

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 10-35590

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HILDA L. SOLIS, SECRETARY OF LABOR,  
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff-Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF  
SOCIAL AND HEALTH SERVICES,

Defendant-Appellee.

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On Appeal from the United States District Court  
for the Western District of Washington

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BRIEF FOR THE SECRETARY OF LABOR

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TABLE OF CONTENTS

	Page
STATEMENT OF JURISDICTION .....	1
STATEMENT OF THE ISSUE .....	2
STATEMENT OF THE CASE .....	2
A. Nature of the Case and Course of Proceedings ....	2
B. Statement of Facts .....	3
C. Decision of the District Court .....	7
SUMMARY OF ARGUMENT .....	8
STANDARD OF REVIEW .....	10
ARGUMENT .....	10
THE DISTRICT COURT ERRED AS A MATTER OF LAW BY CONCLUDING THAT THE SOCIAL WORKERS WORKING IN THE SOCIAL WORKER II AND III POSITIONS ARE EXEMPT FROM THE OVERTIME REQUIREMENTS OF THE FLSA AS LEARNED PROFESSIONALS UNDER SECTION 13(a)(1) OF THE ACT; THE REQUIREMENTS FOR THESE POSITIONS ARE IN SUCH DIVERSE AND UNRELATED FIELDS THAT THEY CANNOT BE CONSIDERED TO REQUIRE KNOWLEDGE THAT IS CUTOMARILY ACQUIRED BY A PROLONGED COURSE OF SPECIALIZED INSTRUCTION .....	10
CONCLUSION .....	26
CERTIFICATE OF COMPLIANCE .....	27
CERTIFICATE OF SERVICE .....	28
STATEMENT OF RELATED CASES .....	29

Cases:

*Adair v. City of Kirkland*,  
185 F.3d 1055 (9th Cir. 1999) ..... 11

*Arnold v. Ben Kanowsky, Inc.*,  
361 U.S. 388 (1960) ..... 11

*Auer v. Robbins*,  
519 U.S. 452 (1997) ..... 24-25

*Barrentine v. Arkansas-Best Freight Sys., Inc.*,  
450 U.S. 728 (1981) ..... 11

*Bothell v. Phase Metrics, Inc.*,  
299 F.3d 1120 (9th Cir. 2002) ..... 11

*Chao v. A-One Med. Servs., Inc.*  
346 F.3d 908 (9th Cir. 2003) ..... 10

*Chatfield v. Children's Servs., Inc.*,  
555 F. Supp. 2d 532 (E.D. Penn. 2008) ..... 21

*Cleveland v. City of Los Angeles*,  
420 F.3d 981 (9th Cir. 2005) ..... 10-11

*Dybach v. Florida Dep't of Corrections*,  
942 F.2d 1562 (11th Cir. 1991) ..... 14, 18

*Fife v. Harmon*,  
171 F.3d 1173 (8th Cir. 1999) ..... 18

*Klem v. County of Santa Clara*,  
208 F.3d 1085 (9th Cir. 2000) ..... 11, 24

*Long Island Care at Home, Ltd. v. Coke*,  
551 U.S. 158 (2007) ..... 25

*Owsley v. San Antonio Indep. Sch. Dist.*,  
187 F.3d 521 (5th Cir. 1999) ..... 19-20, 23-24

*Piscione v. Ernst & Young, L.L.P.*,  
171 F.3d 527 (7th Cir. 1999) ..... 14

*Reich v. American Driver Serv., Inc.*  
33 F.3d 1153 (9th Cir. 1994) ..... 10

Cases -- continued

*Rutlin v. Prime Succession, Inc.*,  
220 F.3d 737 (6th Cir. 2000) ..... 20-21

*Vela v. City of Houston*,  
276 F.3d 659 (5th Cir. 2001) ..... 20

*Young v. Cooper Cameron Corp.*,  
586 F.3d 201 (2d Cir. 2009) ..... 23

Statutes:

28 U.S.C. 1291 ..... 1  
28 U.S.C. 1331 ..... 1  
28 U.S.C. 1345 ..... 1

Fair Labor Standards Act of 1938,  
as amended; 29 U.S.C. 201 *et seq.*

29 U.S.C. 207(a) ..... 2, 10  
29 U.S.C. 211(c) ..... 2  
29 U.S.C. 213(a)(1) ..... *Passim*  
29 U.S.C. 216(c) ..... 3  
29 U.S.C. 217 ..... 1, 3

Code of Federal Regulations:

