

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at LEXINGTON

Filed Electronically
Civil Action No. 5:06-cv-299-JBC

JUSTIN CRAWFORD, BOBBI
BARTLETT, BRIAN HERBEL,
JESSICA HERBEL, REBECCA
GRILLO, KEVIN JOHNSON, CLAUD
A. REYNOLDS, DEBORAH LENNON
and JANET VANNATTA, on behalf of
themselves and all other similarly situated
current and former employees of the
Lexington-Fayette Urban County
Government, Division of Community
Corrections

PLAINTIFFS

v.

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

DEFENDANT

**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL
SUMMARY JUDGMENT**

The Defendant, Lexington-Fayette Urban-County Government (“LFUCG”) submits this memorandum in support of its motion for partial summary judgment on the issue of whether Plaintiffs Mickey Pitts, Geneva Mitchell, Suzanne Whittlesey, Shawn Simpson, Justin Crawford LaTrease Cunningham, Antonio DeLeon, Rebecca Grillo, Randall Jones, John Reams, and Billy Williams, are, and at all relevant times have been, exempt from the maximum hours requirement of the Fair Labor Standards Act, 29 U.S.C. § 207 (“FLSA”). For the reasons discussed herein, there is no genuine dispute about the material facts, and the LFUCG is entitled to a judgment as a matter of law that the

foregoing named plaintiffs are exempt from the maximum hours requirement of the FLSA.

I. STATEMENTS OF FACTS

A. Overview of the Division of Community Corrections

The Division of Community Corrections (“Division”) of the LFUCG is responsible for the operation of the Fayette County Detention Center, which has been located at Old Frankfort Circle in Lexington, Kentucky for the entire period of time relevant to this action.¹ The Division also operates the Community Alternative Program (“CAP”) located on Martin Luther King Boulevard, which is responsible for drug testing of released prisoners and others, and electronic monitoring of individuals confined to home incarceration.

The Division’s organizational structure is pyramidal in shape, with the Director at the apex and approximately three hundred (300) Community Corrections Officers (“CCO’s”) at the base. In between are five levels of management and supervision which, in descending order under the Director, are:

Three (3) Assistant Directors and one (1) Senior Administration Officer

Six (6) Majors

¹ The Court has ruled that the relevant time period for purposes of eligibility of Division employees or former employees to join this case began September 6, 2003, three years before the first Complaint was filed herein. However, the statute of limitations under the FLSA is only two years for non-willful violations, but three years for willful violations. 29 U.S.C. § 255(a). Although the Complaint and subsequent amendments allege willful violations with respect to all Division practices challenged herein, the evidence of record does not support this allegation regarding any practice, including particularly the issue of the exempt status of the eleven Plaintiffs named above. Hence, LFUCG’s position is that the relevant time period commenced September 6, 2004, two years before the first Complaint was filed..

Eight (8) Captains

Twelve (12) Lieutenants

Thirty Six (36) Sergeants

[Exhibits 1 and 2 hereto].² As the titles of these employees indicate, the organization is quasi-military, and the chain of command is followed for communications and operational purposes. The Sergeants are the first line supervisors, and they supervise the CCO's. The Lieutenants supervise the Sergeants and the CCO's, the Captains supervise the Lieutenants, Sergeants, and CCO's, and so forth. [Skiba Depo. p. 49; Brookshire Depo p. 117; 5/18/07 HT pp. 129 - 130]. CCO's do not supervise other employees, but they directly supervise the inmates and are responsible for their care and custody. [Vannatta Depo.p. 50]. Except in unusual cases, Lieutenants and higher ranking officers do no have direct custody of inmates. [Jones Depo pp. 111 – 112; 149, 239; Grillo Depo Vol. II p. 310; Taylor Depo 67-68; Korb Depo p. 95; 152; Reams Depo p. 61].

The Division is organized into five subdivisions called "bureaus," which are: Administration; Information Services; Operations; Programs, Services and Community Placement; and Professional Standards. [*Id.*]. The largest bureau is Operations, which includes the Intake, Custody, Master Control, and Auxiliary Services units. The Custody, Intake, and Master Control units operate around the clock, seven days a week, fifty two weeks a year. [C. Johnson testimony at Jan. 4, 2007 HT p. 54; Cunningham Depo p. 10; C. Johnson Depo p. 73; Kammer testimony, Jan. 3, 2007 HT at 39.].

