STATE OF CALIFORNIA GRAY DAVIS, Governor

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DIVISION OF LABOR STANDARDS ENFORCEMENT
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January 17, 2003

Barbara E. Tanzillo
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Re: **Teachers Exemption In California** (00213)

Dear Ms. Tanzillo:

This is in response to your letter of August 2, 2002, concerning the above-referenced matter directed to Arthur Lujan, State Labor Commissioner, and Anne Stevason, Chief Counsel of the Division of Labor Standards Enforcement. I have been asked to respond on behalf of the Division.

In your letter you ask that the DLSE state whether, under the IWC Orders, the professional exemption for teachers is limited to only those teachers who have a certificate from the Commission for Teacher Preparation and Licensing or teach at an accredited college or university; or, alternatively, whether teachers who teach at an educational organization accredited by a reputable accrediting agency, such as the Bureau for Private Post-Secondary and Vocational Education, may also qualify for the professional exemption provided they otherwise satisfy the duties set forth in the Wage Orders for a learned or artistic professional.

In your letter you quote the language contained in the Orders for the professional exemption and state that in your view, the term "teaching" is used very narrowly in Section 1(A)(1) of the Orders, because it is defined in the Wage Orders as "the profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing, or teaching in an accredited college or university.[1]"

We assume, when you say that the term "teaching" is used very narrowly, that you mean that the term is limited by the definitional language contained in the Orders.

[1]See IWC Orders generally, Section 2, Definitions.

Obviously, there would not seem to be any other way of interpreting the intent of the IWC than to conclude that they meant to limit the term "teacher" by defining it narrowly.

The term "teacher" in the California Orders, unlike the use of the term in the federal Fair Labor Standards Act[2] ("FLSA") cannot be interpreted to include all those who may "teach" as the federal Department of Labor has done in the regulations governing the enforcement of the FLSA:

> "Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed..." (29 C.F.R. 541.3(a)(3))

The federal regulations at 29 C.F.R. § 541.301(g)(1) and (g)(2) further expand on the definition contained at Section 541.3(a)(3). The provisions of those federal regulations clearly illustrate that the Secretary of Labor intended that the exemption was to be very broadly construed[3]. In fact, the federal courts, relying on those regulations, have been able to find that instructors employed by a tractor trailer training school were exempt teachers. (*Gonzalez v. New England Tractor Trailer Training School*, 932 F.Supp. 697 (D.Md. 1996).

The 1947 IWC Orders were the first Orders which contain the exemption for employees in the executive, administrative and professional categories. The Fair Labor Standards Act contained at that time, as it still does, language at 29 U.S.C. § 213(a)(1) which exempts employees in a "bona fide executive, administrative, or professional capacity".

Thus, if the addition of the terms which were "plainly borrowed from parallel language in the FLSA" in the 1947 Orders were the only indicia of the intent of the Industrial Welfare Commission in regard to the term "teacher" DLSE would agree that would be the end of the inquiry.

However, there is overwhelming evidence that while the IWC did adopt the federal language, they did not intend that the

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[2]29 U.S.C. § 213(a)(1) exempts employees in a "bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools..."

[3]For instance, the federal regulations specifically include "teachers of skilled and semiskilled trades and occupations; teachers engaged in automobile driving instruction..."

federal definitions of those terms was to prevail in California. The IWC clarified its intent in this regard when it became clear there was confusion.

It should also be noted that even the language of the minutes of the IWC meeting on March 7, 1947, leaves no doubt that the Commission did not intend to adopt, wholesale, the federal "determination of bona fide executive, administrative, or professional employment". The Commission stated that "standards were set for the determination ...using federal criteria as a guide." Had the IWC in 1947 intended to incorporate the definitions used by the federal government, they could simply have stated that the standards for determining the exemptions would utilize the federal criteria; not the "federal criteria as a guide."