29 C.F.R. 541.300 ..... 9, 12, 25  
29 C.F.R. 541.301 ..... 9, 25  
29 C.F.R. 541.301(a) ..... 12  
29 C.F.R. 541.301(a)(3) ..... 12  
29 C.F.R. 541.301(d) ..... 13, 22-23

Miscellaneous:

Fed. R. App. P. 4(a)(1)(B) ..... 2

69 Fed. Reg. 22122 (Apr. 23, 2004) ..... 13-14

United States Dep't of Labor, Wage & Hour  
Opinion Letter, 2001 WL 1558756  
(Jan. 24, 2001) ..... 14-16, 18

United States Dep't of Labor, Wage & Hour  
Opinion Letter, FLSA2005-50, 2005 WL 3308621  
(Nov. 4, 2005) ..... *Passim*

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BRIEF OF THE SECRETARY OF LABOR

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this case pursuant to section 17 of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 217. Jurisdiction was also vested in the district court under 28 U.S.C. 1331 (federal question jurisdiction) and 28 U.S.C. 1345 (vesting jurisdiction in the district courts over suits commenced by an agency or officer of the United States).

This Court has jurisdiction pursuant to 28 U.S.C. 1291. The district court entered an order granting summary judgment to

the State of Washington, Department of Social and Health Services ("DSHS") on April 26, 2010, and entered a final judgment on May 3, 2010. Appellant's Excerpts of Record ("ER") 4, 10-28. The Secretary of Labor ("Secretary") filed a timely notice of appeal on July 1, 2010. See Fed. R. App. P. 4(a)(1)(B).

#### STATEMENT OF THE ISSUE

Whether the district court erred as a matter of law by concluding that social workers working for DSHS are exempt from the overtime requirements of the FLSA under the learned professional exemption in section 13(a)(1) of the FLSA, which applies only if the position at issue requires knowledge customarily acquired by a prolonged course of specialized intellectual instruction.

#### STATEMENT OF THE CASE

##### A. Nature of the Case and Course of Proceedings

On July 31, 2008, the Secretary filed a complaint against DSHS alleging that DSHS violated the FLSA by failing to pay proper overtime compensation to certain social workers as required by section 7(a) of the FLSA, 29 U.S.C. 207(a), and by failing to comply with the recordkeeping requirements of section 11(c) of the FLSA, 29 U.S.C. 211(c). ER 56-59. The Secretary sought to recover unpaid overtime compensation owed under the FLSA and an equal amount in liquidated damages, as well as a

permanent injunction to enjoin DSHS from committing future violations of the FLSA. *Id.*; see 29 U.S.C. 216(c), 217.

On April 26, 2010, the district court granted DSHS's motion for summary judgment, concluding that the social workers at issue in this case ("Social Workers") are exempt from the overtime requirements of the FLSA under the learned professional exemption in section 13(a)(1) of the FLSA. ER 10-28. Further, because the Social Workers are exempt under section 13(a)(1), the court concluded that the recordkeeping requirements do not apply to them and granted summary judgment to DSHS on this issue as well. *Id.*<sup>1</sup> The court entered a dismissal order on April 29, 2010, and a final judgment on May 3, 2010. ER 4-6. The Secretary filed an appeal with this Court.

B. Statement of Facts

The Children's Administration is an agency within DSHS that provides social services for families and children, with the goal of protecting abused and neglected children. ER 41. It employs social workers to work with children and families to

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<sup>1</sup> After reaching these conclusions, the district court noted that there was evidence that the Social Workers worked more than 40 hours in a week for which they were not compensated. ER 28. The court stated that it was unclear from the briefs whether the Secretary could enforce the FLSA for such uncompensated work and whether injunctive relief would be appropriate. *Id.* It requested additional briefing on these issues. *Id.* In response, the Secretary and DSHS stipulated that, given the court's summary judgment ruling, there were no remaining issues in the case and the court should dismiss the case. ER 7-9.

identify needs and develop a customized plan for services that support families and assure the safety and well-being of children. *Id.*

The required qualifications for the social worker positions at issue in this case (Social Worker II and Social Worker III) are set out in the Children's Administration Social Worker Series matrix ("Matrix"). ER 36.<sup>2</sup> The Matrix states that the qualifications for the Social Worker II position are:

A Bachelor's degree or higher in social services, human services, behavioral sciences, or an allied field, and eighteen months as a Social Worker 1 [or, alternatively, two years of paid social service experience performing functions equivalent to a Social Worker 1].

