STATE OF CALIFORNIA GRAY DAVIS, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
LEGAL SECTION
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102
(415) 703-4863

MILES E. LOCKER, *Attorney for the Labor Commissioner*

May 23, 2003

Patricia Gates
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 94612

Re: Determination of Exempt or Non-Exempt Status of Officers and "Key Administrative Personnel" Employed by Labor Unions

Dear Ms. Gates:

This is in response to your letter of February 6, 2003, in which you seek the guidance of the Division of Labor Standards Enforcement ("DLSE") as to whether labor unions' officers and "key administrative personnel" are exempt from overtime payments under California law. You describe "key administrative personnel" as persons having various titles, including district representatives, district agents, lead representatives, business agents, business representatives, field representatives, and organizers. You seek a determination that persons employed in these positions are exempt.

We start with the presumption that all employees are entitled to overtime compensation. This presumption will be defeated if the specific employee in question comes within the exemptions that are set out in the various Industrial Welfare Commission ("IWC") wage orders. Of course, "[t]he employer bears the burden of proving an employee is exempt. (*Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 196-197, 94 S.Ct. 2223, 2229, 41 L.Ed.2d 1.) Exemptions are narrowly construed against the employer and their application is limited to those employees plainly and unmistakably within their terms. (*Dalheim v. KDFW-TV* (5th Cir.1990) 918 F.2d 1220, 1224.)" *Nordquist v. McGraw-Hill Broadcasting* (1995) 32 Cal.App.4th 555, 562, 38 Cal.Rptr.2d 221, 225-226.

The applicable IWC wage order, 4-2001, sets out the requirements for the executive, administrative, and professional exemptions. You suggest that union officers are covered by the

executive exemption, and "key administrative personnel" are covered by the administrative exemption, so our analysis will focus on these. Under subdivision 1(A)(1) of the wage order, a person is considered to be "employed in an executive capacity", and therefore, exempt from overtime, if:

> (a) [his/her] duties and responsibilities involve the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof; and
>
> (b) [he/she] customarily and regularly directs the work of two or more other employees therein; and
>
> (c) [he/she] has the authority to hire or fire other employees or [his/her] suggestions and recommendations as to the hiring and firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
>
> (d) [he/she] customarily and regularly exercises discretion and independent judgment; and
>
> (e) [he/she] is primarily engaged in duties which meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such items are construed in the following regulations under the Fair Labor Standards Act effective as of [June 30, 2000]: 29 C.F.R. Sections 541.102, 541.104-111, and 541.115-116. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies the this requirement.
>
> (f) Such an employee must also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code §515(c) as 40 hours per week.

Under subdivision 1(A)(2) of the wage order, a person is

considered to be "employed in an administrative capacity", and therefore, exempt from overtime, if:

> (a) [his/her] duties and responsibilities involve ... the performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his/her employer's customers ...; and
>
> (b) [he/she] customarily and regularly exercises discretion and independent judgment; and
>
> (c) [he/she] regularly and directly assists a proprietor, or an employee engaged in a bona fide executive or administrative capacity (as such terms are defined for purposes of this section); or
>
> (d) [he/she] performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge; or
>
> (e) [he/she] executes under only general supervision special assignments and tasks; and
>
> (f) [he/she] is primarily engaged in duties which meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such items are construed in the following regulations under the Fair Labor Standards Act effective as of [June 30, 2000]: 29 C.F.R. Sections 541.201-205, 541.207-208, 541.210, and 541.215. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies the this requirement.
>
> (g) Such an employee must also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Full-time employment is defined in Labor Code §515(c) as 40 hours per week.

The word "primarily" as used in subdivision 1(A)(1)(e) and

(A)(2)(f) is defined as "more than one-half of the employee's work time". (Order 4-2001, subd. 2(N).) Thus, one of the prerequisites for exempt status under California law is that the employee must spend more than 50% of his or work time "engaged in" exempt duties. In contrast to the federal "primary duties" test, which looks to the employee's primary responsibility, California's "primarily engaged test (perhaps better stated as the "primary activities" test) looks to what the employee is actually doing during the workday. As the Industrial Welfare Commission acknowledged in its Statement as to the Basis of the 2000 Wage Orders, the federal "primary duty" test provides less protection to employees than California's "primarily engaged" test. The IWC orders which pre-dated AB 60 also contained this stricter test, though with the passage of AB 60 in 1999, the test is now legislatively mandated, as Labor Code §515(a) expressly provides that no employee can be exempt under the executive, administrative or professional exemptions unless "the employee is primarily engaged in the duties that meet the test of the exemption[.]"

The "duties that meet the test of the exemption" are not defined in any statute. Prior to the adoption of the 2000 wage orders, DLSE relied on federal cases and regulations implementing the Fair Labor Standards Act, to the extent that those cases and regulations were not inconsistent with the California wage orders, in determining the sorts of "duties that meet the test." With the adoption of the 2000 wage orders, the IWC expressly stated which federal regulations are to be followed in determining which activities constitute exempt and non-exempt work. Those federal regulations that the IWC omitted from its list of applicable regulations are obviously not to be considered in construing exemptions under California law; indeed, the reason for the omissions are that the IWC considered those regulations to be inconsistent with California law. Likewise, federal cases construing exemptions under the FLSA are applicable only to the extent that state law parallels federal law.

