

BEFORE STEVEN M. WOLF  
ARBITRATOR

National Council of EEOC )  
Local No. 216, AFGE, )  
AFL-CIO, )  
Union )  
and ) FMCS Case No. 071012-00226-A  
) FLSA Grievance  
)  
Equal Employment Opportunity )  
Commission, )  
)

THE UNION'S POST-ARBITRATION BRIEF FOR THE EXEMPT/NONEXEMPT  
STATUS OF BARGAINING UNIT EMPLOYEES

Statement of Facts

The National Council of EEOC Locals No. 216, American Federation of Government Employees, AFL-CIO, (Union) filed a Step 1 Grievance, on behalf of the bargaining unit employees, challenging the Equal Employment Opportunity Commission's (EEOC) April 7, 2006 notification designating the positions of Investigator GS-1810-9/11/12, ADR Mediator GS-301-12/13, and Investigator (State and Local)GS-1810-12 as exempt from the payment of overtime compensation under the Administrative exemption of the Fair Labor Standards Act (FLSA). Hearings were held on this matter from May 22-24, 2007 and from June 25-29, 2007, in Washington, D.C.

The positions of Investigator and Mediator are bargaining unit positions within the EEOC, *Testimony of Joann Riggs, I H.T. 156 -57, 160-668 , Testimony of Gabrielle Martin, II H.T 383-84, and Union exhibits 4-(I), (J), (K), (L), and (M).*<sup>1</sup> In June 1995, the Union and EEOC entered

---

<sup>1</sup> The hearing transcript is referred to herein by volume as "I H.T.\_\_\_\_. The testimony of witness is referred to by the witnesses last name, i.e. 'Martin,' followed by the transcript reference" Union exhibits are referred to as "-\_\_\_."

into a Settlement Agreement, which resulted in the designation of the positions of Investigator GS-1810-11/12 as non-exempt for purposes of the FLSA, *Testimony of Levi Morrow, II H.T.* 439-40, *U-1*, and *Joint ex. 2*.<sup>2</sup> In January 2002, the Union and the EEOC entered into a Memorandum of Understanding designating the positions of Mediator GS-301 12/13 as non-exempt under the FLSA, *Morrow, II H.T.* 438-39 and *U-2*. On March 20, 2006, the Union notified the EEOC that the employees in the position of Investigators and Mediators were performing the work of the agency and a review of position descriptions and position audits, provided by EEOC, did not support the positions being designated as exempt from the FLSA, *Agency ex. 2*, at p.3.<sup>3</sup> In April 2006, the Union was given a copy of an April 7, 2006 memorandum designating the positions of Investigators and Mediators as exempt from overtime payment under the FLSA, *Martin, II H.T.* 392-94 and *U-3*.

The positions of Investigator and Mediator are the front line positions of the EEOC, *Testimony of Nicholas Inzeo, II H.T.* 470-71. The primary duties of investigators are to take charges from individuals; investigate charges filed by individuals; and conciliate charges of discrimination, *Inzeo, II H.T.* 472. Mediators' day to day duties are to arrange mediation sessions for charges of discrimination; conduct mediation sessions, which involve getting individuals and employers to agree to mediation; and contact employer groups and businesses about the value of mediation, *Inzeo, II H.T.* 472, 475-76. The primary work of Mediators is working with charging parties and outside employers; arranging for mediation sessions, conducting the mediation sessions and attempting to resolve charges of discrimination filed by charging parties, *Inzeo, II*

---

<sup>2</sup> Joint exhibits are hereinafter referred to as "J-\_\_\_\_."

<sup>3</sup> Agency exhibits are hereinafter referred to as "A-\_\_\_\_."

*H.T.* 480,-82, 498-99.

The EEOC began reviewing position descriptions to change the FLSA designation of Investigators and mediators, in early 2004, *Inzeo, II H.T.* 463-65. The Office of Human Resources retained an outside contractor to review the positions of Investigator and Mediator, *Inzeo, II H.T.* 466-67. EEOC sought no guidance from the U.S. Office of Personnel Management (OPM) on the position audits provided by the outside contractor, *Inzeo, II H.T.* 505-08, 511-12. The EEOC was aware of and had discussions on decisions by OPM and the U.S. Department of Labor concerning the non-exempt status of investigators but relied on the outside contractor in reaching its determination on the FLSA status, *Id.* The EEOC was aware that the agency could not rely upon the outside contractor and the outsider contractor could not make a determination on the FLSA status, *Inzeo, II H.T.* 509.