² The Division also employs clerical, administrative, and other staff who are not involved in this action.

The Custody unit is responsible for direct supervision and control of the inmates, who are confined to twenty housing units arranged in two rings, called the “inner” and “outer” rings. The outer ring units are designated AA through LL, and are intended for the general inmate population. They normally house up to eighty (80) inmates, although at unusual times the number is higher. The inner ring units are designated A through H and are intended for a variety of classifications of inmates: inmates with medical conditions; dangerous inmates; inmates who are escape risks, etc. [Capillo Depo. p. 54]. One CCO is assigned to each outer ring unit, and two CCO’s are assigned to some inner ring units. CCO’s are continuously stationed inside each unit.

The Intake unit is responsible for booking arrestees (colloquially called “jails”), processing them into the facility, obtaining and maintaining custody of their personal property, and processing them out of the facility when they have served their time or are freed on bond. The Master Control unit uses electronic equipment to control access to inmate housing units and other areas in the facility and also mans the main lobby used by the public. Master Control also monitors all areas of the facility with video cameras. The Auxiliary Services unit transports inmates to courts and maintains custody and control of them when they are in holding cells at the courthouse. [K. Johnson 12/1/06 Depo pp. 36 – 37; Kammer testimony 1/3/07 HT pp. 45 - 46].

The Programs, Services, and Community Placement Bureau performs a variety of functions, but as relevant to this action its principal function is the administration of CAP. The Bureau of Professional Standards is comprised of Internal Affairs and Safety & Sanitation. This Bureau is also responsible for video reviewing and storage, the administration of the Division’s contract with the food service vendor (currently

Aramark) which provides meals for inmates and employees and its contract for mental health services with Bluegrass Comp Care. [Exh. 1 and 2; Capillo Depo., 6; Carter Depo., 10-11; Kammer Depo., 6].

Custody operates three, eight hour shifts per day: 1st shift is on duty from 7:55 a.m. (0755) to 4:15 p.m. (1615); 2nd shift is on duty from 3:55 p.m. (1555) to 12:15 a.m. (0015); and 3rd shift is on duty from 11:55 p.m. (2355) to 8:15 a.m. (0815). The twenty minute overlap allows each shift's commander to conduct a pre-shift briefing and give the oncoming CCO's time to get to their housing units and relieve the CCO's on duty there. The additional twenty minutes also allows for a twenty minute meal break. Intake and Master Control operate on the same shift schedule.³

One Major is assigned to each of the three Custody shifts, and they work Monday through Friday. [Exh. 1, p. 4 Capillo Depo., pp. 8-9; Korb Depo. pp 12 - 13; 155,]. On 2nd and 3rd shift, Monday through Friday, they are in charge of the entire facility. [Capillo Depo., p. 8]. However, the 2nd and 3rd Shift Majors do not always work the same hours as the rest of the employees on the shift, depending upon whether they must attend meetings during the day shift. [Capillo Depo., 9]. On such days, for example, Major Capillo reports to work at 4:00 a.m. instead of midnight, and he works until noon . [*Id.* at 9]. The Major's role is to act as the first level of administration in the facility. [Job Description (Exh. 3 p. 1 ("maintains daily contact and open line of communication with director and assistant director(s); Korb Depo., 30-31, 65-66)]. In the Major's absence,

³ However, the evidence shows that it takes less time for the oncoming shift to relieve the shift on duty in these units, because the oncoming shift conducts its pre-shift briefing in the area where the employees work, unlike in Custody, where the pre-shift briefing occurs in the Shift Command office, and the CCO's must then walk to their assigned housing units, which can take up to three minutes if they walk directly there.

e.g., weekends, vacation, absences due to illness, the Custody Captain or Lieutenant on duty is in charge of the entire facility. [Capillo Depo., 10; Grillo 3/13/08 Depo pp. 242 - 243]. However, in case they are needed, all majors rotate on-call status, which occurs once every five weekends. [Gibbs Depo., 7]. Only majors are on-call. [*Id.*]

One Captain is assigned to each Custody shift, Monday through Friday. [Exh. 1, 2, p. 4; Hall Depo p. 5; M. Kelly Depo p. 78]. The Custody Captain is the Shift Commander, even when a major is on duty. [Korb Depo. p. 36]. As the Shift Commander, the Captain is in charge of day-to-day operations of the shift. [Job Description (Exhibit 4 hereto); Korb Depo., 65-66; Mitchell Depo., Vol. I, 48; Morgerson Depo., Crawford Depo., 6].

