



March 17, 2011

*BY E-MAIL AND OVERNIGHT DELIVERY*

Catherine O'Hagan Wolfe  
Clerk of Court  
U.S. Court of Appeals for the Second Circuit  
Thurgood Marshall United States Courthouse  
40 Foley Square  
New York, NY 10007

Re: Mullins, et al. v. City of New York, No. 09-3435-cv

Dear Ms. O'Hagan Wolfe:

In a letter dated November 30, 2010, this Court requested that the Department of Labor ("Department") submit a letter brief addressing whether the Plaintiffs-Appellants, a group of police sergeants with the New York City Police Department, satisfy the executive exemption from the overtime requirements of the Fair Labor Standards Act ("FLSA" or "Act"). This Court specifically asked whether the sergeants satisfy two particular elements of the FLSA's executive exemption: (1) whether, pursuant to 29 C.F.R. Part 541 and the 2004 preamble to those regulations, the primary duty of the sergeants is "management"; and (2) whether, if the sergeants' primary duty is management, the evidence presented at trial was sufficient to show that they make recommendations as to tangible employment actions affecting others that are given "particular weight". On behalf of the Department, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae*.

The Department's position is that the district court erred by ruling that the primary duty of the sergeants is management and by granting summary judgment in favor of the City of New York on that element of the executive exemption. Specifically, the district court erred by expressly disregarding 29 C.F.R. 541.3(b), which plainly applies to the sergeants in this case and is entitled to controlling deference. It provides, when determining whether a police officer's primary duty is management, that field law enforcement work by the police officer (i.e., front-line law enforcement) is not management. See 29 C.F.R. 541.3(b)(1), (2). It further provides that, if a police officer's primary duty is field law enforcement work, then his or her primary duty is not management even if he or she directs other officers in the course of performing the field law enforcement work. See 29 C.F.R. 541.3(b)(2). Section 541.3(b) must be applied along with 29 C.F.R. 541.700 and the other pertinent regulations in 29 C.F.R. Part 541 when analyzing whether the sergeants are exempt. Applying those regulations to the district court's factual findings, the primary duty of the sergeants is law enforcement in the field, and thus not management. Because the Department's position is that the sergeants' primary duty is not management and because the sergeants must satisfy each element of the executive exemption to be exempt, see 29 C.F.R. 541.100(a), this brief does not address the other element of the executive exemption about which

the Court inquired (whether the sergeants make recommendations as to tangible employment actions affecting others that are given particular weight).<sup>1</sup>

1. The FLSA's Executive Exemption and 29 C.F.R. 541.3(b)

An employee satisfies the executive exemption if he or she: (1) is paid a weekly salary of at least \$455; (2) has management as his or her primary duty ("management" is discussed in 29 C.F.R. 541.102, and "primary duty" is discussed in 29 C.F.R. 541.700); (3) regularly supervises two or more employees; and (4) has the authority to hire or fire or makes recommendations as to tangible employment actions affecting others that are given particular weight. See 29 C.F.R. 541.100(a). An employee must satisfy all four elements for the exemption to apply. See id. This version of the executive exemption has been in place since August 23, 2004 – the effective date of the Department's 2004 revisions to 29 C.F.R. Part 541. See 69 Fed. Reg. 22,122 (Apr. 23, 2004). Only the second element (primary duty is management) and the fourth element (making recommendations as to tangible employment actions affecting others that are given particular weight) are disputed. See Mullins v. City of New York, 523 F. Supp.2d 339, 355-60 (S.D.N.Y. 2007).<sup>2</sup>

Significantly, as part of the 2004 revisions to 29 C.F.R. Part 541, the Department added 29 C.F.R. 541.3(b). See 69 Fed. Reg. at 22,128-29. Section 541.3(b) addresses how the "primary duty is management" element of the executive exemption applies to police officers and other first responders:

(1) The section 13(a)(1) exemptions and the regulations in this part also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any

---

<sup>1</sup> As this Court is aware, the Secretary filed an amicus brief dated July 20, 2007 with the district court during the summary judgment briefing. See Brief of the Secretary of Labor as Amicus in the Disposition of Plaintiffs' Motion for Summary Judgment ("District Court Amicus Brief"). In that prior brief, the Secretary discussed the current version of the executive exemption, explained the meanings of "primary duty" and "management," and discussed the addition of 29 C.F.R. 541.3(b) to the regulations and its meaning. See id. at 3-6, 8-13. The Secretary, however, did not apply the "primary duty is management" analysis to the facts regarding the sergeants' duties, and did not express a position as to whether summary judgment should have been granted for or against the sergeants on that element of the executive exemption.