In June 2004, the outside contractor, Gene Rouleau and Associates, (GRA) issued FLSA determinations designating the positions of Investigator GS-1810-9/11/12 and ADR Mediator GS-301-12/13 as exempt from the payment of overtime compensation under the Administrative exemption criteria of the FLSA, U-4(G), 4(H), 4(N), 4(O), 4(P), 4(Q). The FLSA determinations were based upon position descriptions issued by the EEOC in 1988, 1993 and 1998, *Riggs I H.T.* 202-21, 240-41 and U-5(A)-(F). In May, June, and July 2005, GRA issued position audits which determined the Investigator GS-1810-12 and ADR Mediator GS-301-13 were exempt from the payment of overtime compensation under the Administrative exemption criteria of the FLSA, U-4(A), 4(C), 4(D), 4(E), 4(F). In 1995 and 2002, the EEOC had designated the position descriptions of Investigator GS-1810- 9/11/12 and Mediator GS-301-12/13, as non-exempt for purposes of the FLSA, *Riggs I H.T.* 222, 232-34, 239-40 and *Inzeo II H.T.* 518-20.

Nicholas Inzeo testified the position descriptions in *Union exhibits* 4(I), (j), (k), (l) and (m) were signed by him in November 2005 and February 2006 and the exempt designation was on the descriptions he received from John McCorry, *Inzeo, II H.T.* 528-31. The personnel action change of the FLSA designation of the Investigator positions was effected in October 2006 and the Mediator personnel action change was effected in April 2007, *Riggs I H.T.* 257-59, 335-36.

Jack McCorry, the Classification Program Manager, testified the job duties and narratives of the position descriptions in *Union exhibits* 4-I, 4-J, 4-K, 4-L, and 4-M were the same as the job descriptions in *Agency exhibit 5* and no review or significant changes had been made to the position descriptions between the issuance dates in 2005 and 2006 and April 2007, *McCorry IV H.T.* 987-1005, 1013-16. Mr. McCorry testified he made the FLSA determinations for the positions of Investigator and Mediator and did not rely on any documents produced by GRA, *McCorry IV H.T.* 1029-33. On April 11, 2006, Angelica Ibarquen, Chief Human Capital Officer, informed the EEOC managers of the decision to change the FLSA designation of investigators and mediators to exempt under the Administrative exemption, based upon the determinations of GRA, that the priority change handling procedures require the positions to exercise independent judgment, A-3, p.1.

Elizabeth Marcus, ADR Mediator GS-301-13, is assigned to the Boston Area office, *Marcus, VI H.T.* 1505. Ms. Marcus mediates cases, which are assigned to her by the Area Office Director or a Trial Attorney; must schedule or attempt to schedule mediation sessions; must report to her supervisor, weekly, on her progress on each case and the average processing time of her cases; may not permanently change work hours without notifying her supervisor; must have approval of her supervisor, prior to using external paid mediators and initial supervisory approval of pro

bono mediators; and contacts employers to educate the employer on the mediation program, *Marcus VI H.T.* 1588-89, 1591-96, 1605-08, 1621-22, 1630-35, and *Berty VII H.T.* 2059-60. Ms. Marcus spends seventy percent of her work time mediating cases, *Marcus VI H.T.* 1623-24. Settlement agreements which have been reached as a result of mediation are signed by the Area Office Director, *Marcus VI H.T.* 1638-39. Unresolved case assignments are returned for investigation, *Id.*