Captains in other units have different roles due to the differences in the functions of their units, but they generally have the same supervisory responsibilities. Captain Darin Kelly is the sole Captain in Program Services and Community Placement, where he is in charge of the CAP unit, Life Skills, the laundry, TV studio, Inmate Services, and classification. [Exh. 2; Kelly Depo., 5]. Captain Suzanne Whittlesey is assigned to the Intake unit, where she is in charge of all three shifts and supervises three lieutenants, six sergeants, and approximately 44 CCO's. [Whittlesey Depo p. 16]

Two Lieutenants are assigned to each Custody shift. Their work schedules are staggered so that one of them is always on duty when the Captains are off duty on weekends and at other times. [Jones 7/9/07 Depo. p. 24].⁴ The Lieutenant is the Assistant

⁴ If the Lieutenant assigned to work on a Captain's day off cannot work due to illness or for other reasons, then the sergeants step up and run the shift. For critical or abnormal situations that may develop the chain of command may be utilized via telephonic communication to come up with the plan of action to address the concern.

Shift Commander. [Job Description (Exhibit 5 hereto); Jones Depo., 22-23]. However, on the weekends when the Captains are off duty, the Custody Lieutenants are the Acting Shift Commanders and are in charge of the entire facility. [Exhibits 1 and 2; Jones Depo., 53 (“ . . .if I'm the highest ranking commander, everything that goes on is basically my responsibility.)].

In other units, the scope of Lieutenants' responsibilities are somewhat different than in Custody, though their supervisory duties are the same with respect to their subordinates. In Master Control, Lieutenant Charlesetta Johnson is in charge of all three shifts. [Exh. 1 and 2, p. 4; Korb Depo. p.13; C. Johnson Depo. p. 6; Powell Depo. p. 92]. She supervises two sergeants and approximately twenty CCO's. [Exh. 1 and 2; C. Johnson Depo., p. 7.] In Intake, Lieutenants are the shift commanders on 2nd and 3rd shifts during the week and on all three shifts on the weekends, when Captain Whittlesey is off duty. [Whittlesey Depo., pp. 19 - 20; Jones Depo. p. 105]. Lt. Kristine LaFoe was previously the commander in charge of 3rd shift in Intake and now is the sole Lieutenant in the Bureau of Programs, Services, and Community Placement. [Exh. 2, p. 7; LaFoe Aff., ¶ 5; Exh. 6].⁵

B. The Plaintiffs

1. Major Mickey Pitts

Mickey Pitts is the only current or former Major to join this action. He retired from the LFUCG in July 2006. He became a Major in January 2000, at which time he was assigned to the Custody unit at the old jail on Clark Street in Lexington.

⁵ As will be discussed below, commanders are regularly reassigned to different bureaus in order to meet the needs of the facility.

After about a year and a half in that position, he transferred to the juvenile detention center on Cisco Rd, where he was the highest ranking officer and was in charge of the facility.⁶ [Pitts Depo. pp. 13 – 14]. In that position, he supervised two sergeants and about sixteen CCO's. [Id. 27]. His duties included: responsibility for “inmate issues” [Id. at 48] as well as being “over” the staff [Id.]. He was paid the same salary each pay period, regardless of the number of hours he worked. [Id. at 20]

Pitts transferred to the new adult facility in 2005 and was placed in charge of the Division of Professional Standards, where he supervised three individuals: a captain, a lieutenant, and a CCO. [Id. 17,18]. As discussed above, the Division of Professional Standards includes internal affairs (investigation of employee misconduct), safety, sanitation, and vendor contract administration.