We do not think it is necessary to spend much time here addressing the applicability of the executive exemption. In deciding whether or not specific work tasks fall within the executive exemption, "in the usual situation the determination ... is not difficult. In the vast majority of cases the bona fide executive employee performs managerial and supervisory functions which are easily recognized as within the scope of the exemption." (29 CFR §541.102(a).) Examples of work that fall on the exempt side of the ledger if performed by an employee who manages his or her business, or a customarily recognized department or subdivision thereof, are found at §541.102(b). It should be no more difficult

to apply this test to union officers than to the officers of a corporation. As to those union officers who spend a portion, but not a majority of their worktime engaged in managerial duties, the inquiry would then shift to how much of their time was spent performing exempt administrative duties. The Division of Labor Standards Enforcement construes state law, like federal law (see 29 CFR §541.600), to permit the so-called "tacking" of one type of exempt work with another type, so that, for example, an employee who spends more than 50% of his worktime performing exempt managerial and exempt administrative work would meet the "primarily engaged" test.

As you acknowledge in your letter, you are not aware of any overtime claims filed by former union officers. Rather, the cases that have been filed concern union business agents and other job categories[1] you describe as "key administrative personnel." These cases are likely to turn on the extent to which the specific work that was performed constitutes exempt administrative work[2]. Most of the recent cases that have grappled with the issue of what sort of work does or doesn't fall within the administrative exemption have focused on the significance of 29 CFR §541.205, which construes the term "directly related to management policies or general business operations of the employer or his employer's customers." The IWC orders parallel the federal regulations by giving that term (and the manner in which it is construed in §541.205) key importance in delineating the nature of exempt administrative work. Section 541.205 provides, in relevant part:

> (a) The phrase "directly related to the management policies or general business operations of his employer or his employer's customers" describes those types of activities relating to the administrative operations of a business as distinguished from production or, in a

---

[1] At the risk of stating the obvious, a job "title alone is of little or no assistance in determining the true importance of an employee to the employer or his exempt or nonexempt status under the regulations," and thus, titles "are of no determinative value." 29 CFR §541.201(b).

[2] That is not to forget the necessity of satisfying the salary test in order to fall within the exemption. To be exempt under California law, the employee must be paid on a salary basis, in a monthly amount that is not less than twice the state minimum hourly wage multiplied by forty multiplied by 52 and divided by 12 (currently $2,340 per month). See Labor Code §515(a)and (c).

> retail or service establishment, "sales" work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers.
>
> (b) The administrative operations of the business include the work performed by so-called white collar employees engaged in "servicing" a business, as, for example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control....
>
> (c) As used to describe work of substantial importance to the management or operation of a business, the phrase "directly related to management policies or general business operations" is not limited to persons who participate in the formulation of management policies or in the operation of the business as a whole. Employees whose work is "directly related" to management policies or to general business operations include those whose work affects policy or whose responsibility it is to execute or carry it out. The phrase also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business.
>
> * * * *
>
> (d) [T]he "management policies or general business operations" may be those of the employer or the employer's customers. For example, many bona fide administrative employees perform important functions as advisers and consultants but are employed by a concern engaged in furnishing such services for a fee.... Such employees, if they meet the other requirements of §541.2, qualify for exemption regardless of whether the management policies or general business operations to which their work is directly related are those of their employer's clients or customers or those of their employer.

Like the IWC orders, the federal regulations expressly limit the administrative exemption to those employees who "customarily

and regularly exercise[] discretion and independent judgment". (29 CFR §541.2(b).) That term is defined at 29 CFR §541.207, which is one of the federal regulations adopted by the IWC for use in determining whether activities are exempt, as follows:

> (a) In general, the exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term, as used in the regulations ... moreover, implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance....
>
> (b) The term must be applied in the light of all the facts involved in the particular employment situation in which the question arises. It has been most frequently misunderstood and misapplied by employers and employees in cases involving the following: (1) Confusion between the exercise of independent discretion and independent judgment, and the use of skill in applying techniques, procedures, or specific standards; and (2) misapplication of the term to employees making decisions relating to matters of little consequence.
>
> (c) Distinguished from skills and procedures:
>
> (1) Perhaps the most frequent cause of misapplication of the term "discretion and independent judgment" is the failure to distinguish it from the use of skill in various respects. An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are met ... is not exercising discretion and independent judgment within the meaning of §541.2. This is true even when there is some leeway in reaching a conclusion, as when an acceptable standard includes a range or a tolerance above or below a specific standard.
>
> * * * *
>
> (d) Decisions in significant matters. (1) The second type of situation in which some difficulty with this phrase has been experienced relates to the level or importance of the matters with respect to which the employee may

> make decisions.... [T]he discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence....