*Id.* The qualifications for the Social Worker III position are:

A Bachelor's degree or higher in social services, human services, behavioral sciences, or an allied field, and one year as a Social Worker 2 [or, alternatively, three years of paid social service experience performing functions equivalent to a Social Worker 2].

*Id.* DSHS also uses an internal document, Social Worker Minimum Qualifications Cheat Sheet ("Cheat Sheet"), to assess each candidate's qualifications. ER 30, 38-39. It provides more

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<sup>2</sup> While the Matrix lists the qualifications for the positions of Social Worker I, II, and III, this case concerns only Social Worker IIs and IIIs. ER 56.



details regarding the degree requirements:

**Education/Degrees:**

Social Services, human services, behavioral sciences or an allied field (Not Social Science)[.]

**Acceptable:** Counseling, Psych, Social Work, Human Services, Sociology, Child Development, Family Studies, Pastoral Counseling, Anthropology, Gerontology, Therapeutic Recreation, Education, Therapeutic Fields, Criminal Justice.

**Not Acceptable:** History, Economics, Civics, Philosophy, Communications, Archaeology, Nursing, Theology, Pastoral Studies, Religion, Recreation, Women's Studies, Native American Studies, Public Administration, Political Science, Law & Justice, Human Resources, Leisure Studies, Physical Education, Law Enforcement, Liberal Arts.

(Note: These Courses would most often be acceptable under the broader heading of Social Sciences and upon review of transcripts if either 30 semester hours or 45 quarter credits were found that fall under Social Services, they could be accepted for Social Workers[.]<sup>3</sup>)

Business Administration, Computer Sciences, Natural Sciences, Physical Sciences, Math, Fine Arts, General Studies.

ER 38.

Thus, the qualifications for a Social Worker II or III position require either a bachelor's degree in one of the "Acceptable" subject areas listed above or, at a minimum in cases in which the bachelor's degree is not in one of the "Acceptable" subject areas, 30 semester or 45 quarter credits of coursework in the "Acceptable" subject areas. For example, a

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<sup>3</sup> "[H]ours" and "credits," as used in reference to college or university classes, seem to be used interchangeably. For purposes of this brief, the term "credits" is used throughout.

History degree with 30 semester credits of Anthropology, or 15 semester credits of Anthropology and 15 semester credits of Counseling, would be sufficient to qualify an individual for a Social Worker II or III position (with the appropriate level of experience). By contrast, a degree in Philosophy with 30 semester credits of history would not be sufficient.<sup>4</sup>

Further, according to DSHS's Recruitment and Classification Manager in charge of screening Social Worker II and III job applicants:

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<sup>4</sup> DSHS's Recruitment and Classification Manager in charge of screening Social Worker II and III job applicants relies upon the Cheat Sheet in determining whether job applicants' education satisfies the educational prerequisites. ER 30. In reference to the Cheat Sheet, she stated:

If a candidate's degree is from an accredited institution and the title of their degree falls within one of those acceptable fields [Counseling, Psychology, Social Work, Human Services, Sociology, Child Development, Family Studies, Pastoral Counseling, Anthropology, Gerontology, Therapeutic Recreation, Education, Therapeutic Fields, Criminal Justice], or they have the requisite semester hours or quarter credits in one of those fields, they have met the educational requirements.

ER 31. Thus, DSHS will consider a candidate with a bachelor's degree in any field and 30 semester or 45 quarter credits of coursework in the "Acceptable" subject areas as having satisfied DSHS's degree requirements for the Social Worker II or III position. Based on this statement, it appears that, in practice, DSHS makes no distinction between candidates with a degree in History versus a degree in Business Administration. Either candidate could qualify if the candidate had completed 30 semester or 45 quarter credits in the "Acceptable" subject areas.

A degree or coursework will fall under an "allied field" if we determine that the coursework is directly related to social work. Coursework is directly related to social work if the courses are ones from fields on our acceptable fields list, if they are part of curriculums within a university's school of social work, or if the course descriptions are similar to those we find in the curriculums from bachelors and masters degrees in the acceptable fields from the University of Washington and Eastern Washington University.

ER 31-32. To make this determination, the Recruitment and Classification Manager or one of her staff members usually reviews the coursework necessary to earn the particular degree and/or course descriptions in the course catalogue on the college or university's website. ER 32.