It was in these 1947 Orders that the IWC first set out exemptions from the minimum wage and overtime requirements of the California law[4]. The Commission adopted the language which was substantially unchanged for some years after that:

> No woman shall be considered to be employed in an administrative, executive, or professional capacity unless one of the following conditions prevails:
>
> (A) The employee is engaged in work which is predominately intellectual, managerial, or creative; which requires exercise of discretion and independent judgment; and for which the remuneration is not less than $250 per month; or
>
> (B) The employee is licensed or certified by the State of California and is engaged in the practice of one of the following recognized professions: law, medicine, dentistry, architecture, engineering, teaching, or accounting.

The employee, consequently, could meet the criteria as an exempt professional in only one way: be licensed or certified by the State of California and be engaged in the practice of one of the listed professions (one of which is "teaching"). There is no minimum remuneration requirement under this criteria.

The first criterion: "exercise of discretion and independent judgment" or engaging in work that is predominately intellectual, can be traced to the federal law. However, the

[4]It must be noted that the IWC Orders at that time only applied to Women and minors. It was not until the 1976 Orders that both men and women were covered by the Orders. Enforcement of the 1976 Orders was enjoined and it was not until the 1980 Orders were found to be valid that men were covered.

professional criteria which had to be met to achieve exemption (*i.e.*, licensure by the State) is unlike any exemption found in the federal law.

In reviewing the actions taken by the IWC in 1947, it is very important to note that while they specifically added or clarified a number of definitions in the new Order (see "Minutes of Meeting of IWC", March 7, 1947, IWC Document No. 527, Page 4), they did not define the term "teacher" at that time. From that, one could imply (using a far more narrow approach than the one required to establish exemptions from remedial legislation[5]) that the IWC intended that the term "teacher" was to have the same meaning as that contained in the federal law. And, of course, if that was the intent of the IWC, there would be no reason to define the term "teacher". Further, of course, if that lack of definition continued to the present, automobile driving instructors and truck driving instructors with no formal education would, as they are under federal law, be exempt as "professionals".

Again, in the IWC Orders as amended by the IWC effective August 1, 1952, the language remains substantially the same except that the remuneration level is raised to $350.00 per month in order to qualify for the exemption; and, again, there was no definition of the term "teacher."

In the IWC Orders issued effective November 15, 1957, the IWC for the first time defined the term "teacher". The definition remains substantially the same in the current Orders:

> "'Teaching' means the profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing or teaching in an accredited college or

[5]"In interpreting the scope of an exemption from the state's overtime laws, we begin by reviewing certain basic principles. First, 'past decisions ... teach that in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection." (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702 [166 Cal.Rptr. 331, 613 P.2d 579].) Thus, under California law, exemptions from statutory mandatory overtime provisions are narrowly construed. (*Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 562 [38 Cal.Rptr.2d 221]; see also *Phillips Co. v. Walling* (1945) 324 U.S. 490, 493 [65 S.Ct. 807, 808, 89 L.Ed. 1095, 157 A.L.R. 876].) Moreover, the assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption. (*Nordquist, supra*, 32 Cal.App.4th at p. 562; *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 196-197 [94 S.Ct. 2223, 2229, 41 L.Ed.2d 1].)" *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 794-795.

university."

The language of the definition should, in fact, have been sufficient to convey the idea that, in California, the definition of "teacher" for purposes of the "professional exemptions" under the IWC Orders, was to apply only to teachers involved in teaching in academic surroundings. However, in the event it ever became an issue, the IWC explained themselves further.

In the "Findings" of the Industrial Welfare Commission, prepared following meetings of May 28, 29 and 30, 1957, the Commission made the following statement (at page 2 of the document, third paragraph) regarding Section 2, Definitions:

> "Several changes were made in Section 2(c) of the various orders intended to clarify without changing the coverage of the orders...¶ The Commission agreed with the Order 2 Wage Board that only teachers having a recognized professional standing should be excluded from the Order. Teachers in various institutions, such as trade schools, should be covered [by the Orders]." (Emphasis and bracketed matter added)

Again, in 1963 in the Orders effective August 30th of that year, the IWC amended the definition of "Teacher":

> "'Teaching' means, for the purpose of section 1 of this Order, the profession of teaching under a certificate from the California State Board of Education or teaching in an accredited college or university"

In the "Findings" of the IWC covering meetings of March 20, 21, and 22, 1963 and April 17 and 18, 1963, the IWC explained the amendment as follows:

> "The definition of "teaching" was clarified to indicate it referred to the profession of teaching as set forth in Section 1 as a criteria for exemption from Sections 3 through 12, and the Commission's intent was all other teachers are covered by all sections of the Industrial Welfare Commission Orders.