<sup>2</sup> The sergeants seek overtime compensation dating back to 2001. See Mullins, 523 F. Supp.2d at 340. However, this Court's questions indicate that it seeks the Department's position on whether the sergeants satisfy the current version of the executive exemption (effective as of August 23, 2004). Moreover, the Secretary did not address in her amicus brief to the district court whether the sergeants satisfy the pre-August 23, 2004 version of the exemption. See District Court Amicus Brief, 3 n.1. Therefore, this brief addresses whether the sergeants satisfy the executive exemption only under the current version of the exemption.

type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

(2) Such employees do not qualify as exempt executive employees because their primary duty is not management of the enterprise in which the employee is employed or a customarily recognized department or subdivision thereof as required under § 541.100. Thus, for example, a police officer or fire fighter whose primary duty is to investigate crimes or fight fires is not exempt under section 13(a)(1) of the Act merely because the police officer or fire fighter also directs the work of other employees in the conduct of an investigation or fighting a fire.

29 C.F.R. 541.3(b)(1), (2). The Secretary explained the importance of 29 C.F.R. 541.3(b) in her amicus brief to the district court: "The new Part 541 regulations also include, for the first time, provisions that explicitly address the application of the overtime exemptions to police officers and other first responders." District Court Amicus Brief, 4.

2. 29 C.F.R. 541.3(b) Applies to Police Officers, such as the Sergeants in this Case, who Perform Field Law Enforcement Work

---

As noted *supra*, section 541.3(b) applies to any exemption analysis involving police officers who, "regardless of rank or pay level," "perform work such as . . . preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work." 29 C.F.R. 541.3(b)(1). It must therefore be part of any exemption analysis when the employees at issue are police officers who perform law enforcement work in the field.

The district court's factual findings leave no doubt that the sergeants perform the field law enforcement work necessary for 29 C.F.R. 541.3(b) to apply. For example, sergeants in the Housing Bureau prevent and detect crimes by patrolling public housing properties (inside buildings and the streets around them) to suppress criminal activity such as the sale of narcotics. *See Mullins*, 523 F. Supp.2d at 345-46. Likewise, sergeants in the Transportation Bureau patrol the highways and dense pedestrian areas such as beaches, public parks, and tourist areas. *See id.* at 347. Sergeants conduct investigations or inspections for violations of law and interview witnesses and interrogate suspects by "conducting interviews of witnesses, suspects, and victims" (*id.* at 342, 357), verifying whether probable cause to arrest a suspect exists, verifying the target location for search warrants and determining whether a warrant is appropriate, and securing and determining the size and scope of a crime scene (*see id.* at 342). They prepare investigative reports, such as reports on unusual occurrences and car chases, and they review and verify complaint reports, stop-and-frisk reports, and arrest reports. *See id.* at 343. Sergeants in Anti-Crime units perform surveillance by acting as observation posts in the field, relaying information to team members who then apprehend and arrest individuals observed selling

narcotics. See id. at 346. Sergeants pursue, restrain, apprehend, and arrest suspects; transport prisoners; capture persons subject to warrants; and detain and supervise suspected and convicted criminals. See id. at 342, 357. One sergeant "participated in and verified" at least 164 arrests in a 17-month period, and another "participated in and verified" at least 114 arrests, transported prisoners at least 55 times, and captured persons subject to warrants in a five-month period. Id. at 346. In addition, sergeants take emotionally disturbed individuals into custody and may use tasers, water cannons, and restraining tape when handling suspects. See id. at 342. Thus, the district court properly found that the sergeants perform extensive field law enforcement work.

