



FLSA2006-23NA

October 26, 2006

Dear **Name***:

This is in response to your request for an opinion on behalf of your client, a labor organization representing state employees, concerning whether certain employee classifications fall within the administrative, executive, or professional exemptions contained in section 13(a)(1) of the Fair Labor Standards Act (FLSA) and 29 C.F.R. Part 541.¹

Although you initially asked about eight employee classifications, you later withdrew your request with respect to six of them. Thus, your pending request involves one employee whose job classification is “Executive Assistant 2 Meeting and Travel Coordinator” and two employees who are classified as “Administrative Assistant 2 for Operations Directors” (for “Group 3” and “Group 4”). At our request, you provided a specific breakdown of the duties of all three employees. Our analysis focuses on this information.

Executive Assistant 2, Meeting and Travel Coordinator

The principal or most important duty of the Executive Assistant 2, Meeting and Travel Coordinator (EA2) is serving as the executive assistant to the union president, in addition to handling travel arrangements for the organization’s entire staff. You state that the EA2 reports directly to the union president and receives annual pay of \$48,386, which is \$6,000 to \$10,000 more than employees designated as Administrative Assistants 1 and 2 receive. The EA2 performs work for the president for 32 hours per week. This time includes 14 hours during which she schedules meetings; maintains the president’s calendar and itinerary; monitors letters, phone calls, and e-mails requesting the president’s presence; and adds all information to a day planner. The EA2 spends 13 hours per week responding to the president’s voicemail and e-mail, crafting responses with little supervision, typing dictated materials, handling general telephone calls and letters from union members, and directing inquiries to other staff as needed. You state that the EA2 responds to general board member inquiries and that this involves interaction with “members of the [state] and National Political community.” Specifically, the EA2 formulates responses when calls come in, if she knows the answer. Otherwise, she forwards messages to the president. Generally, the EA2 prepares the president’s response for his review and signature. The EA2’s work for the president also includes five hours per week handling travel arrangements, including flight arrangements and lodging.

The EA2 spends 15 minutes per week on each of the following tasks: editing and typing speeches drafted for the president, attending meetings with the president, and processing retirement and compensation items. She also spends one and one half hours per week handling

¹ Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

travel arrangements for others. You state that the EA2 negotiates contracts for the meeting/convention sites and any other details associated with these events, but the EA2 does not attend the various conventions.

Finally, the EA2 spends several hours per week performing various other duties relating to bimonthly board meetings, yearly conferences, and biennial conventions. For example, the EA2 coordinates and schedules board and committee meetings, coordinates the luncheon speaker, handles arrangements for the President's VIP reception, and assists with staff work assignments. The EA2 also handles reports and agendas, provides notices, schedules rooms, provides packets, operates the mechanical "voting system," and prepares an outline of meeting minutes for the bimonthly board meetings. She also finds out what topics will be discussed at various conferences to prevent the president or chair from being "blind-sided." The EA2 is the lead worker who handles meeting arrangements for the annual Women's Action Conference, and she also spends two and one half hours in tasks such as processing mail, fielding telephone calls, reviewing staff time sheets and expense forms, assisting on the switchboard, and ordering supplies.

Administrative Assistant 2 for Operations Directors, Group 3

The Administrative Assistant 2 for Operations Directors, Group 3 (AA2-3) reports to a regional operations director and is paid \$40,665 annually, which is approximately \$2,000 to \$6,000 more than an Administrative Assistant 1 and \$6,000 less than the EA2. You characterize the AA2-3's principal or most important duty as responding to union member inquiries regarding workers' compensation, disability, occupational injuries, unemployment, and union contract interpretation in the absence of a staff representative. However, inquiries regarding the contract are often referred to the staff representative. In this regard, the AA2-3 spends 15 hours per week "basically in charge of Union administration of these programs." She answers a large majority of the union members' questions independently, referring to state statutes and the collective bargaining agreement, and interfaces with top state officials to resolve problems.

The AA2-3 also spends nine hours per week handling administrative responsibilities for the staff in Group 3. These responsibilities include reviewing and making recommendations to the supervisor regarding twelve staff representatives' expenses, time sheets, and leave requests; maintaining various filing systems; and responding to and forwarding staff e-mails and voicemails. You state that she handles ninety percent of the staff's telephone calls without supervision.

The AA2-3 spends more than five hours per week labeling and stuffing envelopes, answering or forwarding phone calls from members, ordering supplies, serving as a computer mentor, operating the switchboard, and handling new state employee reports. For four hours a week, the AA2-3 handles general calls and correspondence, such as answering routine questions from members about contacting a staff representative or obtaining a membership packet. She also sends letters to state department heads to release members for meetings. She also types the staff representatives' opening statements for arbitration hearings. She spends three hours per week performing biennial convention duties such as maintaining a filing system and responding to telephone and written inquiries regarding delegate status. Finally, the AA2-3 spends two

hours per week representing the union on the Return-to-Work committee, and negotiates the policies governing the return to part-time work of disabled workers.

