took from Mr. McCrory's testimony that an important reason that caused him to take a fresh look at the ADR Mediator position was that he had come to believe that the ADR Mediator was performing an internal policy function by identifying certain patterns of cases that were coming before them, and providing advice to Agency Management on how best to deal with these kinds of cases.

The relevance here to the administrative exemption criteria would be that these positions satisfy (a)(1) of the "Primary duty test" in that, consistent with 5 CFR §551.104, the ADR Mediator "make[s] policy decisions or participate[s] indirectly, through developing or recommending proposals that are acted on by others." This once again brings the "compliance" standard into play, along with the requirement that the work include a strong programmatic element. (I will address this further in my discussion of Mr. Oland's testimony, where I conclude that subsection (a)(1) is not met.)

Failing that, and crediting Ms. Marcus' estimation that 70% of her time is spent in pure mediation work, I might turn to the "alternate primary duty" test, where the standard, in 5 CFR §551.104, is as follows:

> …A duty consisting less than 50 percent of the work may be credited as the primary duty for exemption purposes provided that duty—
> (1) Constitutes a substantial, regular part of a position;
> (2) Governs the classification and qualification requirements of the position; and
> (3) Is clearly exempt work in terms of the basic nature of the work, the frequency with which the employee must exercise discretion and independent judgment, and the significance of the decisions made.

In this respect, even crediting Mr. McCrory's assessment of what he deemed to be "one substantive area in the extant PD," the record does not, in my view, reveal the information necessary for me to conclude that all three necessary criteria above might be satisfied.

Mr. Bertty noted straightaway that, while the GS13 position is recognized as the highest non-supervisory ADR Mediator grade, there is really no substantive difference between the ADR Mediator-GS12 and GS13 positions, a view that was shared by Ms. Pierre. Although the position was not formally created until 1998, mediation was already in place as a voluntary pilot activity in 1994. Mr. Bertty described that, as the position developed, outside studies revealed that education, technical assistance and outreach efforts would be key to the Agency's efforts to promote mediation, since there were more charging parties than respondents who had appeared willing to come to the mediation table. He estimated that, at present, the ADR Mediators' total outreach duties occupy between twenty-five and thirty percent of their time (a higher estimate than Ms. Marcus herself had offered).

I observe here that outreach is a marker worth examining because, among other reasons, it is, as Mr. Bertty noted, one of the performance standards for ADR Mediators. In assessing a few cases of successful mediation that he believed generated a substantial impact of some kind on the respondent or the public, Mr. Bertty determined that this standard was satisfied if the benefits derived from a mediation extend beyond merely the charging party alone. I am not persuaded that this is the appropriate measuring device to satisfy subsection (a)(2) of the "Primary duty test," involving "management or general business functions or supporting services of substantial importance to the organization serviced…." The question, in my view, is whether such ADR Mediator activities clearly go beyond the fundamental mediation duties of this position, and satisfy what 5 CFR §551.104 requires the Agency to demonstrate in such cases – namely, whether this work "involve[s] substantial discretion on matters of enough importance that the employee's actions and decisions have a noticeable impact on the effectiveness of the organization advised, represented, or serviced." On the evidence presented, I believe, with due respect, that it does not.

My analysis of the respective expert opinions set forth by Messrs. Katz and Oland likewise does not cause me to conclude that the ADR Mediator-GS12 and GS13 positions overcome the presumption of non-exemption set forth in 5 CFR §551.202, such that I might find either "clearly meets the criteria for exemption…."

Mr. Katz likened the primary job responsibilities of the ADR Mediator as constituting, in part, an overlap of those of the Investigators – namely, that both are charged with finding facts, performing analyses, drawing conclusions and reaching resolutions. In furtherance of this, Mr. Katz adopted a very strict reading of subsection

(a)(1) of the "Primary duty test" referencing a job incumbent who, in order to qualify for exemption, "[s]ignificantly affects the formulation or execution of management programs or policies…." He expressed the view that "[t]he central function of the job is to mediate, not to be part of a policy operation." In this context, when examining the ADR Mediator-GS13 Position Description certified by Mr. McCrory in November 2005, he reviewed that portion of the position's "Major Duties" that spoke to where "[t]he mediator, in consultation with the ADR Coordinator, periodically evaluates the effectiveness of the mediation process and makes recommendations that may result in the adoption of new techniques and processes nationwide." His conclusion was that an ADR Mediator's making of recommendations, solicited or otherwise, does not aid in viewing that individual as a part of management.

In fact, by adopting such a narrow reading, which the general principles governing exemption in 5 CFR §551.201 require, these "recommendations" must be of a kind such that, under 5 CFR §551.104, they constitute "making significant determinations furthering the operation of programs and accomplishment of program objectives." Further, a careful reading of the "Major Duties" of the ADR Mediator-GS13, described by Mr. Bertty himself as the highest non-supervisory ADR Mediator position at the Agency, reveals its bulk, in fact, to be front-line mediation.

The ADR Mediator-GS13 Position Description itself (and, by virtually identical language in the ADR Mediator-GS12 Position Description) demonstrates this to be so. It is certainly true that, as noted earlier, an incumbent "promotes and contributes to the EEOC's ADR Program through education, technical assistance and other outreach or informational efforts." However, these positions' major duties principally set forth the

following: “[c]ounsels potential mediation participants,” “[m]ediates employment disputes…that typically include highly complex and complicated issues,” “[w]orks with the parties to bring about an understanding of the mediation process,” “drafts and revises as necessary settlement agreements….”