2. Captain Geneva Mitchell

Geneva Mitchell has been a Captain in the Custody unit since before September 2003. In January 2007, she transferred from 3rd shift to 1st shift. [Mitchell 8/11/07 Depo pp. 11 – 12]. On 1st shift she reports to Major Korb. [Id. at 12]. On both shifts she was and is the Shift Commander and is “responsible for the overall monitoring of the operation of the shift to ensure that the procedures are being followed properly by all of [her] subordinate commanders.” [Mitchell Depo., Vol. I, 48]. Mitchell supervises all subordinate staff assigned to 1st shift, which consists of two lieutenants⁷, six sergeants,

⁶ In 2005, the Commonwealth of Kentucky took control of the juvenile detention center, and all of the LFUCG employees who worked there were transferred to the adult facility on Old Frankfort Circle. The juvenile facility and the practices which occurred there are not at issue in this case.

⁷ One of the lieutenants she supervises is Rebecca Grillo, a plaintiff who, like Mitchell, contends that she is non-exempt.

and about fifty nine CCO's. The minimum staffing on a given shift in Custody is 34 on weekdays and 33 on weekends, including all supervisors. [Grillo 3/13/08 Depo p. 185; Simpson Depo p. 96] Although she occasionally performs non-supervisory work, e.g., taking out trash [*Id.* Vol. I, 22-23] or having direct custody and control of inmates [Mitchell 1/28/08 Depo pp. 8 -9], **she is never free of her supervisory responsibilities, even when performing such work.**[*Id.* Vol. I, 94].

Major Korb, Mitchell's supervisor, testified that Mitchell "has overall supervision of the shift." [Korb Depo., 37]. "She will be –he, she will be held accountable because that's their shift."[*Id.*]. He also testified that his role is to "assist her when she has problems making decisions." [*Id.*, 65-66]. Korb leaves it up to Mitchell to decide which duties to assign to her subordinate commanders and has given her only the general direction to "continually push them all, you know, assign them different areas so they can be proficient in all." [*Id.* at 35]. While Korb prefers that Mitchell perform the paperwork function herself because she needs improvement in doing that task, he leaves that decision to her discretion. [*Id.* at 37].⁸

3. Captain Shawn Simpson

Shawn Simpson was promoted to Captain in 1998 and worked in Custody from 1998 to December 2006. [Simpson Depo., 8-10]. In December 2006 he transferred to Auxiliary Services. [*Id.*] In Custody he worked on all three shifts at one time or another. [*Id.* at 12]. As a Captain in Custody he supervised fifty five (55) to sixty (60) employees. [*Id.* 16-17]. In Auxiliary Services he is the highest ranking officer and is in charge of the department's daily activities. He supervises up to twenty five employees:

⁸ See text at pp. 26 *infra*, for a discussion of the duties of the paperwork commander.

three sergeants and twenty two CCO's. [*Id.*; Exh 2, p. 5; Gibbs Depo., 9]. He currently reports to Major Gibbs. [*Id.* 17].

In both Custody and Auxiliary Services, Simpson's "main duties" are supervisory [*Id.*, 26-27, 34], and he has spent the majority of his time performing those duties. [*Id.* 113-14]. Although he has occasionally, but not daily, performed from five minutes to two hours of non-supervisory work in a day [*Id.*, 18-19, 114], **he is never free of his supervisory responsibilities, even when performing such work.** [*Id.* 26, 33]. He does office work every day, such as checking paperwork, email, and computer files, and going over the daily schedule. [*Id.*, 18]. Simpson is paid the same salary each pay period, regardless of the number of hours he works. [*Id.*, 65, 67].

4. Captain Suzanne Whittlesey

Suzanne Whittlesey has been a Captain since 2000. [Whittlesey Depo., 11]. Since then, she has been the commander of the Intake Unit, where she is in charge of all three shifts. [*Id.*, 15]. The Intake Unit is comprised of Whittlesey, three lieutenants, six sergeants, and approximately forty four (44) CCO's. [*Id.*]. In general, she testified that "it's my job to supervise the commanders. It's their job to supervise the officers." [*Id.* at 54]. She estimated that she spends half of her time on supervisory duties [*Id.*, 52]. The rest of her time is taken up with a host of other management duties. [*Id.* , 23-54].