### 3. 29 C.F.R. 541.3(b) Provides that Field Law Enforcement Work Is Not Management

Prior to the addition of 29 C.F.R. 541.3(b) as part of the 2004 revisions to 29 C.F.R. Part 541, the regulations did "not explicitly address" the exempt status of police officers and other first responders. 69 Fed. Reg. at 22,129. The preamble to those revisions notes: "Most of the courts facing this issue have held that police officers, fire fighters, paramedics and EMTs and similar employees are not exempt because they usually cannot meet the requirements for exemption as executive or administrative employees." Id. The preamble cites eight court decisions, all of which concluded that the employees at issue were not exempt. See id. For example, the preamble states that this Court held that "police investigators whose duties included investigating crime scenes, gathering evidence, interviewing witnesses, interrogating and fingerprinting suspects, making arrests, conducting surveillance, obtaining search warrants, and testifying in court" do not satisfy the administrative exemption "because their primary duty is conducting investigations, not administering the affairs of the department itself." Id. (citing Reich v. State of New York, 3 F.3d 581, 585-87 (2d Cir. 1993)). The preamble further cites a district court decision from this Circuit, which held that "investigators of environmental crimes who carry firearms, patrol a sector of the state and conduct covert surveillance, and rangers who prevent and suppress forest fires, are not exempt administrative employees." Id. (citing Mulverhill v. State of New York, 1994 WL 263594 (N.D.N.Y. 1994)). The officers in these cases performed field law enforcement work. Immediately following the discussion of the eight cases, the preamble states:

The Department has no intention of departing from this established case law. Rather, for the first time, the Department intends to make clear in these revisions to the Part 541 regulations that such police officers, fire fighters, paramedics, EMTs and other first responders are entitled to overtime pay.

Id. (emphases added). By referring to "this established case law," the Secretary unmistakably approved of these court decisions that had found police officers and other first responders, based on their duties, to be non-exempt. Id.

Thus, police officers' field law enforcement work is not exempt management work. See 29 C.F.R. 541.3(b)(1), (2). As the Secretary stated in her amicus brief to the district court, she "added section 541.3(b) to clarify that front line police officers, regardless of rank, whose primary duty is law enforcement in the field are not exempt from the FLSA's overtime requirements." District Court Amicus Brief, 5. Section 541.3(b) is consistent with the Secretary's longstanding focus on an employee's duties as determining his or her exempt status.

See 29 C.F.R. 541.2 (job title alone is insufficient to determine whether an employee is exempt; employee's exempt status is determined by his or her duties); District Court Amicus Brief, 6 ("[T]he new regulations do not depart from the 'established case law' in which application of the duties test determines whether a given employee is exempt.").<sup>3</sup>

Section 541.3(b) further provides that field law enforcement work does not become management simply because the police officer "directs the work of other employees" while performing such work. 29 C.F.R. 541.3(b)(2) ("Thus, for example, a police officer . . . whose primary duty is to investigate crimes . . . is not exempt . . . merely because the police officer . . . also directs the work of other employees in the conduct of an investigation . . ."). As the Secretary stated in her amicus brief to the district court:

The preamble cites police sergeants as an example of a first responder who typically is nonexempt: when police sergeants' primary duty consists of front line law enforcement, they "are entitled to overtime pay even if [in the course of such front line law enforcement] they direct the work of other police officers because their primary duty is not management or directly related to management or general business operations."

District Court Amicus Brief, 6 (quoting 69 Fed. Reg. at 22,129) (bracketed language added by Secretary in District Court Amicus Brief).

Section 541.3(b), however, does not purport to make all police officers non-exempt; the determining factor remains their primary duty. See 29 C.F.R. 541.700(a). Indeed, the preamble notes that "[f]ederal courts have found high-level police and fire officials to be exempt executive or administrative employees only if, in addition to satisfying the other pertinent requirements, . . . their primary duty is performing managerial tasks . . . ." 69 Fed. Reg. at 22,130. The preamble specifically lists tasks that those courts found to be managerial, including "directing operations at crime, fire or accident scenes, including deciding whether additional personnel or equipment is needed." *Id.*<sup>4</sup> The cases identified in the preamble (all decided prior to 2004) involved the high-level direction of operations by fire chiefs and fire captains who generally did not engage in any front-line firefighting. For example, in *Smith v. City of Jackson*, 954 F.2d 296, 297 (5th Cir. 1992), the district chiefs and battalion chiefs responded only to substantial fires, assumed control of the scene and directed firefighting and lifesaving operations when they responded, decided whether additional equipment or personnel were needed and when personnel could withdraw from the scene, and "participate[d] 'hands on' in the firefighting operation" only on "infrequent occasions." In *Masters v. City of Huntington*, 800 F. Supp. 363, 365-66 (S.D. W.Va. 1992), the deputy chiefs oversaw six fire stations, did not respond to every fire, and took command of operations when they did respond. The captains oversaw one fire station, took command of operations at fires if the deputy chief was not present, and directed operations in a particular area of a fire scene when the deputy chief was present. See *id.* Moreover, the court held, with respect to lieutenants in the fire department, that neither their usual duties nor the fact that they

---

<sup>3</sup> Defining field law enforcement work to be non-exempt work and not management is also consistent with the Secretary's general determination that manual labor and "blue collar" work cannot be exempt. See 29 C.F.R. 541.3(a).