Michael Berty, ADR Coordinator of the New York District Office, has responsibility for supervision of the mediation programs, which cover offices in Boston, Buffalo, Newark, and New York, *Berty VII H.T.* 1975, 1978-79. Mr. Berty reviews the qualifications and background of all persons who serve as volunteer mediators, prior to the individuals becoming a part of the EEOC's volunteer mediator program, *Berty VII H.T.* 2068-70. The mediation program receives primarily B cases from the EEOC's Intake Unit which have been categorized by a designation of A, B, or C. Cases assigned to mediation are tracked through the IMS system, which tracks assignments, pending cases, closures and case assignments are made by the supervisor, in locations where there is more than one mediator, *Berty VII H.T.* 2072-74. Mr. Berty testified the EEOC's ADR Deskbook establishes a guideline of ninety days for completion of mediation, *Berty VII H.T.* 2077. All mediation cases are tracked in the IMS system, which is reviewed by the supervisor for assignment dates, pending cases, settlements, and closure date, *Berty VII H.T.* 2078-79. Mr. Berty testified outreach is a work requirement and mediators are rated as part of their performance evaluation on outreach, *Berty VII H.T.* 2082-83. Mr. Berty testified working with student interns is not training, *Berty VII H.T.* 2086. Mr. Berty testified the ADR Deskbook contains forms for letters, settlement agreements, and other documents used

by mediators, *Berty VII H.T.* 2103-04. All settlement agreements have certain language which is required by the EEOC and a mediator may not omit required language at their discretion, *Id.*

Shannon Breen, Investigator GS-1810-12, works in the Denver Field Office and began employment, in Chicago in 2001 as a grade 7, *Breen V H.T.* 1219-20. Ms. Breen's highest level of education is a Bachelor's degree in Communications and she began employment, with the EEOC, two months after graduation from college, *Breen V H.T.* 1367-68. Ms. Breen testified charges of discrimination received at EEOC are assigned a designation of A, B. Or C under standards developed by the Agency, *Breen V H.T.* 1373-75. After assigning a designation to a charge of discrimination, Ms. Breen submits the case to the Intake Supervisor, who sends the cases to the Mediation or Enforcement Unit or issues dismissals , *Breen V H.T.* 1376-77, 1390-91. Ms. Breen has an average caseload of 60 to 90 cases; a completion goal of 180 days; and keeps a quarterly charge processing sheet showing the progress of her work, *Breen V H.T.* 1377-79. Managers and supervisors make decisions on whether cases are assigned to mediation or enforcement, *Breen V H.T.* 1382-83. Ms. Breen has done outreach, at a maximum, of twice each year since her employment with the EEOC, *Breen V H.T.* 1384-85. The Compliance Manual developed by the EEOC Headquarters contains standards for Investigators in processing their work, *Breen V H.T.* 1386-87. Conciliation Agreements drafted by Investigators must contain certain required language and all conciliation agreements are signed by the office director, *Breen V H.T.* 1388-89. The Training committee and Intake committee are joint committees organized by the Union and Management, *Breen V H.T.* 1395-1401. Ms. Breen testified she spends about five percent of her time giving advice to other employees ; spends the majority of her time processing charges of discrimination; and is assigned on a rotational basis to Intake by the

Enforcement Manager, *Breen V H.T.* 1424-31.

Darlene Moore, Investigator (State and Local) GS-1810-12 is employed with the Detroit Field Office and began her employment with the EEOC in 1978 as a Clerk Typist, *Moore VI H.T.* 1651, 1705. Ms. Moore's duties are to review investigation files from state and local agencies authorized to conduct investigation of charges of discrimination, under standards set by the EEOC, *Moore VI H.T.* 1707-8. Ms. Moore may not waive the standards and must seek supervisory approval for a permanent change in her scheduled work hours, *Moore VI H.T.* 1709-10. Ms. Moore issues letters of right to sue which are stamped with the signature of the District Director, *Moore VI H.T.* 1711. Once each year, Ms. Moore is responsible for completion of the EEOC work sharing agreement with state and local agencies, which is subject to approval of the District Director and the EEOC Headquarters, *Moore VI H.T.* 1712-19. Ms. Moore may not change the amount of the fees paid to the state and local agencies, *Id.* Ms. Moore may not remove cases from a state and local agency, without notification to the director, *Moore VI H.T.* 1734. The position description for Investigator (State and Local) has been unchanged since 1988, *U-5(D)* and *A-5(38-42)*.

