



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

MAY 22 2006

Ms. Barbara Hutchinson  
Attorney at Law  
7907 Powhatan Street  
New Carrollton, MD 20784

Dear Ms. Hutchinson:

This is in response to the Step 1 grievance you filed on behalf of Investigators in grades GS-9, GS-11 and GS-12, Alternative Dispute Resolution Mediators in grades GS-12 and GS-13 and Paralegal Specialists in grades GS-9 and GS-11 in District, Field, Area and Local Offices. The grievance was filed on April 7, 2006 and received in this office on April 13, 2006. In the grievance, you assert that from April 1, 2003 to the present, the Agency has violated the CBA and attendant laws and regulations by failing to pay overtime compensation to these employees when they worked beyond their regularly scheduled tours of duty by working in excess of eight hours per day or in excess of 40 hours per week.

On April 14, 2006 you amended the grievance to challenge the Agency's decision to change the exemption designation of Investigators and Mediators and Paralegal Specialists from non-exempt to exempt. You assert that the positions do not meet the administrative exemption criteria under the FLSA and that the Agency's decision violates 5 U.S.C. §5542, 29 U.S.C. §216 (b), 5 CFR §551.201, §551.202, §551.206 and the June 6, 1995 Settlement Agreement. You also argue that designating the positions as exempt illegally deprives the employees of overtime compensation.

As remedies, you ask for back pay for the affected employees for unpaid overtime, including suffered and permitted overtime, compensation for the forced use of compensatory time, liquidated damages, attorney fees and costs associated with processing this grievance. You also seek a redesignation of the positions as non-exempt.

In the grievance, you assert that Investigators, Mediators and Paralegal Specialists have been denied overtime compensation for working beyond their scheduled tours of duty. However, the CBA, at Section 41.07, provides that a written grievance at a minimum shall identify the employee and the office and the incident and the date it occurred. Your grievance does not comply with this CBA requirement. Here, not only have you not identified by name, position and grade, any employee you believe worked uncompensated overtime, you have not provided any information regarding the work allegedly performed, the days on which the work was performed or the number of hours purportedly worked. Absent more specific information in this regard, we are unable to establish whether any overtime work was, in fact, performed or to determine whether the Agency has an obligation to compensate employees for that work. You should note, however, that inasmuch as uncompensated overtime has already been the subject of

PK  
Rogge  
5-19-06

Stanger  
5/19/06



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separate grievances and arbitration proceedings for bargaining unit employees in the Baltimore District Office and the Washington Field Office, employees in these offices will not be considered in the instant grievance.

In the grievance, you challenge the Agency's decision to change the exemption designation of Investigators, Mediators and Paralegal Specialists. You argue that the Agency's decision violates the 1995 settlement agreement in which it was agreed that bargaining unit positions at grades GS-11 and above were non-exempt. You argue further that Investigators, Mediators and Paralegal Specialists do not meet the administrative exemption criteria under the Fair Labor Standards Act (FLSA). We note first that Paralegal Specialists were not included in the March 6, 2006 notification to the Union of the Agency's decision to change the exemption designation of Investigators and Mediators. Inasmuch as no decision has been made concerning whether to change the FLSA designation of Paralegal Specialists, this decision will deal only with the Agency's decision, and the bases thereof, to change the exemption designation of Investigators and Mediators from non-exempt to exempt.

In reaching its 1995 agreement, the Agency had determined that Investigators did not frequently exercise discretion and independent judgment, under only general supervision, and did not meet the *administrative* exemption criteria and were, therefore, non-exempt under the FLSA. However, in 1996, the Agency fully implemented its Priority Charge Handling Procedures (PCHP) that set forth a new framework for processing charges. As a result of PCHP, Investigators are now permitted to apply independent investigatory procedures on a case by case basis. They now have the authority to make independent decisions on whether a case has merit and a full investigation is needed or the case has no merit and should be dismissed.