Although there is no further documentation available regarding the reason for the modification of the definition in 1963, it is clear that there had been some question about what the definition added in the 1957 Orders was in regard to. Section 1 of the IWC Orders "Applicability" deals with the exemptions and, the IWC was obviously attempting to make certain

that this definition was intended to address the exemption language in the Orders. The language is consistent with the language used by the Commission in the 1957 Orders which – perhaps more clearly – announces that it was the intent of the IWC that "[T]eachers in various institutions, such as trade schools, should be covered."

The DLSE's interpretation of the definition of "teacher" which limited the exemption to those who taught in academic settings is, of course, well known to the IWC. As an example, in adopting the new IWC Orders in response to the landmark legislation contained in Labor Code § 500 *et seq.,* the IWC specified a number of the federal regulations to be used to interpret the terms "managerial, administrative and professional". (See Section 1, Applicability, of IWC Orders dated 2001 and later) While the Applicability Section of the new Orders continues to exempt teachers as professionals, the IWC's "Statement As To The Basis" points out that adoption of language based upon 29 CFR § 541.2 (a)-(c), was not to be construed to "affect the professional exemption as it relates to teachers, or to otherwise change existing law." (Statement As To the Basis, Wage Orders 1-13 2001.)

In the Statement As To The Basis of the 2001 Orders, the IWC noted:

> "The new regulations in this section of the IWC's wage orders regarding the administrative, executive, and professional exemption are consistent with existing law and <u>enforcement</u> <u>practices</u>." (Emphasis added)

In addition, for purposes of construing the professional exemption in the new Orders, the IWC specifically noted that only section 541.301 (a) through (d) were to be utilized. (IWC Orders, Applicability, Section 1(A)(3)(d)) The IWC thus specifically excluded the provisions of the federal regulations found at 29 C.F.R. § 541.301(g)(1) and (g)(2) which expand on the definition of "teacher" from consideration in determining the professional exemption. These federal regulations, which the IWC excluded, are, of course, the very regulations which the federal courts utilized in determining, in the ***Gonzales v. New England Tractor Trailer Training School*** case, that truck driver instructors with less than three months of training were exempt as "teachers" under the federal law.

As you state, the learned professional exemption was intended to allow the DLSE to extend the professional exemption. "[E]merging occupations, such as those in the fields of science

and high technology[6]..." were particularly targeted by the IWC. However, there is no indication that the Commission intended to undo the clearly defined intent to limit the teacher exemption to those workers meeting the definition contained in the Order by allowing those workers to be exempted under the learned professional category. In addition, the Commission announced in the same Statement As To The Basis that in regard to the learned exemption: "...it would allow enforcement staff to consider individual situations and actual duties when applying the exemption. The language also would permit, but would not be limited to, use of the federal guidelines for purposes of interpretation."

We cannot agree with your statement that "[U]nder California law, it is unclear whether a teacher who is not certified by the Commission for Teacher Preparation and Licensing or does not teach at an accredited college or university, may, nonetheless, qualify for the professional exemption." We hope you would agree that the statement is inaccurate after reading the history of the teacher exemption in California outlined above.

We hope this adequately addresses the issues you raised in your letter. Thank you for your interest in California labor law.

Yours truly,

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c.c. Arthur Lujan, State Labor Commissioner
Tom Grogan, Chief Deputy Labor Commissioner
Anne Stevason, Chief Counsel
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[6]See Section 1, Applicability, Statement At To the Basis Upon Which Industrial Welfare Commission Order No. 4-89 Is Predicated.