<sup>4</sup> This Court cited this quotation from the preamble in its questions to the Department.

occasionally assumed captains' responsibilities were sufficient to make them exempt. See id. at 368-69. In West v. Anne Arundel County, 137 F.3d 752, 763 (4th Cir. 1998), the captains' duties did not include any front-line first responding; instead, the captains "spent almost all of their time managing personnel, evaluating personnel performance, attending management meetings, performing administrative tasks in regard to management, handling sick leave, managing the distribution of equipment, and instructing subordinates." And the field lieutenants spent only a minority of their time supervising EMS operations in the field and spent a majority of their time performing management duties such as coordinating and implementing training, maintaining personnel records, ensuring operational readiness, evaluating and testing subordinates, and reporting and making recommendations on equipment and procedures. See id. at 763-64.<sup>5</sup> As the Secretary stated in her brief to the district court:

[T]he types of managerial duties performed by some high-ranking police officers . . . [b]y way of contrast, . . . reinforce the Secretary's position that front-line law enforcement, such as patrolling, firing taser guns, serving warrants, participating in and making arrests, investigating crimes, interviewing and interrogating witnesses, and securing crime scenes are front-line law enforcement activities that are not management tasks under section 541.3(b).

District Court Amicus Brief, 11 (emphases added).

#### 4. 29 C.F.R. 541.3(b) Is Entitled to Controlling Deference

The FLSA delegates to the Secretary the authority to define through regulations the scope of the executive, administrative, professional, and outside salesman exemptions from the Act's overtime requirements. See 29 U.S.C. 213(a)(1). The Part 541 regulations were promulgated pursuant to that express statutory grant of rulemaking authority after notice and comment. See 69 Fed. Reg. at 22,123-24 (citing 29 U.S.C. 213(a)(1)). Those regulations, including 29 C.F.R. 541.3(b), are therefore entitled to controlling deference. See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific

---

<sup>5</sup> In Simmons v. City of Fort Worth, 805 F. Supp. 419, 421 (N.D. Tex. 1992), the deputy chiefs oversaw between 15 and 186 employees; were responsible for planning, organizing, directing, and evaluating the work of an entire division within the department (including developing fire department policies, training staff, and preparing budgets); and directed firefighting operations when necessary. The fire district chiefs oversaw between 9 and 37 employees; were responsible for planning, organizing, and directing their assigned fire companies; scheduled and supervised training; were responsible for readiness; completed reports; evaluated personnel performance; and assisted in preparing budgets and establishing goals and objectives. See id. At fire scenes, they generally evaluated conditions and requested assistance if warranted. See id. In Keller v. City of Columbus, 778 F. Supp. 1480, 1482-83 (S.D. Ind. 1991), the captains and lieutenants were each responsible for one of the city's fire stations; were responsible for ensuring the readiness of the station's equipment, property and personnel; maintained personnel records; commanded and directed operations at a fire or emergency scene; and led firefighters "in actual fire suppression activities" only when relieved of overall command by a higher ranking officer.

provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."); see also Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 165-68, 171-74 (2007). Furthermore, courts must give controlling deference to the Secretary's interpretation of her own regulations unless it is plainly erroneous or inconsistent with the regulation. See Auer v. Robbins, 519 U.S. 452, 461 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it [in an amicus brief] is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation.") (internal quotation marks omitted); see also Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 881-82 (2011) (relying on Auer and deferring to agency's amicus brief); Fed. Express Corp. v. Holowecki, 552 U.S. 389, 397 (2008) (under Auer, courts accept an agency's reasonable interpretation of its regulations set forth in an amicus brief); Coke, 551 U.S. at 171 (where the Secretary's interpretation of her own regulation reflects her fair and considered judgment on matter in question, her interpretation is controlling). This principle holds true whether the Secretary's interpretation of her own regulations is articulated in a legal brief, in the preamble to the regulations, or in other interpretive materials. See Coke, 551 U.S. at 171 (internal advisory memorandum); Auer, 519 U.S. at 462-63 (amicus brief); Rucker v. Lee Holding Co., 471 F.3d 6, 12-13 (1st Cir. 2006) (regulatory preamble). The Secretary's interpretation of 29 C.F.R. Part 541 reflects the Department's careful and considered analysis of the FLSA's executive exemption as it applies to police officers. As such, the Secretary's interpretation, as set forth in the 2004 preamble to the revisions to 29 C.F.R. Part 541 and in this brief, is dispositive.