C. Decision of the District Court

In its order granting DSHS's motion for summary judgment, the district court concluded that the Social Workers are exempt from the FLSA's overtime requirements under section 13(a)(1)'s exemption for professional employees. ER 10-28. Specifically, it concluded that the Social Workers are learned professionals because the Social Worker II and III positions require a sufficient amount of specialized intellectual instruction, and thereby satisfy the educational requirement of the learned professional exemption. ER 27. According to the district court, DSHS's degree requirements, including the alternative requirement of 30 semester or 45 quarter credits of coursework in certain subject areas, "are plainly more exacting" than a

bachelor's degree in any field and more exacting than the general social science degree for social workers that the Department of Labor's Wage and Hour Division ("Wage and Hour") rejected in a 2005 opinion letter. ER 25-26.

In addition, the district court stated that DSHS's requirement that applicants have a certain amount of work experience and its requirement that newly hired Social Worker IIs and IIIs complete a four to six week DSHS-run training course before they can be responsible for individual cases each weigh in favor of the conclusion that the Social Worker II and III positions require a sufficient amount of specialized intellectual instruction. ER 26. The court dismissed the Secretary's interpretation of her regulations, as set forth in her brief, as not supported by the regulations or administrative practices, and therefore not entitled to controlling deference. ER 23.

#### SUMMARY OF ARGUMENT

The district court erred as a matter of law in concluding that DSHS's Social Workers are exempt as learned professionals from the overtime provisions of the FLSA. The social worker positions at issue do not qualify for the learned professional exemption under section 13(a)(1) because these positions do not require a "prolonged course of specialized intellectual instruction," and therefore do not satisfy the regulatory

requirements for this exemption as set forth in 29 C.F.R. 541.300 and 541.301.

DSHS's minimum educational qualifications for these positions encompass such a diverse range of subject areas that the degree requirements do not constitute specialized instruction. The fact that DSHS deems, for example, a degree in philosophy or history, together with 30 semester or 45 quarter credits of coursework in such seemingly unrelated fields as Anthropology, Gerontology, and Therapeutic Recreation, sufficient for obtaining the positions of Social Worker II and III, reveals that knowledge customarily acquired by a prolonged course of specialized instruction is not a prerequisite for those positions. It is important to note that the relevant inquiry as to whether an employer can avail itself of the professional learned exemption is not what educational achievements the individuals in these particular positions have attained (something that is not clear from the record as currently constituted) but, rather, whether the positions in question require a prolonged course of specialized intellectual instruction (which here they decidedly do not).

Applying the learned professional exemption to this case would essentially render an exemption that must be narrowly construed against the employer meaningless. Most significantly,

it would ignore the Secretary's interpretation of her own regulations, which is entitled to controlling deference.

#### STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. See *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 914 (9th Cir. 2003). "A district court's determinations regarding exemptions to the FLSA are questions of law that we review de novo. However, findings of fact underlying a legal determination are reviewed for clear error." *Cleveland v. City of Los Angeles*, 420 F.3d 981, 988 (9th Cir. 2005) (citation omitted); see *Reich v. Am. Driver Serv., Inc.*, 33 F.3d 1153, 1155 (9th Cir. 1994).

#### ARGUMENT

THE DISTRICT COURT ERRED AS A MATTER OF LAW BY CONCLUDING THAT THE SOCIAL WORKERS WORKING IN THE SOCIAL WORKER II AND III POSITIONS ARE EXEMPT FROM THE OVERTIME REQUIREMENTS OF THE FLSA AS LEARNED PROFESSIONALS UNDER SECTION 13(a)(1) OF THE ACT; THE REQUIREMENTS FOR THESE POSITIONS ARE IN SUCH DIVERSE AND UNRELATED FIELDS THAT THEY CANNOT BE CONSIDERED TO REQUIRE KNOWLEDGE THAT IS CUTOMARILY ACQUIRED BY A PROLONGED COURSE OF SPECIALIZED INSTRUCTION

1. The FLSA requires that employers ordinarily pay their employees one and one-half times the employees' regular rate of pay for overtime hours worked. See 29 U.S.C. 207(a). However, the FLSA provides for an exemption from the overtime requirements for employees employed in a bona fide executive, administrative, or professional capacity, "as such terms are

defined and delimited from time to time by regulations of the Secretary." 29 U.S.C. 213(a)(1).<sup>5</sup> In determining whether an exemption applies, "[t]he FLSA is construed liberally in favor of employees[.]" *Cleveland*, 420 F.3d at 988 (internal quotation marks omitted, citing *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)). Consequently, FLSA exemptions are construed narrowly against employers and "are to be withheld except as to persons plainly and unmistakably within their terms and spirit." *Klem v. County of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000) (internal quotation marks omitted). The criteria to qualify for an exemption are "absolute." *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1125 (9th Cir. 2002) (internal quotation marks omitted). Moreover, the employer asserting an exemption bears the burden of showing that the particular exemption applies. See *id.* at 1124. This is in keeping with one of the purposes of the FLSA, which is "to protect all covered workers from . . . oppressive working hours." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981); see *Adair v. City of Kirkland*, 185 F.3d 1055, 1059 (9th Cir. 1999) (citing *Barrentine*).