The Agency suggested that, by the action of ADR Mediators in engaging in successful mediations, they reduce the cases Investigators need to investigate and thereby advance the mission of the Agency. Taking this as true, and recalling the presumption of FLSA non-exemption, this is as much as to say that ADR Mediators are performing the very work they are assigned to perform.

Mr. Oland’s review of the ADR Mediator-GS12 and GS13 positions concluded, as he did with the Investigator positions, that these positions share a very strong compliance component, and that, therefore, they meet subsection (a)(1) of the “Primary duty test.” As I noted in my earlier discussion of this element, I believe this to be an impermissibly broad reading of the term “compliance,” as referenced in 5 CFR §551.104, under the discussion of “[f]ormulation or execution of management programs or policies.” Mr. Oland appeared to suggest that, because the ADR Mediator’s activities include efforts to achieve respondents’ “compliance” with applicable laws and regulations through mediated settlements, this transforms a front line employee into an Agency policymaker.

With due respect, and as previously noted, this approach actually runs counter to stated Agency policy. First, the Agency is required, under 5 CFR §551.202(b), to construe narrowly what “compliance” means. Taking up what Mr. Oland appears above to suggest, I find that it means something quite different. By looking at 5 CFR §551.104,

following the reference to “obtaining compliance with such policies by other individuals or organizations within or outside of the Federal Government,” there appears the additional clause referencing “…or making significant determinations furthering the operation of programs and accomplishment of program objectives.” This sounds in a key much more policy-oriented than the daily conduct of mediation.

This is further buttressed by the language that immediately follows. It states:

> …Administrative employees engaged in such work [i.e., “obtaining compliance” or “making significant determinations…”] 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).”

As I read this clarifying language, it does not reasonably contemplate the inclusion of ADR Mediators, whose major duties consist plainly of mediation, and not the shaping of the structure that permits the mediation process to function in the first instance.

Accordingly, for all these reasons, I conclude that the ADR Mediator-GS12 and GS13 Position Descriptions should be classified as FLSA non-exempt.

IV. THE UNION’S ALLEGATION OF THE AGENCY’S WILLFUL AND INTENTIONAL VIOLATION OF THE FLSA

The Union alleges that the Agency engaged in a willful and intentional violation of the FLSA. It points to the Agency’s designation of the positions at issue as exempt, irrespective of the 1995 Settlement Agreement, the 2002 Memorandum of Understanding, and the Agency’s own lack of a reasonable belief that its actions herein were in compliance with the FLSA.

OPM Regulations at 5 CFR §551.104 include the following definitions:

Willful violation means a violation in circumstances where the agency knew that its conduct was prohibited by the Act or showed reckless disregard of the requirements of the Act. All of the facts and circumstances surrounding the violation are taken into account in determining whether a violation was willful.

…

Reckless disregard of the requirements of the Act means failure to make adequate inquiry into whether conduct is in compliance with the Act.

The Union alleges the Agency was perfidious to the extent that it knew its conduct was contrary to FLSA requirements or, as the definition also states, showed reckless disregard of those requirements, by failing to make adequate inquiry into whether its conduct was, in fact, in compliance.

I am required by the regulations to examine, and take into account, "[a]ll of the facts and circumstances surrounding the violation…." I may not agree with the Agency's own conclusions that, for example, the institution of the Priority Charge Handling Procedures for Investigators after the 1995 Settlement Agreement made a significant difference under 5 CFR §551.206, or that ADR Mediators, after 2002, had assumed duties that called for a role in policymaking, likewise affecting an exemption determination. Whether GRA's activities on behalf of the Agency, including its exemption determinations and its desk audits, caused the Agency to make correct exemption decisions are issues I have addressed and decided.

However, bad faith means more than being wrong. OPM's October 16, 2006 FLSA Decision in the Defense Security Service case reaffirms this.

The Union refers me also to the District of Columbia Circuit Court of Appeals' decision in *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993). In that case, the D.C. Circuit affirmed an award of liquidated damages against the District of Columbia Fire Department because it had no reasonable basis to believe that Firefighters of a

certain rank in the Department were exempt from FLSA overtime requirements on the basis of their being "executive, administrative, or professional employees," and thus avoid liability for liquidated damages. The court's finding rested on objective indicia that included the Department's own hourly time docking practice in cases of absence. While it noted the district court's finding that the Department lacked good faith in its determination, the Circuit Court relied solely on the "reasonable basis" test.

I find the *Kinney* case not to be of a kind with the current dispute. *Kinney* presented, in my view, a factual circumstance offering no real opportunity to argue in favor of exemption. In the case before me, I do not, for reasons already set forth, find such a bright line circumstance.

I therefore decline to find that the Agency willfully, or in reckless disregard of the requirements of the Act, violated the FLSA.

V. REMEDY

The parties are directed to meet and discuss in order to arrive at a resolution of the appropriate remedy, consistent with the findings herein.

With the parties' consent, I shall retain jurisdiction for a period to be agreed upon following the disposition of all issues remaining before me for decision.

Steven M. Wolf, Esq.
Arbitrator

March 23, 2008