Turning to the relevant caselaw, *Bell v. Farmers Insurance Exchange* (2001) 87 Cal.App.4th 805 (rev. denied, 6/20/01; cert. denied at 534 U.S. 1041, 122 S.Ct. 616), is of particular significance, as it is the most recent published California decision to analyze the parameters of the administrative exemption. Although that case arose under IWC Orders 4-89 and 4-98, the predecessor orders to the post-AB 60 revisions to Order 4, the court's analysis is founded upon the same federal regulations, including 29 CFR §541.205, that the IWC has now expressly made applicable to the current wage orders. The *Bell* court reviewed the regulatory history of the IWC's administrative exemption, and concluded (as had the DLSE in prior opinion letters that are cited in *Bell*) that the federal regulations delineating the nature of exempt work were relevant to that determination under state law[3]. Thus, the analysis set forth in *Bell* applies with equal force to all of the post-AB 60 wage orders, including Order 4-2001.

The precise question before the court in *Bell* was whether the "claims representatives" employed by an insurance company were non-exempt as a matter of law. The court noted that claims adjusting was the sole function of the employer's operation, and that this task was performed by the "claims representatives". With that, the court adopted the reasoning of a line of cases that found non-exempt status through application of the administrative/production dichotomy. These cases included *Dalheim v. KDFW-TV, Inc.* (5th Cir. 1990) 918 F.2d 1220 [holding that "production" under 29 CFR §541.205(a) extends beyond manufacturing employees; but rather,

---

[3] The *Bell* court cautioned that because "'the state is empowered to go beyond the federal regulations in adopting protective regulations for the benefit of workers[,][t]he federal authorities are of little if any assistance in construing state regulations which provide greater protection to workers.'" *Bell v. Farmers Insurance Exchange, supra,* 87 Cal.App.4th at pp. 817-818. See also *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785 [IWC orders more protective than federal regulations as to determination of outside sales exemption, so no reliance on federal regulations]; *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 [IWC's broad definition of "hours worked" encompasses certain activities that are excluded from compensation under federal Portal-to-Portal Act, so no reliance on federal law.]

that the distinction is between those employees whose primary duty is administering the business affairs of the enterprise or its customers from those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce or market; and that under this test, a television station's news producers are non-exempt production employees], *Martin v. Cooper Electric Supply Co.* (3d Cir. 1991) 940 F.2d 896 [holding that inside salespersons employed by a wholesale electrical supplier are non-exempt production employees], *Bratt v. County of Los Angeles* (9th Cir. 1990) 912 F.2d 1066, 1070 [holding that deputy probation officers and children's treatment counselors who conduct factual investigations and make recommendations to the courts are not within the administrative exemption as "the services that [these] employees provide the courts do not relate to court policy or overall operational management but to the court's day-to-day production process."], *Reich v. State of New York* (2d Cir. 1993) 3 F.3d 581, 587-588 [holding that the work of investigators for the New York Bureau of Criminal Investigations falls "squarely on the 'production side' of the line" since their primary function was to conduct the service performed by the bureau- criminal investigations], *Reich v. American Intern. Adjustment Co.* (D.Conn. 1994) 902 F.Supp. 321, 325 [using "a production/administrative test" to hold that automobile damage appraisers did not qualify as exempt administrative employees, as the employer "is in the business of resolving damage claims. The appraisers perform the day-to-day activities of the business through their fact finding and damage evaluations...[and] do not administer the business...."], *Reich v. Chicago Title Ins. Co.* (D.Kan.1994) 853 F.Supp.1325, 1330 [holding that notwithstanding employer's status as a title insurer, it is in the escrow closing business, and that "escrow closings are a very real product ..., which it markets and sells separate from ... its overall title insurance operations, so that escrow closers are non-exempt production employees"], and *Fleming v. Carpenters/Contractors Cooperation Com.* (S.D. Cal. 1993) 834 F.Supp. 323, 327 [holding that a labor compliance group's field investigators were non-exempt production employees as they "were engaged in the day-to-day carrying out of CCC's mission of finding and reporting labor law violations committed by contractors on public work projects"][4].

The *Bell* court also analyzed the significance of the work performed by the claims representatives, and concluded their

---

[4] This is not at all different from the work performed by DLSE's field investigators, who investigate wage and hour law violations. These investigators are non-exempt under the FLSA.

responsibilities were "restricted to 'the routine and the unimportant,'" as evidenced by the fact that these employees were ordinarily occupied in the routine of processing a large number of small claims," with their authority to settle claims set at $15,000 or lower. *Bell, supra,* 87 Cal.App.4th at pp. 827-828. Thus, the activities of these employees did not constitute "work of substantial importance to the management or operation of the business of [their] employer or [their] employer's customers" within the meaning of 29 CFR §541.205(a).