Gail Cober, Director of the Detroit Field Office, began employment with EEOC in 1989 and became an Enforcement supervisor in 1992, *Cober VII H.T.* 1808. The Detroit Field Office reports to the Indianapolis District Office and was previously a District Office, prior to January 2006, *Cober VII H.T.* 1866, 1869. Ms. Cober testified that in her various supervisory positions since 1992, Investigators and Mediators may not change their permanent work schedules, without supervisory approval, *Cober VII H.T.* 1872, 1874. Ms. Cober testified the IMS system is used for reviewing the cases assigned to Investigators and Mediators to assure compliance with the

EEOC goals of resolving cases in 180 days and meetings are held quarterly with Investigators to review cases and recommend work assignments, *Cober VII H.T.* 1878-82. The performance standards for Investigators contains a performance standard on outreach, *Cober VII H.T.* 1884. Ms. Cober testified the average caseload of Investigators is forty to sixty cases per year, *Cober VII H.T.* 1893-94. Under the Priority Charge Handling Process, an Investigator interviews individuals who wish to file a charge; writes up the charge information; enters the information in the IMS system; assigns a category of A, B, or C to the case; gives the case to the Intake Supervisor; and may only indicate an interest in being assigned the case for investigation, *Cober VII H.T.* 1919-25. The Intake Supervisor assigns the case to an office automation assistant to prepare and serve the charge of discrimination and other documents; assigns the case to an Enforcement Supervisor or the Mediation Unit; and dismisses charges which warrant dismissal, *Cober VII H.T.* 1926- 31. Once a case receives a designation of A, B, or C, the designation may not be changed, *Cober VII H.T.* 1933-34. Ms. Cober testified her employees spend fifty percent or more of their time processing charges of discrimination, *Cober VII H.T.* 1954-55, 1958-62.. Ms. Cober testified Congressional correspondence is received by an office clerical who sends the inquiry to the appropriate unit for a response and all responses are reviewed by a supervisor or manager, *Cober VII H.T.* 1964.

Bruce Oland is employed on an annual agreement with GRA, which provides intermittent work, as a work becomes available, *Oland VIII H.T.* 2265-68. Mr. Oland's past experience as a Personnel Management Specialist and Division Director, with the U.S. Office of Personnel Management, did not include conducting evaluations of positions for FLSA determinations, *Oland VIII H.T.* 2255-64. In 2004, Mr. Oland conducted FLSA determinations on specific



positions based upon the position descriptions, *Oland VIII H.T.* 2357-58, 2362-63. In 2004, Mr. Oland was given position descriptions which showed the positions of Investigator GS-1810-12 and ADR Mediator GS-301-12/13 were designated as FLSA exempt and does not recall receiving the EEOC's 1995 policy on overtime, *Oland VIII H.T.* 2263-66, 2370-72. Mr. Oland testified he conducts FLSA determinations de novo, but he cut and pasted language from his 2004 FLSA determinations into evaluations he prepared in April 2007, *Oland VIII H.T.* 2378-80. Mr. Oland testified in 1996 two new duties were added to investigator positions of discharging cases and recommending the cases for further investigation and conducting conciliation, *Oland VIII H.T.* 2381-85. Mr. Oland was not aware investigators had conducted conciliation since the opening of the EEOC in 1965, *Oland VIII H.T.* 2385-86. Mr. Oland testified the administrative exemption criteria are to be narrowly applied and a position must meet all the criteria to be designated exempt, *Oland VIII H.T.* 2387-90. Mr. Oland testified he believed the work of Investigators and Mediators under a broad interpretation of the Administrative exemption, 5 C.F.R. 551.206, is work directly related to assisting with the running or servicing of the agency or its customers, *Oland VIII H.T.* 2396-97 and U-11 Mr. Oland testified when an Investigator is conciliating cases, the individual is enforcing the laws against an employer, *Oland VIII H.T.* 2398-99. Mr. Oland testified the positions in *Agency ex. 4*, pp. 1-46, did not meet the criteria in 551 C.F.R. 551.206(a)(3), *Oland VIII H.T.* 2407. Mr. Oland testified the Investigator position, in *Agency ex. 4*, pp. 47-53 and *Agency ex. 5*, pp. 38-42, had not had any additional duties added ; the position had been designated as FLSA non-exempt in 1995 by EEOC; and he had never observed the duties performed by the Investigator(State and Local), *Oland VIII H.T.* 2407-11, 2418-19.