Administrative Assistant 2, for Operations Directors, Group 4

The Administrative Assistant 2, Group 4, for Operations Directors (AA2-4) reports to a regional operations director and is paid \$43,720 annually, approximately \$2,000 to \$6,000 more than an Administrative Assistant 1 and \$6,000 less than the EA2. You state that the employee's principal or most important duty is "to shepherd the Quality Partnership with the State." In this regard, the AA2-4 spends 15 hours per week performing several tasks, including: (1) writing and laying out a quarterly four-page "quality control" newsletter² comprised of articles and photographs; (2) handling the Quality table at various functions by preparing table items, staffing or securing staff to work at the table, and interacting with members; (3) acting as the support person regarding the Union Quality Network, an internal union program, by taking notes, typing and distributing minutes, preparing the agenda, conducting meetings in the absence of the supervisor, arranging lunches, and gathering information; and (4) supporting the supervisor in his capacity as co-chair of the state Quality Network, a joint program with management, by preparing the agenda, taking notes, distributing minutes, and creating and mailing notices. In her supervisor's absence, she has chaired the meetings and reported to the supervisor regarding the discussions. The AA2-4 is also in charge of getting members and managers involved in the state Quality Network, by interacting with state counterparts in designing a statewide Web site, as well as sending information to the Webmaster for posting, and developing the newsletter. Finally, as part of her state Quality Network duties, the AA2-4 was responsible for the agenda, seeking speakers, and arranging volunteers for three conferences held in 2005.

The AA2-4 spends 20 hours per week performing duties such as typing the opening statements for arbitration hearings for seven field staff representatives, reviewing time sheets and expense forms, fielding and responding to union member's calls for staff by forwarding the call to the proper informational source, such as the staff representative or operations director, working at the switchboard, taking dictation, typing correspondence, scheduling meetings, maintaining a filing system, and drafting routine correspondence on her own when she knows the answer; however, all correspondence prepared by the AA2-4 is reviewed by the operations director. The AA2-4 does not attempt to interpret the union contract. Additionally, the AA2-4 is assigned special projects, usually relating to quality control, that require "research and preparing policies to be proposed for adoption" and are done without supervision. The AA2-4 is also the facilitator for monthly team meetings, responsible for the agenda; reserving the meeting room; and taking, typing, and distributing meeting notes.

She spends three hours per week preparing the initial draft of the departmental budget, preparing the final proposal after in-depth discussions with her supervisor, and tracking annual expenses. She also spends two hours performing duties such as maintaining the database for

² The Quality Control newsletter takes about a week to prepare and is reviewed by the operations director who makes minor changes or provides additional input.

the Union Bulletin Board Network, creating flyers, sitting on the Union Power Committee, submitting newsletter articles for mailings, and stuffing envelopes and metering mail.

FLSA section 13(a)(1) provides an exemption from the minimum wage and overtime provisions for “any employee employed in a bona fide executive, administrative, or professional capacity,” as those terms are defined in 29 C.F.R. Part 541. Your letter does not appear to present any basis for concluding that these employees satisfy the requirements of either the executive or professional exemptions. However, you have raised issues regarding the administrative exemption. Under 29 C.F.R. § 541.200, the term “employee employed in a bona fide administrative capacity” means “any employee”:

- (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week . . . ;
- (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
- (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Id.

Please note that this response assumes that the employees are paid on a salary basis as defined in 29 C.F.R. § 541.602 at a rate of not less than \$455 per week.

To qualify for the administrative exemption, an employee’s primary duty must be “directly related to management or general business operations.” This “refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.” 29 C.F.R. § 541.201(a). Work that is “directly related to management or general business operations includes”:

work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.

29 C.F.R. § 541.201(b).

The term “primary duty” means

the principal, main, major or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job

as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

29 C.F.R. § 541.700(a).

In order to qualify for the administrative exemption,

an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

29 C.F.R. § 541.202(a).

As indicated in 29 C.F.R. § 541.202(b):

The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long-or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

Federal courts generally hold that employees who meet at least two or three of the factors mentioned above are exercising discretion and independent judgment, although a case-by-case analysis is required. 69 Fed. Reg. 22,121, 22,143 (Apr. 23, 2004).