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<sup>5</sup> It also provides for an exemption from the minimum wage requirements for such employees. See 29 U.S.C. 213(a)(1). However, payment of the minimum wage is not at issue in this case.

2. Through its legislative rulemaking authority, see 29 U.S.C. 213(a)(1), the Department of Labor ("Department") has defined an "employee employed in a bona fide . . . professional capacity" to mean, in relevant part, an employee paid on a salary basis at a rate of not less than \$455 per week whose primary duty is the performance of work that requires "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." 29 C.F.R. 541.300.<sup>6</sup> This is referred to as "the learned professional" exemption. Section 541.301 requires that three elements be satisfied to meet the primary duty test of the learned professional exemption: "(1) [t]he employee must perform work requiring advanced knowledge; (2) [t]he advanced knowledge must be in a field of science or learning; and (3) [t]he advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction." 29 C.F.R. 541.301(a).<sup>7</sup> The regulations further explain the phrase "customarily acquired by a prolonged course of specialized intellectual instruction":

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<sup>6</sup> There is no dispute that the Social Workers in this case are paid on a salary basis at a rate of not less than \$455 per week.

<sup>7</sup> In the course of the district court proceedings in this case, the Secretary did not dispute that the first and second prongs were satisfied. ER 54-55. Therefore, the only disputed issue is whether the advanced knowledge must be "customarily acquired by a prolonged course of specialized intellectual instruction." 29 C.F.R. 541.301(a)(3).



[It] restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word "customarily" means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry. However, the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.

29 C.F.R. 541.301(d).

Thus, the regulation provides that the professional exemption is available only when specialized academic instruction is a prerequisite for the position, as evidenced by the possession of an appropriate advanced academic degree. It clearly distinguishes positions for which an academic degree in any field would be sufficient; such positions do not satisfy the "prolonged course of specialized instruction" requirement and therefore do not qualify for the professional exemption. See 69 Fed. Reg. 22122, 22150 (Apr. 23, 2004) (Preamble) (occupations

that "require only a four-year college degree in any field or a two-year degree as a standard prerequisite for entrance into the field" do not qualify for the learned professional exemption). Further, the educational requirements for the position, not the education of the specific employees at issue, determine whether the employees fall under the professional exemption. See *Piscione v. Ernst & Young, L.L.P.*, 171 F.3d 527, 545 (7th Cir. 1999); *Dybach v. Florida Dep't of Corrections*, 942 F.2d 1562, 1565 (11th Cir. 1991) ("[T]he determinative factor is the job requirement and not the education in fact acquired by the employee.").

3. The Department has interpreted these regulations as applied to social workers in two opinion letters. See Opinion Letter, FLSA2005-50, 2005 WL 3308621 (Nov. 4, 2005) ("2005 Opinion Letter"); Opinion Letter, 2001 WL 1558756 (Jan. 24, 2001) ("2001 Opinion Letter"). In the first of these opinion letters, social caseworkers were required to have, at a minimum, a bachelor's degree in "human behavioral science." 2001 Opinion Letter. The employer considered the degree requirement met by completion of 30 semester or 45 quarter hours in either "development of human behavior, child development, family intervention techniques, diagnostic measures of therapeutic techniques such as social work, psychology, sociology, guidance and counseling, and child development." *Id.* Wage and Hour

concluded that the position of social caseworker met the requirements of the professional exemption. *Id.*

In the second of these opinion letters, Wage and Hour concluded that caseworkers who needed only a bachelor's degree in the social sciences did not qualify for the learned professional exemption. See 2005 Opinion Letter.<sup>8</sup> "The course of study for a bachelor's degree in 'social sciences' does not constitute the 'specialized' academic training necessary to qualify an occupation for the learned professional exemption. Thus, specialized academic training is not a standard prerequisite for their employment." *Id.* (emphasis added). These letters make clear that a social worker position which requires a bachelor's degree in any social science is not a position that requires knowledge that is "customarily acquired by a prolonged course of specialized intellectual instruction"; however, a social worker position which requires a bachelor's degree in the specific fields of psychology or sociology, among other specialized, related areas of study, is a position that requires knowledge that is "customarily acquired by a prolonged course of specialized intellectual instruction."