5. The District Court Erred by Disregarding 29 C.F.R. 541.3(b)

In setting forth the applicable legal standards for analyzing the sergeants' primary duty, the district court referred to 29 C.F.R. 541.3(b) and stated:

This carve-out for first responders is justified on the grounds that "[s]uch employees" do not have management as their primary duty, and cannot therefore be properly considered exempt executives. "Thus, for example, a police officer . . . whose primary duty is to investigate crimes . . . is not exempt . . . merely because the police officer . . . also directs the work of other employees in the conduct of an investigation . . . ."

See Mullins, 523 F. Supp.2d at 353 (quoting 29 C.F.R. 541.3(b)(2)) (brackets and ellipses added by district court). As the district court turned to applying the legal standards to its factual findings, however, it disregarded 29 C.F.R. 541.3(b) as not having any relevant part in the analysis. See id. at 354. After quoting the discussion of 29 C.F.R. 541.3(b) in the preamble to the 2004 revisions to 29 C.F.R. Part 541 that police sergeants whose primary duty is field law enforcement work would still be "entitled to overtime pay even if they direct the work of other police officers because their primary duty is not management," see id. (quoting 69 Fed. Reg. at 22,129), the district court stated: "The Department of Labor, however, also makes clear that it has 'no intention of departing from [ ] established case law.'" Id. (quoting 69 Fed. Reg. at 22,129) (brackets added by district court). The district court further stated:

Indeed, in its brief submitted as amicus curiae, the Secretary of Labor reiterates that, with regard to the inquiry into whether an employee's primary duty is management, "the new

regulations do not depart from the 'established case law' in which application of the duties test determines whether a given employee is exempt."

Id. (quoting District Court Amicus Brief, 6). Yet, the pertinent regulation at 29 C.F.R. 541.3(b) played no part in the court's determination that the sergeants' primary duty is management. Because 29 C.F.R. 541.3(b) applies to the sergeants and is entitled to controlling deference, the district court erred by not considering it when analyzing whether the sergeants' primary duty is management. The district court's reasons for disregarding 29 C.F.R. 541.3(b) are without merit.

First, the district court misreads the preamble by asserting that the Department "makes clear" in it that "it has 'no intention of departing from [ ] established case law,'" Mullins, 523 F. Supp.2d at 354 (quoting 69 Fed. Reg. at 22,129) (brackets added by district court), thereby indicating, according to the court, that 29 C.F.R. 541.3(b) has no effect. As explained *supra*, the preamble discusses eight court decisions that concluded that the first responder employees at issue were non-exempt. See 69 Fed. Reg. at 22,129. Immediately following the discussion of those eight court decisions, the preamble states:

The Department has no intention of departing from this established case law. Rather, for the first time, the Department intends to make clear in these revisions to the Part 541 regulations that such police officers, fire fighters, paramedics, EMTs and other first responders are entitled to overtime pay.

Id. (emphasis added). The district court's deletion of the "this" that precedes "established case law," and replacing it with brackets, is not an accurate characterization of the preamble's language and alters its intended meaning. A fuller quotation of the relevant preamble language demonstrates that the Department approved of the specific case law that held that police officers whose primary duty is law enforcement in the field do not satisfy the FLSA's exemptions. Id.

Second, the district court asserted that the Secretary stated in her amicus brief to that court that, when analyzing whether an employee's primary duty is management, "the new regulations do not depart from the 'established case law' in which application of the duties test determines whether a given employee is exempt," Mullins, 523 F. Supp.2d at 354 (quoting District Court Amicus Brief, 6), thereby again attempting to show that the addition of 29 C.F.R. 541.3(b) is without force. The Secretary's prior brief, however, explained the meaning of 29 C.F.R. 541.3(b) and did not invite the district court to disregard it:

The preamble cites police sergeants as an example of a first responder who typically is nonexempt: when police sergeants' primary duty consists of front line law enforcement, they "are entitled to overtime pay even if [in the course of such front line law enforcement] they direct the work of other police officers because their primary duty is not management or directly related to management or general business operations." 69 Fed. Reg. at 22,129. In this regard, the new regulations do not depart from the "established case law" in which application of the duties test determines whether a given employee is exempt. Id. Rather, section 541.3(b) explains that any police officer whose primary duty consists of such law enforcement activities as "preventing or detecting crimes" and "conducting investigations," 29 C.F.R. 541.3(b)(1), even as they are



concurrently "direct[ing] the work of other employees in the conduct of an investigation," are not exempt because their primary duty is not "management of the enterprise in which the employee is employed or a customarily recognized department or subdivision thereof." 29 C.F.R. 541.3(b)(2); see 29 C.F.R. 541.106 (concurrent duties).