Paul Katz was retained by the Union to provide an assessment of the FLSA exempt/non-exempt status of the Investigator and Mediator positions, *Katz III H.T* 568, 576. Mr. Katz was proffered as an expert on FLSA determinations by the Union and accepted without objection based upon his past experience, which included serving as Assistant Director for the U.S. Office of Personnel Management, with responsibility for classification of positions in the federal government and implementation of the Fair Labor Standards Act within the federal government, *Katz III H.T.* 569-76 and *U-7*. Mr. Katz had previous experience with positions in the EEOC, having worked on the classification of Equal Employment Opportunity Specialist positions in the federal government, *Id.*, at 573-75. Mr. Katz testified positions in the federal government are presumptively non-exempt unless proven otherwise; each federal agency must make the determination on the FLSA status; and agency determinations must comply with applicable regulations, *Katz III H.T.* 618-19. Mr. Katz reviewed the OPM website for decisions on the position of Investigator GS-1810 and found a decision determining an OPM Investigator GS-1810-12 did not meet the criteria for Administrative exemption, *Katz III H.T.* 624-26 and *U-11*. Mr. Katz testified in interpreting the Administrative exemption, the exercise of independent judgment and discretion, under 5 C.F.R. 551.206(c) applies to making decisions about how the employees does the work and not to decision making on tasks assigned as part of the employee's regular and recurring duties, *Katz IV H.T.* 796-99.

Mr. Katz concluded the positions of investigator and mediator were non-exempt for purposes of the FLSA, *Id* and *Katz IV H.T.* 867-69. Mr. Katz conducted a review of the Investigator and Mediator positions and issued a report on his findings, *Katz III H.T.* 576-8 and *U-8*. In his initial report, Mr. Katz found six different jobs were represented by the position

descriptions; found the primary job duties of the investigator to be finding and analyzing facts; evaluating facts; and drawing conclusions; and found the position did not perform any duties that were part of management, that is running the agency and or working on the policy of the agency, *Katz III*, 583-84, 605-06, 613-15 and *U-8*. Mr. Katz found outreach was not a primary duty of the investigator and did not represent work that affected the formulation of management policies as required by 5 C.F.R. 552.206(a)(1) and(2) , *Katz IV H.T.* 833-43. Mr. Katz conducted a supplemental review of the EEOC positions, submitted as *Agency ex. 5*, *Katz III H.T.* 752 and *J-3*.

Mr. Katz found the primary duties of the ADR Mediator GS-12/13 to be serving as an impartial third party to resolve employment disputes and found the positions did not perform any management functions or support functions for the EEOC, *Katz III H.T.* 616-17, *Katz IV H.T.* 815-20 and *U-8*.

#### Legal Standards

Article 31, Sec. 31.06 of the Collective Bargaining Agreement, (CBA) requires non-exempt employees of the EEOC be paid overtime, in accordance with applicable law, rules, and regulations, *J-1*. Article 42, Sec. 41.02(3)(B) permits the filing of a grievance for a violation, misinterpretation, or misapplication of any law, rule or regulation affecting conditions of employment, *Id.*

5 C.F.R. §§ 551.101 et.seq. sets forth the regulatory requirements for the application of the FLSA to federal employees. 5 C.F.R.§ 551.104 defines an Administrative employee as an employee who meets all the criteria in § 551.206, *U-14*. The standards for applying exemption criteria under the FLSA are stated in 5 C.F.R. § 551.202. An employing agency is required to

designate a position as exempt only when the agency correctly determines the employee clearly meets one or more of the exemption criteria; is required to presume an employee is nonexempt; required to narrowly construe the exemption criteria; and is required to bear the burden of proving any claim of exemption, 5 C.F.R. § 551.202. The Administrative exemption criteria requires the primary duty of an employee be an advisor or assistant to management, a representative of management, or a specialist in a management or general business function or supporting service, 5 C.F.R. § 551.206(a)-(d), *U-15*. An administrative employee must significantly affect the formulation or execution of management programs or policies or be involved in management or general business functions or supporting services of substantial importance to the organization serviced; or substantially participate in the executive or administrative functions of a management official, *Id.* The employee must perform office or predominately nonmanual work and must exercise discretion and independent judgment, *Id.* All four criteria of the Administrative exemption must be met for an employing agency to claim the exemption, *Id.*