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<sup>8</sup> The 2005 letter distinguished social workers, who were required to have a master's degree in social work, drug and alcohol, education, counseling, psychology, or criminal justice, plus two years of post-masters work experience, as qualifying for the learned professional exemption. See 2005 Opinion Letter.

4. In this case, DSHS's Social Worker II and III positions do not require a prolonged course of specialized instruction. The minimum qualifications for the Social Worker II and III positions, as stated in the Matrix, are a bachelor's degree in "social services, human services, behavioral sciences, or an allied field," and varying levels of professional experience. DSHS's Cheat Sheet indicates that the minimum qualifications are actually broader than the Matrix states. In the Cheat Sheet, DSHS deems degrees in several diverse and unrelated fields, such as Anthropology, Gerontology, and Therapeutic Recreation, in addition to degrees in such fields as Social Work, Psychology, Sociology, and Counseling, as "Acceptable."<sup>9</sup> The fact that so many subject areas in such unrelated fields are sufficient for the Social Worker II and III positions shows that these positions do not require a prolonged course of specialized instruction. If a Social Worker II or III position can be performed by an individual with a degree in Anthropology just as

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<sup>9</sup> In accordance with Wage and Hour's 2001 Opinion Letter, degrees in psychology or sociology satisfy the educational requirement of the learned professional exemption. Thus, if DSHS required that candidates have a degree or sufficient coursework in psychology or sociology, the Department would not dispute that this satisfies the educational requirements for the exemption. However, DSHS accepts candidates with degrees or coursework in a much wider range of subject areas than psychology and sociology. The 2001 Opinion Letter did not involve an institution which accepted degrees or coursework in, for instance, Anthropology, Gerontology, Therapeutic Recreation, or Therapeutic Fields.

well as it can by an individual with a degree in Social Work, these positions do not require specialized instruction.

Further, the Cheat Sheet indicates that a degree in these fields is not even necessary; rather, all that is necessary is 30 semester or 45 quarter credits in such fields.<sup>10</sup> DSHS will accept a candidate who has completed, at a minimum, nine classes in any of the Acceptable subjects (for an individual who does not have a degree in one of the "Acceptable" subject areas), or any combination of such subjects. Thus, for example, an applicant with a bachelor's degree in Philosophy and one Psychology class, one Sociology class, two Anthropology classes, two Therapeutic Recreation classes, two Criminal Justice classes, and one Education class (and the requisite professional experience) would be deemed qualified to work as a Social Worker II or III. Therefore, these positions cannot be said to require a degree, or even a prolonged course of specialized instruction, in a related academic field. The wide range of unrelated degrees or coursework that DSHS deems acceptable makes DSHS's degree requirements more analogous to the general social science degree in the 2005 Opinion Letter (which did not qualify the caseworkers for a learned professional exemption) than to the

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<sup>10</sup> Most semester classes are worth three credits. Therefore, 30 semester credits are equivalent to ten classes, or one year of classes. Most quarter classes are worth five credits. Therefore, 45 semester credits are equivalent to nine classes, or one year of classes.

specific degrees in human behavior, child development, family intervention techniques, social work, psychology, sociology, or counseling in the 2001 Opinion Letter (which did qualify the social caseworkers for a learned professional exemption).<sup>11</sup>

5. The relevant appellate case law supports the Secretary's position.<sup>12</sup> The educational degree requirements in this case are most analogous to those in *Dybach v. Florida Dep't of Corrections*, 942 F.2d 1562 (11th Cir. 1991), and *Fife v. Harmon*, 171 F.3d 1173 (8th Cir. 1999). In *Dybach*, the Eleventh Circuit held that probation officers, who were required to have a bachelor's degree in any field, including those not related to corrections or law enforcement, were not learned professionals. See 942 F.2d at 1564, 1566. In *Fife*, the Eighth Circuit noted in dictum that airport Airfield Operations Specialists, whose minimum qualifications were a bachelor's degree in aviation management or a directly related field, would not qualify for the learned professional exemption because the requisite degree was based on a general academic education, not a prolonged course of specialized instruction. See 171 F.3d at 1177. Here,

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<sup>11</sup> The Department has never stated in any of its opinion letters that degrees or coursework in subjects such as Anthropology, Gerontology, Therapeutic Recreation, or Therapeutic Fields are sufficient to satisfy the learned professional exemption for social workers.