District Court Amicus Brief, 5-6 (bracketed language added by Secretary in District Court Amicus Brief). The Secretary was simply making the point that 29 C.F.R. 541.3(b) does not suggest that all police officers are exempt or non-exempt, but instead focuses on their duties as determinative, which she unremarkably noted was consistent with "established case law." Id.<sup>6</sup> The suggestion by the district court that the Secretary was inviting the court to ignore the very regulation that she was explaining and interpreting in her brief defies logic. Section 541.3(b) is entitled to controlling deference and should have been considered by the district court.

6. Application of 29 C.F.R. 541.3(b) Shows that the District Court's Analysis Constituted Legal Error and Application of the Part 541 Regulations as a Whole Shows that the Sergeants' Primary Duty Is Not Management

---

a. The district court concluded that the sergeants' primary duty is management because they are "front-line supervisors of subordinate police officers," they exercise a great deal of management and discretion over "the officers they accompany in the field" and perform additional duties that are separate and distinct from those they "share with their subordinates," and they are paid more than police officers. Mullins, 523 F. Supp.2d at 357-59.<sup>7</sup> The district court's reliance on these factors is contrary to 29 C.F.R. 541.3(b) and does not support a conclusion that the sergeants' primary duty is management.

First, the district court's findings that the sergeants are "front-line supervisors," have responsibility over the police officers with whom they work alongside, and are looked to by police officers for guidance and direction, Mullins, 523 F. Supp.2d at 357-59, do not support its conclusion that the sergeants' primary duty is management. As the district court's findings make evident, the sergeants' direction of police officers is done in conjunction with their performance of field law enforcement work.<sup>8</sup> Section 541.3(b) addresses this very circumstance and provides

---

<sup>6</sup> The Secretary's reiteration that 29 C.F.R. 541.3(b) focuses on the employee's duties is also consistent with pre-2004 versions of 29 C.F.R. Part 541, as well as with 29 C.F.R. 541.2 (employee's salary and duties, as opposed to job title, determine whether he or she is exempt).

<sup>7</sup> The district court concluded that the sergeants' "principal value" to the police department is their service as immediate supervisors in the chain of command to whom police officers look for guidance and direction, "particularly while in the field," but it does not cite any evidence from the record to support its conclusion. Mullins, 523 F. Supp.2d at 358-59.

<sup>8</sup> Sergeants "perform law enforcement duties alongside patrol officers in the field" (Mullins, 523 F. Supp.2d at 357); "generally spend much of their time in the field with their subordinates" (id.); exercise a great deal of management and discretion over "the officers they accompany in the field" (id. at 358); and are looked to by police officers for guidance and direction, "particularly while in the field" (id. at 358-59). Further, sergeants are "making tactical decisions such as when to retreat from a crime scene" (id. at 358); "directing subordinates to canvas a certain area" (id.); "positioning officers in the field for law enforcement operations" (id.); "utiliz[ing] hand signals

that "for example, a police officer . . . whose primary duty is to investigate crimes . . . is not exempt . . . merely because the police officer . . . also directs the work of other employees in the conduct of an investigation . . . ." 29 C.F.R. 541.3(b)(2). In other words, the fact that the sergeants direct police officers while they perform field law enforcement activities does not transform the field law enforcement into management. See id.