*Adams v. U.S.*, 27 Fed.Cl. 5 (1992) set out the applicable standards for determining exemptions for federal employees under the Administrative exemption of the FLSA<sup>4</sup>. *Adams* held the employer bears the burden of proving employees are exempt; a primary duty is work which constitutes over 50% of the work; a duty which constitutes less than 50% of the work may not be credited as a primary duty, *Id.*, at 12-13. Formulation or execution of management policies or engaging in supporting services requires an employee be engaged in planning,

---

<sup>4</sup> The decision references 5 C.F.R. § 551.205 which was recodified in 1998 as 5 C.F.R. § 551.206.

developing, promoting, coordinating, controlling or evaluating programs of the employing organization, which is distinct from the agency's product or basic task, *Id.*, at 14-15. To be a supporting service an employee's work must support the agency in carrying out its basic task rather than engaging in the basic task, *Id.* To meet the nonmanual work test, the employee must perform work in an office setting and the work must be nonmanual work or work which requires the use of general intellectual abilities, which does not include the employee relying on standardized application of established procedures, *Id.*, at 16-17. An employee exercises independent judgment and discretion when the employee has the ability to evaluate courses of action; make decisions, which are reviewed later; and the decisions made during the course of the assignment must be independently significant, *Id.*, at 17. Decisions which affect procedural details of the employee's own work do not meet the independent judgment and discretion criteria, *Id.* *Berg v. U.S.* 49 Fed.Cl. 459, 469- 72 (2001) held the primary duty constitutes work which is over 50% of the employee's work; must be involved in the planning, development, or promotion of management functions, i.e. program management of the agency; and must be work in administrative support of managers i.e., such as data processing, and are not front-line production workers.

*Kinney v. District of Columbia*, 994 F.2d 6, 12-13 (D.C. Cir. 1993) held an employer, to escape liability for an intentional violation, has the burden to show its actions were taken in good faith under the FLSA and on a reasonable belief the employer was not violating the law. Good faith requires a showing an employer acted with an “. . .[H]onest intention to ascertain what the . . .” law requires and act in compliance with the law, *Id.* An employer must show that the absence of precise legal guidelines led the employer to believe it was in compliance with the

law.

### Argument

The positions of Investigator and Mediator are the front-line positions of the EEOC. Mr. Inzeo affirmed that the positions perform the work of the agency and the testimony of the employees and supervisor called by the EEOC confirm that the major duties of the position of Investigator and Mediator is the processing of charges of discrimination which are filed with the EEOC or state and local employment agencies. Testimony of employees in this case established the employees perform the production work of the agency and not administrative or support functions as a major duty of their position. As Mr. Katz testified and supported through his reports, the major duties of the positions of Investigators and Mediators is conducting the business of the agency, which is the investigation of charges of discrimination. To meet the primary duty test of 5 C.F.R. § 551.206(a)(1) and (2), as set forth in *Adams, supra.* and *Berg, supra.*, the positions must affect the planning, development, coordination, or evaluation of the agency's programs as distinct from performing the basic tasks of the agency.

The Investigator(State and Local) position likewise fails to meet the primary duty test, and the intellectual and specialized or technical knowledge criteria, for as testified by Ms. Moore, she reviews investigations conducted by state and local agencies under standards established by the EEOC, prepares closing letters for the cases; and mails out the closing letters; her work sharing agreement duties occur once a year; she does not set the fee paid for cases; and does not negotiate the substantive language of the work sharing agreements, other than the numerical numbers to be reached, *Moore VI H.T.*1662,-66, 1677-78, 1709-15, 1718 and *U-8*, p. 7. The major duties of the Investigator(State and Local) are to coordinate activities between EEOC and

the state and local agencies and review and analyze investigations conducted by the agencies under established standards of the EEOC, *A-5*, p. 39. The duties performed and the knowledge applied do not rise to the level to meet the criteria required under 5 C.F.R. § 551.206 (a) and (b), *Adams, supra* at 13-17 and *Berg, supra.* at 469-70, 474-75.