<sup>12</sup> No appellate case has addressed the learned professional exemption as applied to social workers.

the fact that so many diverse subject areas, ranging from Anthropology to Therapeutic Recreation, satisfy the educational prerequisites of the Social Worker II and III positions indicates that the instructional requirements are similar to the general requirements that were rejected in *Dybach* and *Fife* as not qualifying for the learned professional overtime exemption.

Nor is *Owsley v. San Antonio Indep. Sch. Dist.*, 187 F.3d 521 (5th Cir. 1999), to the contrary. The Fifth Circuit in *Owsley* concluded that athletic trainers who were required to have a bachelor's degree in any field and a certain amount of specialized coursework (plus a certain number of hours of apprenticeship) qualified as learned professionals. See 187 F.3d at 524-25. However, a closer examination of the coursework requirements in *Owsley* indicates that it is distinguishable from the instant case. Unlike the Social Workers in this case, who are required to have completed a minimum of nine or ten classes in any of a wide range of unrelated subject areas (for instance, Psychology, Sociology, Anthropology, Pastoral Counseling, Gerontology, Therapeutic Recreation, or Criminal Justice), the athletic trainers in *Owsley* were required to have completed five classes in five specific subjects (anatomy, health, kinesiology, physiology, athletic training), all of which shared a direct connection to sports medicine and athletic training. See *id.* This specific coursework requirement was determinative in the

court's analysis and conclusion. The court distinguished a 1993 opinion letter in which the Department stated that athletic trainers did not qualify as learned professionals; in the 1993 scenario, the trainers were not required to have taken the five specialized college courses, and therefore the 1993 letter did not account for this additional specialized training. See *id.* at 525. It is this specialized intellectual instruction, upon which the court relied in *Owsley*, that is lacking here.

Consequently, unlike *Owsley*, the Social Worker II and III positions do not require specialized instruction, and therefore do not qualify as learned professional positions. See *Vela v. City of Houston*, 276 F.3d 659, 675-76 (5th Cir. 2001)

(distinguishing *Owsley* because the educational requirements for emergency medical technicians and paramedics, which consisted of 800 and 200 hours, respectively, of training, clinical experience, and field internship, but not a bachelor's degree, were less rigorous than those for the athletic trainers in *Owsley*).

*Rutlin v. Prime Succession, Inc.*, 220 F.3d 737 (6th Cir. 2000), is similarly distinguishable. In *Rutlin*, the Sixth Circuit concluded that a funeral director and embalmer position qualified as an exempt learned professional position. See *id.* at 742. While the position did not require a bachelor's degree, it nonetheless required a year of mortuary science school and



two years of college with very specific coursework relevant to the position (i.e., chemistry and psychology). See *id.* Again, the coursework requirements in *Rutlin* were specialized in relation to the duties of the position of embalmer and funeral director. As discussed *supra*, a close analysis of the Cheat Sheet reveals that such specialization of coursework is not required to become a Social Worker II or III. In sum, the coursework that DSHS deems acceptable is much more diverse and general than the specialized coursework required in *Owsley* and *Rutlin*.<sup>13</sup>

6. The district court's reliance on two additional factors beyond the educational prerequisites to support its conclusion that the Social Worker II and III positions require a sufficient

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<sup>13</sup> In *Chatfield v. Children's Servs., Inc.*, 555 F. Supp. 2d 532 (E.D. Pa. 2008), Children's Services required its Truancy Prevention Case Managers to have a bachelor's degree in social work, human services, or a related field, plus three years of work experience. See *id.* at 535-56. The plaintiff, Chatfield, had a bachelor's degree in psychology, which the court concluded was consistent with the degree requirements for the position. See *id.* at 536. The court further concluded that the educational prerequisites for this position satisfied the specialized instruction requirement for the learned professional exemption. The court distinguished Children's Services' degree requirements, which it concluded were sufficiently specialized in a field related to the work that Truancy Prevention Case Managers perform, from the broad, unspecified group of social sciences that the Department rejected in its 2005 Opinion Letter as not sufficiently specialized. See *id.* at 537. Thus, Children's Services in *Chatfield* properly accepted psychology as a related field; there is no indication that the court there would have accepted the wide and diverse range of degrees at issue here.