Second, the district court's reliance on the sergeants' discretion and additional duties, see Mullins, 523 F. Supp.2d at 358-59, is misplaced. As an initial matter, exercising discretion is not one of the elements of the executive exemption. See 29 C.F.R. 541.100(a). In any event, the sergeants' discretion and additional duties almost entirely relate to their performance of field law enforcement work. See Mullins, 523 F. Supp.2d at 358 (sergeants "exercise discretion and make significant decisions based on their judgment while in the field" and exercise management and discretion over "the officers they accompany in the field") (emphases added). The sergeants' additional duties involving discretion identified by the district court comprise more sophisticated, but nonetheless non-exempt, aspects of field law enforcement work: "verifying whether probable cause to arrest a suspect exists, determining whether a show-up identification procedure is justified, making tactical decisions such as when to retreat from a crime scene, directing subordinates to canvas a certain area, positioning officers in the field for law enforcement operations, and guiding subordinates on proper police procedures." Id. Moreover, the additional duties identified by the district court that the sergeants perform beyond a police officer's duties (see id. at 342-43) are almost entirely field law enforcement work.<sup>9</sup>

---

to position officers on bicycles in the field for law enforcement operations" while on bike patrols (id. at 345-46); "act[ing] as observation posts [and] relaying information to team members who then apprehend and arrest individuals observed selling narcotics" (id. at 346); assigning police officers on their team specific duties during operations, selecting target locations for a particular tour and the order in which to address each target, and "direct[ing] the team's law enforcement activities" during actual operations (id.); "direct[ing] the positioning of the unit's police officers for purposes of setting up crowd control formations" (id. at 347); "direct[ing] police officers to resume patrol when their services are no longer needed" at a crime scene (id. at 343); "direct[ing] patrol officers to make arrests, remove contraband from suspects or prisoners, and conduct searches" (id.); and "taking charge of a crime scene if they are the highest ranking officer present [and] directing other officers and ensuring that they are performing their jobs" (id. at 344).

<sup>9</sup> Sergeants' duties in addition to those that they share with their subordinates include handling unusual or serious incidents, "instances where a firearm has been discharged, felonies, towing incidents, and calls that have occupied officers for more than thirty minutes. Sergeants are dispatched and required to respond when situations involving emotionally disturbed individuals arise, as police officers are not permitted to take such people into custody. In handling suspects, sergeants are authorized to use certain restraining devices that are not available to police officers [including] tasers, water cannons, and restraining tape." Mullins, 523 F. Supp.2d at 342. In addition, sergeants: may initiate "Level One" mobilizations (rapidly mobilizing police personnel to the scene) in unusual or emergency situations; determine when to retreat from a crime scene; direct police officers to resume patrol when their services are no longer needed; decide to direct a line-up change or reallocate and reassign police officers depending on the circumstances of the tour; complete unusual occurrence reports and reports of car chases; review evidence vouchers; and review and verify complaint reports, stop-and-frisk reports, and arrest reports. Id. at 343.

Third, the district court cited "the difference in the rate of pay between a sergeant and a police officer [to] bolster[] the Court's conclusion." Mullins, 523 F. Supp.2d at 359. However, 29 C.F.R. 541.3(b) provides that police officers' front-line law enforcement is not management "regardless of [their] rank or pay level." 29 C.F.R. 541.3(b)(1). Moreover, any enhanced rate of pay presumably is based on the sergeants' additional law enforcement duties as referenced in the preceding paragraph. Accordingly, the district court erred by considering the sergeants' additional pay as compared to police officers.

b. Section 541.3(b) is consistent with, and necessarily informs, the "primary duty" regulation at 29 C.F.R. 541.700 and, when applied together to the district court's factual findings on summary judgment, the conclusion must necessarily be that the sergeants' primary duty is not management. Section 541.700(a) defines "primary duty" as "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." The district court found that the sergeants "perform law enforcement duties alongside patrol officers in the field," "generally spend much of their time in the field with their subordinates," and "spend most of their shifts working alongside their subordinates and performing many of the same law enforcement tasks." Mullins, 523 F. Supp.2d at 357. In light of these specific findings and the district court's factual findings as a whole, the sergeants' primary duty is field law enforcement, which is not management according to 29 C.F.R. 541.3(b). The regulations do identify certain non-exclusive factors for determining an employee's primary duty, including the amount of time spent performing exempt work, "the relative importance of the exempt duties," "the employee's relative freedom from direct supervision," and the employee's salary as compared to others, see 29 C.F.R. 541.700(a); the regulations also provide that an employee can spend a minority of time performing exempt work, i.e., management, and still be exempt if such "other factors support such a conclusion," see 29 C.F.R. 541.700(b). The district court did rely on such other factors – the sergeants' role as "front-line supervisors," their responsibility and discretion in the field, and their higher pay, Mullins, 523 F. Supp.2d at 357-59 – to conclude that the sergeants' primary duty is management. However, as discussed *supra*, 29 C.F.R. 541.3(b) provides that, for police officers such as these sergeants, giving direction and exercising discretion while performing field law enforcement work do not transform their non-management primary duty into a management primary duty, regardless of the police officer's rank or pay. See 29 C.F.R. 541.3(b)(1), (2).