Although its holding is unquestionably founded upon the administrative/production dichotomy, the *Bell* court recognized the dichotomy's limitations: "We recognize that the administrative/production worker dichotomy is a somewhat gross distinction that may not be dispositive in many cases. The federal decisions granting judgment for plaintiffs on the basis of this dichotomy were decided in the context of interpretive regulations that guard against an overly broad application of the distinction. For example, some businesses, such as management consulting firms, may provide services that clearly pertain to business administration, even though they are activities that businesses exist to produce and market." *(Bell, supra,* 87 Cal.App.4th at pp. 826-827.) The Court noted that employees engaged in providing such services to their employer's customers may come within the administrative exemption if their work is "directly related to management policies or general business operations [of their] employer's customers" and is "of substantial importance to the management or operation of the [business of their] employer's customers." *Ibid.*, at p. 826, fn. 20. *Bell* thus acknowledged that the fact that an employee is engaged in producing services that the employer exists to market to its customers is not necessarily dispositive, in that subdivision (d) of 29 CFR §541.205 allows for such employees to qualify the administrative exemption -- if the services they provide are of substantial importance and directly related to the their employer's customers' management policies or general business operations. The nature of the work of the claims representatives in *Bell* precluded them from qualifying for the exemption under subdivision (d).

In *Webster v. Public School Employees of Washington* (9th Cir. 2001) 247 F.3d 910, the court dealt with the question of whether a labor union "field representative" met the federal "primary duties" test for the administrative exemption. Although the case was obviously not decided under California's "primarily engaged" test, the court's examination of various job tasks to determine whether they would fall under the administrative or the "production" side of the ledger is based on federal regulations which the IWC has

expressly made applicable to the determination of this issue under state law. Thus, as to the issue of whether the various tasks performed by this union field representative are exempt or non-exempt in nature, this case has great persuasive value[5].

The facts of *Webster* were as follows: The plaintiff, a field representative employed by a union of public school employees, was responsible for the representation of certain union bargaining units consisting of about 1200 school district employees. The union bargaining units were described as self-governing entities pursuant to the union's state by-laws, and the primary role of the bargaining unit is the negotiation and enforcement of collective bargaining agreements. After discussing plaintiff's job description, the court discussed the actual work tasks that he performed (which, in this case, happened to largely mirror the job description):

> Webster spends most of his time negotiating collective bargaining agreements that determine the terms and conditions of employment for bargaining unit members. Webster regularly meets with members of a unit's negotiating committee to draft agreement proposals. Webster explains agreement proposals to rank-and-file members of the bargaining unit and at times submits proposals to school districts.... After Webster and his bargaining team have negotiated a tentative agreement with the school district, Webster explains the agreement to bargaining unit members....
>
> Webster's other main duty is handling bargaining unit member's grievances related to issues arising under the agreements. Webster acts as the members' advocate and representative through a review process that includes hearings before an employee's immediate supervisor, the school superintendent, and the local school board. (*Webster, supra,* 247 F.3d at pp. 912-913.)

The key issue in the case was defined by the court as "whether Webster's duties negotiating collective bargaining agreements and

---

[5] On the other hand, we caution against any reliance on *Webster* with respect to its discussion of the salary basis test under the FLSA, and in particular, the effect of deductions from an exempt employee's accrued vacation balance for partial day absences. State law differs from federal law in this regard. (See OL 2002.08.30, at www.dir.ca.gov/dlse/opinions/2002-08-30.)

handling grievances satisfies the primary duties test." (*Ibid.*, at p. 914.) The Ninth Circuit started from the premise that the union's bargaining units are the union's "customers" for the purpose of analyzing the nature of Webster's work under the federal regulations. Webster argued that because the primary service goal of the bargaining units is to secure collective bargaining agreements with school districts, and because his primary duty was to negotiate those agreements on behalf of the bargaining units, he performed production, not administrative work. The Court rejected that argument, instead reasoning that the union's customers -- the bargaining units -- operate as businesses vis-a-vis their dealings with the school districts, and that "Webster was exempt because his primary duty of contract negotiation involves 'advising the bargaining unit on how to conduct its business (in terms of hours, wages, and working conditions'" and is thus more analogous to administration" than to production. (*Ibid.*, at p. 916.) The court explained that Webster's description of the bargaining units "solely as units of production" (i.e., as businesses designed to produce collective bargaining agreements) "would render the distinction between administrative work and production meaningless." (*Ibid.*) Rather, the court held that the negotiation of collective bargaining agreements is exempt administrative work "because it is 'directly related to management policy or general business operations of [Webster's] employer's customers" within the meaning of 29 CFR §541.2 and 541.205(a). (*Ibid.*) Moreover, the court noted that "[t]he importance of the issues decided by the collective bargaining agreements and the procedures by which the agreements are negotiated place Webster's negotiations squarely within the scope of exempt administrative work." (*Ibid.*) The "importance of the issues decided by the collective bargaining agreements" satisfies the provision at 29 CFR §541.205(a) that "limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers." Presumably, the "procedures by which the agreements are negotiated" was the Ninth Circuit's short-handed way for acknowledging that in negotiating these collective bargaining agreements, Webster customarily and regularly exercised discretion and independent judgment over matters of consequence, as required for exempt status under 29 CFR §541.2(b) and §541.207.