amount of specialized intellectual instruction, ER 26, is based on a misinterpretation of the specialized educational requirement of the learned professional exemption. Specifically, as to the first factor the court relied on -- DSHS's requirement that applicants have a certain amount of work experience -- the court misinterpreted the relevance of work experience as it relates to the prolonged course of specialized intellectual instruction required for the learned professional exemption. The Department's regulation on this subject, 29 C.F.R. 541.301(d), states that the learned professional exemption is available to an employee in a profession in which a prolonged course of specialized intellectual instruction is a standard prerequisite for entrance into the profession, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. "Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry." 29 C.F.R. 541.301(d). In other words, a combination of work experience and intellectual instruction is sufficient to qualify for the learned professional exemption only for the occasional individual employee and only for a profession in which a prolonged course of intellectual

instruction is a standard prerequisite for entrance into the profession.

DSHS's requirement that all Social Worker IIs and IIIs have work experience does not satisfy this criterion. Because DSHS's educational prerequisites do not themselves constitute specialized instruction, DSHS's work experience requirement cannot substitute for this educational deficiency. Moreover, DSHS's work experience requirement is for all Social Worker IIs and IIIs, not the occasional individual Social Worker II or III as contemplated by the regulation. See *Young v. Cooper Cameron Corp.*, 586 F.3d 201, 206 (2d Cir. 2009) (citing 29 C.F.R. 541.301(d) and concluding that "'customarily' . . . makes the [learned professional] exemption applicable to the rare individual who, unlike the vast majority of others in the profession, lacks the formal educational training and degree. But where most or all employees in a particular job lack advanced education and instruction, the exemption is inapplicable"). The district court's reliance on *Owsley*, and specifically the requirement in *Owsley* that the athletic trainers have 1,800 hours of apprenticeship in addition to a bachelor's degree, ER 26, is misplaced. While 1,800 hours of apprenticeship was one of the prerequisites for athletic trainers in *Owsley*, the court attributed no importance to that particular requirement in concluding that the athletic trainers

had sufficiently specialized instruction; the only factor relevant to the Fifth Circuit's conclusion was the coursework requirement in subject areas directly relevant to the work of the athletic trainers. See 187 F.3d at 524-25.

As to the second factor -- DSHS's requirement that newly hired Social Worker IIs and IIIs complete a four to six week DSHS-run training course before they can be responsible for individual cases -- the court again misinterpreted the relevance of this training course in applying the learned professional exemption. In fact, DSHS's training course is irrelevant to the question at issue here because it is not a prerequisite for being hired as a Social Worker II or III. Rather, it is a course that all newly hired Social Worker IIs and IIIs must take in order to keep their job and before they can be responsible for individual cases.

7. The Secretary's interpretation of the learned professional regulation as applied to DSHS's Social Workers is entitled to controlling deference. Where a particular requirement is a creature of an agency's own regulations, the agency's interpretation of it is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted); see *Klem*, 208 F.3d at 1089 (citing *Auer*). The Secretary's interpretation is entitled to controlling deference

even when the interpretation is advanced in the form of a legal brief, as long as that interpretation reflects "the agency's fair and considered judgment on the matter in question," and is not "a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack[.]" *Auer*, 519 U.S. at 462; see *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007) (citing *Auer* and concluding that Department's interpretation in an Advisory Memorandum drafted in response to litigation reflects the Department's considered views, as evidenced by the fact that the Department has addressed the issue for at least ten years).

In this case, the Secretary has interpreted her own regulations, 29 C.F.R. 541.300 and 541.301 (promulgated pursuant to specific congressional authorization and after notice and comment rulemaking), which require a prolonged course of specialized instruction as a precondition to the learned professional exemption, as not being satisfied by the educational prerequisites for DSHS's Social Workers. Because the Secretary's position in this case, as set forth in her brief before this Court, is consistent with the regulations and the Department's opinion letters, it deserves controlling deference. As in *Auer*, there is no reason to suspect that the Secretary's interpretation of her own regulations does not reflect her fair and considered judgment on this issue. The district court thus

inappropriately dismissed the Secretary's position as deserving no deference. ER 23.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision and conclude that DSHS's Social Worker IIs and IIIs are not exempt as learned professionals under section 13(a)(1) of the FLSA.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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I certify that the brief for the Secretary of Labor was served electronically through this Court's CM/ECF filing system on the following individuals on this 8th day of October, 2010:

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATION

I certify that this copy of the Secretary's brief is identical to the Secretary's brief that was filed electronically on October 8, 2010.

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