In 2006, Whittlesey applied for a position as an Assistant Director of the Division. [*Id.*, 48, Depo. Exh. 2 (letter of Jan. 19, 2006)]. In that application, she emphasized her qualifications to be an assistant director, based upon her education and her experience as the commander of Intake, including the experience described above and

in more detail below, including, creating a training manual which was incorporated into an official Operational Order of the Division. [*Id.*, Exh. 2].

5. Lt. (now Sergeant) Justin Crawford

Justin Crawford is currently a Sergeant on 1st shift in the Custody unit. However, between September 7, 2003 and the payroll period ending March 7, 2004, he was a Lieutenant in Custody on the 3rd shift. [J. Crawford 11/17/06 Depo p. 20]. In March 2004, he voluntarily took a demotion to the position of Sergeant, so that he could receive additional pay in the form of overtime compensation. [Crawford Depo., 11/17/06 pp. 20 – 21].⁹

6. Lt. LaTrease Cunningham

Latrease Cunningham, has been a Lieutenant in the Intake unit on 1st shift for the entire period of time relevant to this case. She reports to Captain Whittlesey and supervises two Sergeants and fifteen (15) CCO's. [Exh. 1, 2; Cunningham Depo., 11]. She is the highest ranking officer on the shift most of the time. [Cunningham Depo., 20], and she is never free of her supervisory responsibilities. [*Id.*, 33].

7. Lt. Antonio DeLeon

Antonio DeLeon is currently a Lieutenant assigned to the Custody unit on 2nd shift. He reports to Captain Dwight Hall and supervises three sergeants and 59 CCO's. However, at one time or another he has worked all three shifts in Custody as a lieutenant. He became a lieutenant in September 2005. Prior to that date he was a sergeant, and prior to that he was a CCO. [Exh. 1, 2; DeLeon Depo., 8 - 9,12]. If no

⁹ If the Court applies the two year statute of limitations under the FLSA, then Crawford's claim would be barred.

Captain or Major is on duty, including all weekends, he is the highest ranking officer on duty. [DeLeon Depo., 12, 14]. Whenever he is on duty, he is never free of his supervisory responsibilities. [*Id.*, 44].

8. Lt. Rebecca Grillo

Rebecca Grillo is a Lieutenant assigned to the Custody unit on 1st shift. She reports to Captain Geneva Mitchell and supervises three sergeants and 59 CCO's. She has been assigned to Custody since approximately 1999 – 2000. [Grillo 11/30/06 Depo pp. 15 -16]. Before then, she was a lieutenant in the Community Alternative Program, which performs drug testing of released drug offenders and others, and supervises individuals who are in home incarceration. When on duty, she is never free of her supervisory responsibilities. [Grillo Depo., Vol. II, p. 314]

9. Lt. Randolph Jones

Randolph Jones is a Lieutenant and has been assigned to the 3rd shift in the Intake unit since approximately January 2006. There he supervises two sergeants and fifteen CCO's and reports to Captain Whittlesey. Prior to his assignment to Intake, Jones was a lieutenant on 1st shift in Custody. In Custody he reported to Captain Shawn Simpson and supervised two sergeants and approximately 62 CCO's.

10. Lt. John Reams

John Reams is a former LFUCG employee who resigned February 28, 2007. He was a lieutenant for about five months, from March 21, 2004 through August 22, 2004. [Reams Depo., 8].¹⁰ After that he took a voluntary demotion to the rank of sergeant in order to be eligible to earn overtime pay. [*Id.* at 8 - 9]. When he was a

¹⁰ Like Crawford, Reams' claim is barred if the statute of limitations is two years.

lieutenant, he was assigned to the Custody unit on the 3rd shift. [Reams Depo. p. 10] When on duty as a Lieutenant, he is never relieved of his supervisory responsibilities. [*Id.*, 70].

11. Lt. Bill Williams

Bill Williams is a former LFUCG employee who retired October 29, 2004. Between September 2003 and the date of his retirement, he was a lieutenant in Auxiliary Services.¹¹ He was the highest ranking officer in Auxiliary Services and supervised all of the other officers, including sergeants and CCO's. [Exh. 1,2; Williams Depo., 13 - 14].