Thus, *Webster* stands for the proposition that as a general matter, the negotiation of collective bargaining agreements will constitute exempt administrative work. The court explained that this conclusion is supported by the federal regulations, which expressly provide that "(1) Exempt administrative operations 'include work performed by so-called white collar employees engaged

in servicing a business,' including 'advising the management, planning, [and] negotiating,' 29 CFR §541.205(b); (2) [A]dministrative employees are 'advisory specialists and consultants of various kinds,'...29 CFR §541.205(c)(5); (3) [L]abor relations consultants, and financial consultants are examples of bona fide administrative employees who can qualify as exempt if their work is directly related to the business operations of their employer's customers. 29 CFR §541.205(d)." (*Webster, supra,* 247 F.3d at p. 916.)

In language that reflects *Bell's* warning against misapplication of the administrative/production dichotomy when the employee is producing services for the employer's customers that nonetheless meet the test for the exemption under subdivision (d) of section 541.205, the *Webster* court observed that the dichotomy must be applied sensibly, as "[t]he purpose of the dichotomy is to clarify the meaning of 'work directly related to the management policies or general business operations,' not to frustrate the purpose and spirit of the entire exemption." (*Ibid.*) Application of the dichotomy in isolation, without consideration of its purpose as an analytic tool, could lead to the obviously erroneous conclusion that every employee, including the CEO, of a company that provides other businesses with management or administrative services is a "production employee" whose work consists of "producing" these management or administrative services. The Ninth Circuit cautioned that this sort of overly broad application "would defeat the purpose of the administrative exemption." (*Ibid.*)

It is important to understand that there is no conflict between *Bell* and *Webster.* These cases reached opposite results as to whether the respective plaintiffs were exempt administrative employees, but both decisions employed a similar analysis. The results are different only because the employees' job duties were different. Indeed, there is nothing in *Webster* that would lead us to question the ongoing validity of *Bell.* Likewise, there is nothing in *Webster* that limits, much less overrules, the line of cases that hold that employees who are primarily engaged in performing factual investigations for employers who are in the business of investigating, or reporting, or gathering information to assist in the prosecution of law violations are non-exempt production workers. See, e.g., *Fleming v. Carpenters/Contractors Cooperation Committee* (S.D.Cal. 1993) 843 F.Supp. 323 [holding that field investigators employed by compliance organization who investigate prevailing wage violations on public works jobs are not administrative employees]; *Reich v. State of New York* (2d Cir. 1993) 3 F.3d 581 [criminal investigators employed by Bureau of Criminal Investigations are not administrative employees]; *Harris*

v. District of Columbia (D.D.C. 1990) 741 F.Supp. 254 [housing inspectors employed by Housing Inspection Branch are not administrative employees]; *Ahern v. State of New York* (N.D.N.Y. 1992) 807 F.Supp. 919 [investigators for New York State Police are not administrative employees, as they perform the law enforcement service that the employer exists to produce].

Webster does not suggest that *all persons* employed by labor organizations are exempt administrative employees. No one would seriously suggest that a labor union's clerical employees -- typists, receptionists, file clerks, secretaries, and the like -- are exempt from overtime. Likewise, as *Fleming* and the other cases dealing with investigators makes clear, a person employed by a union in a non-policy making role to perform investigations as to whether employers are complying with wage and hour requirements is not engaged in exempt work when performing those investigations. To be sure, *Webster* holds that the work of negotiating collective bargaining agreements is administrative work. Also, *Webster* certainly implies (and we will rely on it for the proposition) that the work of processing grievances under a collective bargaining agreement is administrative work. And of course, 29 CFR §541.208, which is one of the federal regulations that the IWC adopted for the purpose of construing what constitutes administrative work, tells us that "work which is directly and closely related to" exempt administrative work is also considered exempt. By way of example, although typing is normally non-exempt work, time spent by a union "field representative" typing a draft of a proposed section in a collective bargaining agreement that he is negotiating would be considered "directly and closely related" to the exempt work of negotiating the agreement, so that this time spent typing would fall on the exempt side of the ledger for the purpose of determining, under California law, whether the "field representative" is "primarily engaged" in exempt work. Likewise, time spent by a union business agent driving to and from a meeting with management representatives to negotiate a collective bargaining agreement is treated as exempt.