c. The Secretary's definition of "management" confirms this result. The sergeants perform very few of the 15 management activities identified in 29 C.F.R. 541.102. Sergeants do "direct[] the work of employees" (a management activity identified in 29 C.F.R. 541.102), but as discussed *supra*, such direction largely occurs as the sergeants perform field law enforcement work with police officers and is therefore not management. See 29 C.F.R. 541.3(b)(2). Sergeants arguably appraise employees' productivity and efficiency – another identified management activity (29 C.F.R. 541.102). However, the appraisals occupy a small amount of the sergeants' time and are not recommendations for promotion as 29 C.F.R. 541.102 requires in order for the appraisals to be a management activity; instead, promotion is governed by a civil service exam and process.

d. Finally, the Secretary's discussion of concurrent duties further supports this result. Employees who concurrently perform exempt and non-exempt work can be exempt but generally

only if they "make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work." 29 C.F.R. 541.106(a).<sup>10</sup> This does not describe the sergeants' duties. Sergeant is the second lowest rank in the police department out of ten ranks.<sup>11</sup> Sergeants generally cannot decide when to perform field law enforcement; they receive their daily assignments from lieutenants or higher-ranking officers. Mullins, 523 F. Supp.2d at 344. Sergeants are "required to be out in the field on patrol with their unit throughout each shift" (id. at 345), are assigned a pre-determined geographic area that they and their officers patrol (id. at 347), are dispatched to all arrests in their unit and must respond when directly dispatched (id. at 342), and are "dispatched and required to respond when situations involving emotionally disturbed individuals arise" (id.). In addition, the concurrent duties regulations provide that "an employee whose primary duty is to work as an electrician is not an exempt executive even if the employee also directs the work of other employees on the job site, orders parts and materials for the job, and handles requests from the prime contractor." 29 C.F.R. 541.106(c). This is akin to the sergeants' work and their direction of others. Thus, the basis for the district court's decision is flawed, and when applying the applicable regulations at 29 C.F.R. Part 541, including 29 C.F.R. 541.3(b), to the facts as found by the court, the conclusion must be that the sergeants' primary duty is law enforcement in the field and therefore not management.

In conclusion, applying the pertinent regulations from 29 C.F.R. Part 541 to the district court's factual findings, the sergeants' primary duty is field law enforcement, not management. Accordingly, the sergeants do not satisfy the executive exemption.<sup>12</sup>

---

<sup>10</sup> The employee's primary duty is still the benchmark. See 29 C.F.R. 541.106(a) (cross-referencing 29 C.F.R. 541.100).

<sup>11</sup> See Joint Appendix, Volume III, A-290.

<sup>12</sup> Because the sergeants' primary duty is not management, they cannot satisfy the executive exemption even if they make recommendations as to tangible employment actions affecting others that are given particular weight (the fourth element of the executive exemption); accordingly, this brief does not address the exemption's fourth element. Indeed, the phrasing of this Court's second question to the Department recognized that it need not address that element if it were to conclude that the sergeants' primary duty is not management.

Respectfully submitted,

M. PATRICIA SMITH  
Solicitor of Labor

JENNIFER S. BRAND  
Associate Solicitor

PAUL L. FRIEDEN  
Counsel for Appellate Litigation

/s/ Dean A. Romhilt  
DEAN A. ROMHILT  
Attorney  
U.S. Department of Labor  
Office of the Solicitor  
200 Constitution Avenue, N.W.  
Room N-2716  
Washington, D.C. 20210  
202-693-5550

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this brief as *amicus curiae* of the Secretary of Labor was served on each of the following on this 17<sup>th</sup> day of March, 2011, via electronic mail and overnight delivery:

Gregory K. McGillivray  
Woodley & McGillivray  
1125 15th Street, N.W.  
Suite 400  
Washington, D.C. 20005  
gkm@wmlaborlaw.com  
202-833-8855

Counsel for Appellants

Karen M. Griffin  
Corporation Counsel of the City of New York  
100 Church Street  
New York, NY 10007  
kgriffin@law.nyc.gov  
212-788-0791

Counsel for Appellee

/s/ Dean A. Romhilt  
DEAN A. ROMHILT