C. Plaintiffs' Job Duties

1. Majors' Job Duties

Attached hereto as Exhibit 3 is the official LFUCG Job Description for Community Corrections Major, Pay Grade 117E, established 6/24/96 and last revised 05/02/05. **Pitts testified that this job description is accurate.** [Pitts Depo, at 29-30].¹² According to this job description, the general job function of a Major is: "Performs work of substantial difficulty with **responsibility for the supervision of all uniform staff.** Responsibilities extend to officers on three shifts, including all sections (i.e. Processing & Control, Auxiliary Services, etc.)." [*Id.* (emphasis added)]. While too lengthy to quote in full, the entire description bears careful reading, as do the job descriptions of the Captains and Lieutenants submitted herewith. Some of the more important provisions state:

¹¹ Williams testified that he was promoted to captain in 1983 but never received a captain's salary because, for some unexplained reason, the paperwork "never went through." and he never pursued the matter. [Williams Depo. pp. 10 – 11].

¹² He also testified that the job descriptions for Community Corrections Captains and Lieutenants are accurate. [*Id.* at 28, 29].

Program Administration/Supervision

Maintains daily contact and open line of communication with director and assistant director(s) while providing direction and supervision for commanders and line staff.

Meets with supervisors regularly to discuss operational events, inmate care and custody, etc.

Conducts meetings with subordinate commanders and assistants to keep them apprised of any changes in policies/procedures; **evaluates staff performance; addresses any complaints.**

Makes command decisions regarding inmate disciplinary actions, granting of special requests for inmates, etc.

Reviews all complaints regarding staff misconduct and/or impropriety; initiates investigations; and submits findings to Director Community Corrections and Assistant Director.

Resolves inmate/staff related complaints by reviewing the facts, making decisions and taking appropriate action according to policy/procedure guidelines.

Reviews confiscated items and makes proposals regarding changes or improvement in security procedures.

Reviews all custody staff shift assignments ensuring balanced coverage at all times. Recommends promotions, disciplinary actions, etc., for all uniform staff.

Coordinates division activities with other agencies to maintain a harmonious operation.

Develops new procedures to deal with problem areas; and monitors compliance of staff to changes.

Participates in pre-employment interviews for custody staff replacements.

Monitors reclassification of inmates for proper housing location after court ordered sentencing.

Plans operational strategies and develops policies/procedures.

....

[Exh. 3 (emphasis added)].

More specifically, Majors:

have a private office and spend the majority of their time in their offices, which are located in the executive command area [Gibbs Depo. p. 20];

do performance evaluations of their direct reports and review and sign off on performance evaluations of all subordinate employees [Pitts Depo., 34, 40, 50-51; Korb Depo., 153; Gibbs];

make recommendations to terminate employees, which have been accepted by administration [Pitts Depo., 35, 37, 212; Korb Depo., 62, 65-66; Gibbs Depo., 67];

issue oral warnings and making recommendations for more serious discipline, which have been accepted. [Cunningham Depo p. 27]

review recommendations for disciplinary actions taken by his staff for anything above an oral warning.[Gibbs Dep. 9:2-13.]

review oral warnings issued by subordinate commanders to ensure consistency, but not for approval, which is unnecessary. [Gibbs Depo. 30:10-16];

direct subordinates to issue discipline or Coachings and Counselings¹³ instead of issuing them himself. (Gibbs Depo., 31, 53];

maintaining daily contact with administration [Pitts Depo., 46];

attend meetings with Lieutenants and higher ranking commanders [*Id.*, 71-74];

¹³ Coachings and Counselings (“C&C’s”) are non-disciplinary forms of action used to commend or correct employee behavior. [Capillo Depo p. 62; Deleon Depo. p. 37; Johnson 12/1/06 Depo p. 113; Hall Depo p. 31]

are the first level of administration and do not typically perform the day to day duties of lower level commanders [Korb Depo., 30-32; Cunningham Depo., 86; Taylor Depo., 13];

supervise and monitor captains and lower ranks [Gibbs Depo. 7-10, 24, 30, 41; Korb Depo., 30-31];

supervise multiple shifts in units outside of Custody. [Gibbs Depo. 7:10-12.];

review the break sheets to ensure that employees are taking their rest and meal breaks, address any problems noted with the subordinate commanders, [Gibbs Depo. 45, 53, 54];

delegate authority to subordinates, such as broad authority to approve overtime pay for staff without his prior approval [Gibbs Depo., 43, 52; Korb Depo., 32];

conduct investigations into alleged employee misconduct; [Gibbs Depo., 21; Korb Depo., 140-41];

change employee work schedules [Hill Depo., 127];

determine whether tardiness is excused or unexcused; [Korb Depo., 60-61];