Although all "work which is directly and closely related to" the negotiation of contracts and the processing of grievances constitutes exempt work, *Webster* does not extend this any further; i.e., it does not say that *all work* performed by persons who negotiate contracts and process grievances is administrative work, without regard to whether the work in question is directly and closely related to the exempt administrative work. The court found Webster exempt under federal law because his primary duty consisted of this exempt administrative work, and once having reached that conclusion about the nature of the work that was his primary duty,

it was unnecessary for the court to inquire about the remainder of Webster's work duties. If *Webster* had been decided under California law, the court could not have found him exempt from overtime without a determination that he spent the majority of his time "engaged in" or performing exempt work. *Webster* does not obviate the need, under state law, to apply the "primarily engaged in" test by closely analyzing the nature of the work performed and by segregating the exempt work from the non-exempt work in order to ascertain the percentage of time spent engaged in each.

You acknowledge that union business agents' job duties vary somewhat from union to union. However, you provide a description of various job duties that you state are customarily performed by business agents. Bearing in mind that each case must be evaluated on its own facts, we will analyze whether the various job tasks that you describe constitute exempt administrative work or non-exempt work, within the meaning of IWC Order 4-2001 and the applicable federal regulations.

1. Negotiation of Collective Bargaining Agreements- As we have already indicated, as a general matter, the negotiation of collective bargaining agreements that determine the terms and conditions of employment for members of a bargaining unit is exempt administrative work. Beyond the time spent in negotiations with management representatives, exempt work would also include time spent drafting contract proposals, meeting with bargaining unit members to identify issues to be addressed in negotiations or to ascertain the members' views about contract proposals, consulting with the union's attorneys about contract language, and otherwise preparing for negotiations.

2. Processing Employee Grievances- Here too, as we have already indicated, the work performed by union business agents investigating, handling, and resolving employee grievances under a collective bargaining agreement's grievance/arbitration procedure constitutes exempt administrative activity. This would include time spent interviewing the grievant, determining whether the grievance has merit, preparing the grievant's case, presenting the case in meetings with management, deciding whether to pursue a grievance to arbitration, assisting in the preparation of the case for arbitration, appearing at the arbitration, and informing bargaining unit members about the outcome of the grievance or arbitration.

3. Recruitment of Stewards and Employee Committee Members- To the extent that time spent recruiting bargaining unit members to serve as stewards or employee committee members involves the exercise of

discretion and independent judgment, such recruitment activities would constitute exempt administrative work, provided that these bargaining unit members are being recruited to assist the business agent in the performance of tasks that are exempt in nature (e.g., processing grievances, serving on bargaining committees in the negotiation of a collective bargaining agreement, etc.). Time spent by union business agents training stewards and employee committee members on matters such as how to process grievances at their initial stages, how to assure compliance with the collective bargaining agreement at the work site, and how to identify issues appropriate for negotiations with management would also fall on the exempt side of the ledger.

4. Scheduling and Leading Meetings- The focus here must be on the nature of the meeting itself. For example, a business agent conducting a meeting with bargaining unit members to discuss workplace health and safety issues to determine whether the employer is violating the collective bargaining agreement or state or federal OSHA requirements, and to decide how to proceed to alleviate the problem, is obviously engaged in exempt administrative activity. Likewise, time spent in meetings with management to attempt to resolve these or similar issues counts as time spent engaged in exempt activities. Also, time spent at union membership meetings to discuss the bargaining unit's business--e.g., the progress of grievances or contract negotiations, the provisions of the collective bargaining agreement, employer compliance with the collective bargaining agreement, plans to organize non-union workplaces, political support activities, etc.--would fall on the exempt side of the ledger.

5. Organizing and Picketing- Walking a picket line, using a marker to write a slogan on a picket sign, or handing out union leaflets to workers in front of a worksite, are non-exempt activities. They do not involve the exercise of discretion and independent judgment, and cannot be said to be directly and closely related to any activity that is exempt. On the other hand, a business agent who formulates a plan for how to organize unorganized workers, or who communicates that plan to other persons who will carry it out, is engaged in an exempt administrative activity. Likewise, the selection of employers as a target for picketing and the development of picketing tactics--e.g., deciding where pickets at a construction site should be placed--constitutes exempt activity.

6. Participation in the Union's Legislative Assembly- Business agents who participate as representatives to the union's legislative bodies (e.g., the district council, or the

international assembly), and who in that capacity propose, deliberate and vote on resolutions that will determine how the union will go about conducting its business, are engaged in exempt administrative activities.

7. Political Activity and Political Education- Much like organizing and picketing, this is a category that involves some activities that are exempt and others that are not. Obviously, distributing leaflets at a shopping center in support of a political candidate, or making telephone calls to registered voters to read a script to them as to why they should vote a certain way on a ballot initiative are non-exempt activities. On the other hand, business agents who speak before federal, state or local governmental bodies such as Congressional subcommittees, the State Legislature, the Industrial Welfare Commission, city councils, and the like, to advocate for laws or regulations to benefit union members and other working people are engaged in exempt administrative activity. Likewise, meetings with union members to discuss political issues that impact on working people and to formulate strategies for making gains in the political arena are exempt activities.