Under the regulations applicable to federal employment, a federal employee is presumptively non-exempt unless the employer shows the employee meets all the criteria of an exemption.. Failure to meet any one of the criteria requires a position be classified as non-exempt, *U-11*. The record in this case does not show any evidence produced by the employer which would support its claim that the positions meet all the Administrative exemption criteria. In the present case, the positions do not meet all the Administrative criteria and are therefore non-exempt.

The designation of the positions of Investigator and Mediator as exempt was a willful and intentional violation of the FLSA, by the EEOC. The U.S. Office of Personnel Management has defined a willful violation as the agency knew its conduct was prohibited or showed reckless disregard of the requirements of the FLSA, *U-11*, pp. 7-8 and *Kinney, supra*. In this case, the EEOC had designated the Investigator positions as non-exempt in 1995 and the Mediator positions as non-exempt in 2002. The testimony of Mr. Inzeo, Mr. McCory, and Ms. Riggs show that the EEOC was aware of its obligations under the FLSA to correctly determine the FLSA status of the positions. Mr. Inzeo as the manager, responsible for supervision of the employees knew the positions performed the front-line production work of the agency. The EEOC submitted no evidence that its designation, of the positions as exempt, was based upon a reasonable belief it was complying with the FLSA. Mr. McCory testified he consulted no decisions of OPM; did not read the EEOC's prior policies on the positions; and never sought to

determine whether his presumption that the addition of the Priority Charge Handling Process as a duty of the Investigator position, was a significant duty, which would support a change in the FLSA designation. Mr. McCory presumption that mediators were providing a service to management lacks any support in the law or the regulations. Mr. McCory's testimony that he believed the designation complied with the regulations and the law is the exact argument, which was rejected in *Kinney, supra*. Throughout this proceeding the EEOC has not produced any evidence which would support a claim that its actions were an error. In fact, the EEOC has engaged in behavior which is in reckless disregard of the law, by informing the Union and its managers its decision was based upon the results provided by GRA; issuing duplicate position descriptions with new cover sheets; drafting new evaluations, which it asserts are applicable to the positions, after the date of implementation for the Investigators and Mediator; and asserting through the testimony of Jack McCory, the FLSA decision was not made by GRA. These are not the acts of an employer operating, under a good faith belief, it is in compliance with the law.



The actions of the EEOC show a reckless disregard for the law and show the agency knew its actions violated the law. The Agency's actions in designating the positions as exempt is an intentional and willful violation of the FLSA.

Conclusion

The Union respectfully requests, based upon the foregoing, the positions of Investigator and Mediator be found to be FLSA non-exempt and the EEOC be found to have committed an intentional and willful violation of the law.

Respectfully Submitted,

/s/ \_\_\_\_\_  
Barbara B. Hutchinson  
D.C. Bar No. 418967  
7907 Powhatan Street  
New Carrollton, MD. 20784  
Telephone: (301) 577-3387  
Facsimile: (301) 577-3764  
For the Union

CERTIFICATE OF SERVICE

The foregoing Union's Post-Arbitration Brief for the Exempt/Nonexempt Status of Bargaining Unit Employees, was served upon the Arbitrator and the Equal Employment Opportunity Commission by the following designated methods, addressed to:

via electronic mail, without enclosures and U.S. mail, first class postage attached, with accompanying case law:

---

Steven M. Wolf  
2137 Green Brier Drive  
Villanova, PA. 19085  
[Swolfarb@comcast.net](mailto:Swolfarb@comcast.net)

and

via U.S. mail, first class postage attached, without enclosures:

James Sober  
U.S. Equal Employment Opportunity Commission  
1801 L Street, N.W.  
Washington, D.C. 20507

This 16<sup>th</sup> day of August 2007.

/s/ \_\_\_\_\_  
Barbara B. Hutchinson