The regulations further clarify that “[t]he exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level.” 29 C.F.R. § 541.202(c). Additionally, the regulations provide that the “exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.” 29 C.F.R. § 541.202(e). Moreover, the exercise of discretion and independent judgment “does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work.” 29 C.F.R. § 541.202(e). It is not sufficient that an employee makes limited decisions within clearly “prescribed parameters.” *Dalheim v. KDFW-TV*, 706 F. Supp. 493, 509 (N.D. Tex. 1988), *aff’d*, 918 F.2d 1220 (5th Cir. 1990). Rather, there must be true discretion and independent judgment exercised on matters of significance or consequence related to the management or general business operations of the employer or the employer’s customers. *See Wage and Hour Opinion Letter FLSA2005-54* (Dec. 16, 2005).

Finally, the regulations provide that “[a]n executive assistant or administrative assistant to a business owner or senior executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.” 29 C.F.R. § 541.203(d). However, this provision does not “expand the exemption to include secretaries or other clerical employees.” 69 Fed. Reg. at 22,146. An employee’s exempt status is not determined by an employee’s job title, but rather based on the individual employee’s job duties. *See* 29 C.F.R. § 541.2.

Executive Assistant 2, Meeting and Travel Coordinator

Based on the specific duties you described, it is our opinion that the EA2 meets the requirements for the administrative exemption. The EA2’s primary duty involves the performance of office or non-manual work directly related to the management or general business operations of the employer. The EA2 assists the union president, responds to inquiries on his behalf, handles travel arrangements and coordinates meetings for the president and union board members, and processes certain compensation items. *See Wage and Hour Opinion Letter Aug. 20, 1992* (executive assistant who assists executive employee in performance of his duties is a type of administrative employee) (copy enclosed). The regulations list an executive assistant to the senior executive of a large business as an example of an administrative employee. 29 C.F.R. § 541.203(d). Additionally, the EA2 appears to perform some work involving a number of the typical administrative functions listed in 29 C.F.R. § 541.201(b), including budgeting, purchasing, procurement, labor relations, public relations, and government relations.

As the executive assistant to the union president, the EA2 also meets the requirement of exercising discretion and independent judgment, as described in 29 C.F.R. § 541.203(d). In this regard, you have stated that the EA2, with little supervision, prepares responses to inquiries

on behalf of the president, directs inquiries to other staff as needed, responds to board member inquiries by interacting with the state and national political community, and negotiates contracts for meeting/convention sites and any other details associated with these events. The fact that the president may review the EA2's work does not prevent a determination that she exercises the requisite discretion and independent judgment to qualify for the exemption. *See* 29 C.F.R. § 541.202(c); Field Operations Handbook § 22d11 (exempt executive secretaries may "prepare a reply for the executive's signature, or route it to someone else for handling"). Nevertheless, in reaching our conclusion, we assume that the EA2 prepares responses that involve significant and non-routine matters, that the EA2 has the authority to decide whether she should answer correspondence herself, and that her duties with respect to negotiating contracts for the biennial and/or other meetings are not primarily secretarial or clerical in nature. *See* 29 C.F.R. § 541.202(e).

Finally, we note that the EA2's duties include non-exempt secretarial work, such as taking dictation, typing, processing mail, assisting on the switchboard, scheduling meetings, and ordering supplies; however, these duties appear to be collateral to the EA2's primary duty of assisting the union president. *See* 29 C.F.R. § 541.700(b); *Demos v. City of Indianapolis*, 302 F.3d 698, 704-05 (7th Cir. 2002) ("employee's primary duty 'is that which is of principal importance to the employer, rather than collateral tasks which may take up more than fifty percent of his or her time'") (quoting *Reich v. Wyoming*, 993 F.2d 739, 742 (10th Cir. 1993)). Indeed, the EA2 earns approximately 20 to 33 percent more annually than the administrative assistants, which is a factor supporting the determination that her primary duty is the performance of exempt work. *See* 29 C.F.R. § 541.700(a).

Therefore, it is our opinion that the Executive Assistant 2 qualifies as an administrative employee and is exempt from the minimum wage and overtime requirements of the FLSA under section 13(a)(1).

Administrative Assistant 2 for Operations Directors, Group 3

It is our opinion that the AA2-3 does not exercise sufficient discretion and independent judgment with respect to matters of significance to qualify as an exempt administrative employee; therefore, our analysis is limited to this issue. Although the AA2-3 handles the union's administration of various compensation programs, there is no evidence that the AA2-3 has discretion with regard to her duties, or the authority to establish or deviate from policy regarding any of the programs. Similar to the inspectors and investigators described as nonexempt in 29 C.F.R. § 541.203(j), the AA2-3 may apply known standards to determine whether prescribed criteria are met, but she is not formulating or implementing management policies, providing expert advice, planning business objectives, or handling complaints in accordance with the requirements of 29 C.F.R. § 541.202(b).