8. Job Placement Coordination- In the ordinary course of events, time spent dispatching out-of-work union members to appropriate employment opportunities will not involve the exercise of discretion and independent judgment. Unions that run hiring halls receive notices from employers that they need workers of a particular skill or job category, and these openings are then filled by following a routine formula -- be it based on seniority, time since the last job, previous experience with that particular employer, etc. Absent compelling evidence that the business agent's actual work performed as a dispatcher involves the exercise of discretion and independent judgment over matters of significance, this activity would fall on the non-exempt side of the ledger.

Often, in our experience, cases involving the determination of whether an employee was primarily engaged in duties that meet the test of the executive or administrative exemptions are characterized by sharply conflicting testimony from the employee, as to what work he or she actually did, and the employer, as to what work the employee was hired to perform. The wage orders expressly provide that in determining whether the employee is primarily engaged in exempt duties, "[t]he work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and

the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement." IWC Order 4-2001, subd. 1(A)(1)(e), and 1(A)(2)(f). The IWC's Statement as to the Basis for the 2000 Wage Orders indicates that this test was adopted from the California Supreme Court's decision in *Ramirez v. Yosemite Water, supra,* 20 Cal 4th 785, 801-802, a case which involved the determination of whether outside salespersons -- employees who by definition must perform the majority of their work away from the employer's premises engaged in outside sales -- meet the quantitative test for that exemption. The Supreme Court, sensitive to the risk that such off-site employees could overstate the hours spent performing non-exempt non-sales work, and also aware of the risk that employers could overstate the extent to which such employees were expected to perform exempt outside sales work, crafted a nuanced approach for analyzing whether such employees came within the definition of outside salespersons. In its Statement of Basis, the IWC reprinted the following language from *Ramirez,* explaining that it also "provide[s] some guidance" for enforcement of the administrative and executive exemptions:

> Having recognized California's distinctive quantitative approach to determining which employees are outside salespersons, we must then address an issue implicitly raised by the parties that caused some confusion in the trial court and the Court of Appeal: Is the number of hours worked in sales-related activities to be determined by the number of hours that the employer, according to its job description or its estimate, claims the employee should be working in sales, or should it be determined by the actual average hours the employee spent on sales activity? The logic inherent in the IWC's quantitative definition of outside salesperson dictates that neither alternative would be wholly satisfactory. On the one hand, if hours worked on sales were determined through an employer's job description, then the employer could make an employee exempt from overtime laws solely by fashioning an idealized job description that had little basis in reality. On the other hand, an employee who is supposed to be engaged in sales activities during most of his working hours and falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption. A trial court, in determining whether the employee is an outside salesperson, must steer clear of these two pitfalls by inquiring into the realistic requirements of the job. In so doing, the court should consider, first and foremost,

> how the employee actually spends his or her time. But the trial court should also consider whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job.

We therefore conclude that to the extent that there is no dispute about what work the employee actually performed, and the percentage of his or her time spent performing various tasks, little consideration need be given to the employer's expectations at the time the employee was hired. If the employer contemporaneously knew, or reasonably should have known, how the employee was spending his or her worktime, the employer's prior expectations cannot overcome the focus -- the "first and foremost" consideration -- on the employee's actual activities. The employer's realistic expectations gain importance only if there is a bona fide dispute as to how much time the employee spent engaged in various exempt and non-exempt tasks. Any consideration of the employer's realistic expectations about how the employee is to spend his or her worktime must be tempered by consideration of whether the employer ever concretely expressed displeasure to the employee over any divergence between the employee's actual performance and the employer's expectations, and by consideration as to whether any such concrete expressions of displeasure were themselves realistic given the actual overall requirements of the job.

We leave for the end of our analysis a response to your contention, set out in you letter of February 6, 2003, that anything other than an across-the-board DLSE policy holding that union's "key administrative personnel" are exempt from overtime would frustrate the federal scheme to ensure that unions are democratically governed and responsive to the will of their memberships. This federal scheme is founded upon the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA", 29 USC §§401, et seq.), a law that governs relations between unions and their members. There is nothing in the LMRDA that purports to preempt state wage and hour laws that concern the payment of wages for work performed. Not only is there no indication in the LMRDA of any intent to preempt such state laws; there is express language in the LMRDA disclaiming any intent to preempt such laws. 29 USC §523(a) states: "Except as expressly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization ... under any other Federal law or under

the laws of any State[.]" Certainly if the LMRDA operated in the manner that you suggest, the Ninth Circuit would have disposed of *Webster* without the necessity of construing the FLSA regulations on the parameters of the administrative exemption. Not surprisingly, there is no discussion of the LMRDA in *Webster*.