Although you contend that the Agency violated the 1995 Settlement Agreement with regard to the change in exemption status of Mediators, the Settlement Agreement did not and could not have included Mediators since the Agency did not establish Mediator positions until 1998, several years after the Settlement Agreement was signed. Moreover, although the Settlement Agreement changed the FLSA exemption status of GS-11 and GS-12 Investigators from exempt to non-exempt from the FLSA overtime provisions, nothing in the plain language of the Settlement Agreement states that Investigators must remain non-exempt from FLSA overtime provisions in perpetuity. It is unreasonable and impractical to assume that the intent or purpose of the Settlement Agreement prevents the Agency from changing the FLSA exemption status of Investigators, in light of changed facts and circumstances which warrant the change more than a decade after the Agreement was signed. It is practical to expect that the procedural and technical aspects of a position will change over time. Here, realizing that the procedural and technical aspects of the Investigator position have, in fact, changed, the Agency took affirmative steps to substantiate these changes and subsequently made a decision to change the FLSA designation.

The Agency's recent decision to change the exemption designation of GS-1810 Investigators at grades GS-9 through 12 and GS-301 Mediators at grades 12 and 13 is based on the results of an independent audit which determined that the positions meet the primary test, the nonmanual

work test and the discretion and independent judgment test of the *administrative* exemption criteria of the FLSA. The primary test is met if the employee's work significantly affects the formulation or execution of management programs or policies, which can include a broad range of activities from developing national goals to contributing to the formulation of objectives of a small office, or by indirectly participating in developing or recommending proposals that are acted on by others. The nonmanual work test is met if the employee performs office or other predominantly nonmanual work of an intellectual nature involving general intellectual capability. The discretion and independent judgment test is met if the work involves sufficient variables as to regularly require discretion and judgment in determining the approaches and techniques to be used, in making determinations during the course of assignments and in evaluating results.

It is our belief that employees in both Investigator and Mediator positions significantly affect the execution of management policies or programs by obtaining compliance with such policies by other individuals or organizations, both within and outside the Government. Employees in both positions apply intelligence, perceptiveness, analytical reasoning, substantial judgment and discretion, have an ability to consider numerous complex factors and an ability to adapt and apply a variety of subject matter principles and concepts. Moreover, both positions require creativity and judgment to implement and coordinate resolutions and to accurately project the impact of various possible courses of action. Thus, both positions are exempt under the FLSA.

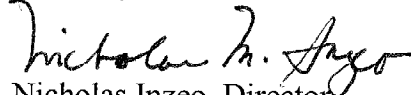
In conclusion, I have considered whether your assertions that the Agency violated 5 U.S.C. §5542, 29 U.S.C. §216(b), 5 CFR §551.201, §551.202 and §551.206 are valid ones. First, 5 U.S.C. 5542 sets forth overtime rates and how overtime pay is calculated for Federal employees. Here, you have not provided any evidence of any actual overtime worked by any employee which would even necessitate a computation of overtime compensation. Therefore, your assertion in this regard is unfounded.

Next, 29 U.S.C. §216 (b) describes the penalties imposed for violating the provisions of §206 or §207. Inasmuch as there has been no finding that the Agency violated the Act or any of its provisions, your assertion here is speculative, at best.

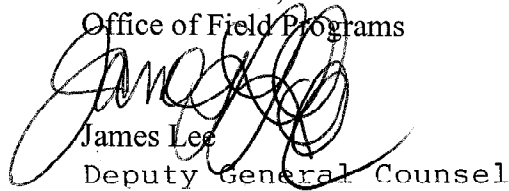
Finally, 5 CFR §551.202, §551.202 and 5 CFR §551.206 set forth the general principles governing exemption determinations and describes the administrative exemption criteria for making determinations under the FLSA. In arriving at its decision to exempt Investigators and Mediators under the statute, the Agency followed the governing principles outlined in Section 551, including independently auditing the positions against the exemption criteria to correctly determine whether the positions met the criteria and should be exempted. There appears to be no basis for your assertions in this regard.

Based on the foregoing, we conclude that the Agency has not violated the CBA or any of the law, rules or regulations asserted by the Union. Therefore, this grievance and requested remedies are denied. If you are not satisfied, you may elevate it in accordance with the CBA to Angelica E. Ibarguen, Chief Human Capital Officer at 1801 L Street, N.W., Washington, D.C. 20507.

Sincerely,



Nicholas Inzeo, Director  
Office of Field Programs



James Lee  
Deputy General Counsel