Rather, it appears that the AA2-3's duties involve the use of skills in applying specific standards, as described in 29 C.F.R. § 541.202(e). *See* Wage and Hour Opinion Letter Feb. 5, 1999 (labor organization field representative whose primary duty involved assisting in operation of union, maintaining presence in field, and providing contact source for any problems, performed work involving use of skills and application of known standards, rather

than work requiring exercise of discretion and independent judgment) (copy enclosed). Indeed, these facts can be contrasted with those in *Hazel v. Mich. State Employees Ass'n*, 826 F. Supp. 1096, 1106 (W.D. Mich. 1993), where a labor relations representative and a senior membership services representative were found to exercise the requisite discretion to come within the administrative exemption. The exempt labor relations representative in the *Hazel* case performed research, investigated complaints, selected arbitrators, worked with outside counsel, determined a “strategic approach” for arguments, and evaluated proposed settlements. The senior membership services representative exercised discretion by developing programs to respond to the needs of members, advising members with regard to grievance procedures, clarifying contract provisions, preparing files, presenting cases for grievance hearings, mediating member conflicts, and formulating settlements. *See also Douglas v. Argo-Tech Corp.*, 113 F.3d 67, 72-73 (6th Cir. 1997) (union vice president who handled employee grievances found exempt).

Most of the other duties that you list, involving a significant percentage of the AA2-3’s time, also seem to involve routine secretarial work such as typing for the staff representatives, filing, answering the phone, and stuffing envelopes, as well as responding to routine inquiries, which is work identified as nonexempt in 29 C.F.R. § 541.202(e). Although you state that the AA2-3 handles ninety percent of staff phone calls with no supervision, there is no description of the types of calls that she handles, other than calls from members involving routine questions.

Finally, we note that the AA2-3 spends two hours per week representing the union and negotiating policies on the Return-to-Work committee. This may be an exempt duty; however, according to your own description, this is not the employee’s principal, or most important, duty, and the employee spends minimal time on this function. Although the amount of time spent performing a duty is not necessarily dispositive of the issue of whether a duty is the primary duty, it provides a useful guide. *See* 29 C.F.R. § 541.700(b).

Therefore, it is our opinion that the Administrative Assistant 2 for Group 3 does not qualify as an exempt administrative employee.

Administrative Assistant 2, for Operations Directors, Group 4

Finally, it is our opinion that the AA2-4 similarly does not meet the discretion and independent judgment prong of the administrative exemption. Thus, our analysis is limited to this issue. Although she carries out some non-secretarial duties with respect to the Quality Partnership program, her role in this regard seems to involve the use of skills and technical abilities in gathering factual information, as described in 29 C.F.R. § 541.203(j). *See Dalheim*, 706 F. Supp. at 509. For example, the AA2-4 drafts a short, partially pictorial newsletter, and her supervisor provides input on this project. She prepares items to be distributed and sometimes staffs a table at various events. She interacts with a state counterpart in designing a statewide Web site, and sends information to the Webmaster for posting. However, it does not appear that the AA2-4 has the authority to formulate, affect, interpret, or implement management policies, that she performs work that substantially affects business operations, or that she is involved in planning long-term or short-term business objectives, as described in 29 C.F.R. § 541.202(b). Although you state that the AA2-4 conducts meetings in her supervisor’s

absence, much of the AA2-4's role regarding Quality Partnership is supportive and involves secretarial work. *See* 29 C.F.R. § 541.202(e). Further, the AA2-4 spends a significant portion of her time performing non-exempt secretarial and clerical tasks unrelated to the Quality Partnership program, such as typing for staff representatives, working at the switchboard, and taking dictation.

We note that the duties of the AA2-4 are similar to the duties of other employees who we found not to exercise the requisite discretion and independent judgment to qualify for the administrative exemption. *See* Wage and Hour Opinion Letter July 17, 2000 (executive secretary published bi-monthly newsletter and proposed action regarding various programs); Wage and Hour Opinion Letter Mar. 11, 1998 (community assistant planner aided in developing and updating policies and procedures for county planning programs, developed staff reports, and undertook special projects); Wage and Hour Opinion Letter Oct. 20, 1997 (administrative assistant aided board of directors and executive director in preparing monthly newsletter and performing special projects) (copies enclosed).

To recap, it is our opinion that the Executive Assistant 2, Meeting and Travel Coordinator qualifies as an exempt administrative employee. However, the Administrative Assistant 2 for Operations Directors, Group 3 and Administrative Assistant 2 for Operations Directors, Group 4 do not fulfill the requirements for exemption.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that the above information is responsive to your inquiry.

Sincerely,

Barbara R. Relford
Office of Enforcement Policy
Fair Labor Standards Team

*** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**