You are correct that the California Supreme Court has held that "the strong federal policy favoring union democracy, embodied in the LMRDA, preempts state causes of action for wrongful discharge or related torts when brought against a union-employer by former management or policymaking employee." *Screen Extras Guild v. Superior Court* (1990) 51 Cal.3d 1017, 1021. In that case, a former union business agent who had been discharged for alleged dishonesty and insubordination filed an action against the union for wrongful discharge in breach of an employment contract and related torts. The Supreme Court reasoned that to effectuate the LMRDA's policies of democratic union governance and responsiveness to the will of the union membership, "elected union officials have the authority to discharge union employees in management or policymaking positions who do not, in their opinion, serve the union membership properly." *Ibid.*, at p. 1020. Permitting a former union business agent to bring a wrongful discharge action under state law "would undermine the ability of elected union leaders to effectuate the will and policies of the union membership they represent." *Ibid.* The Supreme Court rejected the argument that the union business agent who brought this action did not fall within the class of policymaking or confidential employees whose continued employment is subject to the unfettered discretion of elected union officials. The Court observed that this business agent had "significant decisionmaking responsibility for the implementation of [union] policies and their application to individual cases[.]" *Ibid.*, at p. 1031. The Court explained:

> Union business agents "have significant responsibility for the day-to-day conduct of union affairs." (*Finnegan v. Leu* [(1982)] 456 U.S. [431] at pp. 441-442, 102 S.Ct. at p. 1873; *Bloom v. General Truck Drivers* [(9th Cir. 1986)] 783 F.2d [1356] at p. 1357.) Business representatives are expressly recognized in the LMRDA to be "key administrative personnel" (29 USC §402(q)) who "occupy positions of trust in relation to [labor] organization[s] and [their] members as a group." (29 USC §501(a).)
>
> Functionally, the business agent is at the forefront of implementing union policy, linking the union member and the upper echelons of the union bureaucracy. It is the

> business agent who responds to workers' grievances and who often selects which ones to pursue. The business agent makes strategic decisions regarding pursuit of collective bargaining and is frequently the chief organizer of strikes. The business agent is charged with seeing that a union contract is enforced and makes a number of discretionary decisions in that regard.... In short, for many union members, the business agent *is* the union, the chief representative of union policies."

Screen Extras Guild v. Superior Court, supra, 51 Cal.3d at p. 1031.

It is a giant leap from LMRDA preemption of state wrongful discharge causes of action to preemption of claims under state wage and hour law for payment of wages allegedly owed for work performed. It is a leap that cannot be made, because there is nothing in *Screen Extras Guild* that even remotely suggests that anything other than wrongful termination type claims are preempted. Such claims are preempted because of the potential conflict between wrongful termination litigation and the effectuation of the policies embodied in the LMRDA. As the Supreme Court explained, "Congress intends that elected union officials shall be free to discharge management or policymaking personnel. Thus, allowing [wrongful discharge] claims to proceed in the California courts would restrict the exercise of the right to terminate which *Finnegan* found [to be] an integral part of ensuring a union administration's responsiveness to the mandate of the union election." *(Screen Extras Guild, supra,* 51 Cal.3d at p. 1028 [internal quotations and citations omitted].) In contrast, enforcement of state wage and hour law requirements does not in any way interfere with whatever discretion elected union officials enjoy, under the LMRDA, to discharge appointed business agents or other employees of the union. Moreover, non-enforcement of state wage and hour law as to a union's employees would not in any manner further the goals of union democracy that are articulated in the LMRDA.

Furthermore, the use of the term "key administrative personnel" at 29 CFR §402(q) to describe elected or appointed "business agents, heads of departments or major units, and organizers who exercise substantial independent authority" has no significance with respect to whether any such persons are exempt under federal or state wage and hour law. This definitional provision in the LMRDA merely provides that such persons, along with elected union officials, come within the purview of the term "officer, agent, shop steward or other representative" of a labor organization, when that term is used in the LMRDA.

This is not to say that *Screen Extras Guild* has no relevance to the question of whether various aspects of the work performed by a business agent is exempt administrative work within the meaning of the IWC Order 4. Even though it is not a wage and hour case, there are certainly implications for wage and hour law in its discussion of the nature of the duties normally performed by a business agent, the degree to which business agents exercise discretion and independent judgment in carrying out these tasks, and the significance of the decisions that are made by business agents in implementing union policies and applying those policies to individual cases in processing grievances. But we squarely reject the notion that there is an across-the-board blanket exemption from overtime for union business agents and other employees of unions who perform similar tasks. Rather, the manner for determining the exempt or non-exempt status for these employees is no different than the manner of making this determination for any employee. It is a factually intensive determination that looks to exactly what work is performed by the employee, and what percentage of the employee's worktime is spent performing work that is exempt within the meaning of the IWC order and the applicable federal regulations.

In closing, thank you for your patience in awaiting this reply. As you can see, the issues presented here did not lend themselves to anything but a detailed and exhaustive analysis, which we hope will prove useful to all persons seeking to navigate the sometimes perplexing shoals of the administrative exemption. Feel free to contact us with any further questions.

Sincerely,

Miles E. Locker
Attorney for the Labor Commissioner

cc: Ronald D. Iler
Chuck Cake, DIR Director
Arthur Lujan, Labor Commissioner
Anne Stevason, DLSE Chief Counsel
DLSE Assistant Chiefs
DLSE Regional Managers
Bridget Bane, IWC Executive Officer

2003.05.23