2. Captains' Job Duties

Attached hereto is the official LFUCG job description of Community Corrections Captain. **Mitchell, Simpson, and Whittlesey all testified that this job description is accurate.** [Mitchell Depo., Vol. I, 23, 48; Simpson Depo., 34-38; Whittlesey Depo., 23-48]. Indeed, **Whittlesey testified that she wrote the job description.** [Whittelsey Depo., 49-50]. As with the job description for the Major, this job description bears careful reading but cannot be quoted in full here. Pertinent parts of it state:

General Function: . . . Performs work of considerable difficulty serving as a Commander with responsibility for the supervision of Community Corrections Officers on a given shift or assigned to a specialized program or unit.

Administers, coordinates and supervises daily activities relative to assigned area..

Essential Functions: (Any one position may not include all of the duties listed nor do the listed examples include all tasks which may be performed.)

Administrative/Supervisory:

Supervises, monitors and coordinates the activities of subordinates and inmate trustees relative to assigned area ensuring that security is maintained and that there is compliance with established policies and procedures.

Conducts roll call, makes staff duty assignments and relays information keeping staff informed of policy/procedure changes and events occurring on prior shifts.

Prepares staff duty schedule ensuring adequate coverage at all times and reviews shift reports.

Conducts staff inspections ensuring proper uniform care and appearance.

Counsels subordinate staff and commends, corrects or initiates disciplinary action as appropriate.

Coordinates post-sentence transportation schedules with staff and Sheriff's Department.

Maintains population balance in inmate housing areas.

Supervises and manages the activities of assigned area to include planning, development, investigation and analysis; reviews and analyzes statistics and trends to formulate new directions to meet changing community needs.

Analyzes operating practices and management methods to increase efficiency, implement cost reductions and improve performance standards.

Selects and approves inmate trustees for duty both inside and outside the facility.

Authorizes the use of video equipment and supervises the taping of incidents and/or unusual inmate activity as stipulated in policy/procedure.

Makes command decisions during emergency situations when higher-ranking official is not available.

Conducts periodic staff meetings, recommends promotions and/or other personnel action as appropriate.

Monitors the activities of trainees ensuring that assignments from the Training Officer are carried out.

Periodically inspects all departments ensuring that housekeeping, security procedures, emergency equipment and all operational systems are all in accordance with operational requirements.

Submits proposals for improvement or establish of policy/procedure.

Community Corrections Services:

Conducts intermittent security and inspection tours of the Community Corrections Center.

Checks housing areas of “special-needs” inmates ensuring proper order and care.

Checks for security violations by custody staff and others.

Make outside perimeter checks and checks safety equipment.

Performs the duties of subordinate Community Corrections Officers when necessitated by workload.

Intake/Processing:

Checks and verifies daily schedules and information concerning all criminal trials and court proceedings; ensures information is processed appropriately.

Supervises the processing of all offender court documents, ensuring that commitments are accurately posted to the offender’s permanent record, that release dates are correct and offender is released appropriately.

Coordinates scheduling of add-on cases to ensure that inmates are brought to court and necessary paperwork is updated.

Ensures information required of the various inmate management and information systems is entered, maintained and processed accurately.

[Exh. 18., pp.1-2].

The testimony confirms in more detail the Captains' job duties. The testimony is that the Captains:

- are the shift commander in Custody [Mitchell Depo, Vol. I, 48; Crawford, Vol. I, 6];
- supervise the shift commander in Intake [Whittlesey Depo., 19-20];
- conduct daily pre-shift briefings where duty assignments are made to lower ranking employees [Simpson Depo., 18-19, 27, 28; Mitchell 8/11/07 Depo. pp. 55 - 56];
- assign work duties to subordinates (e.g., deciding which custody employees will be in which units or work as rovers, or which Intake employees will man the triage desk, do pat/frisk, etc.). [Mitchell Depo., Vol. I, 39, 56 (she assigns duties to herself and her commanders); Whittlesey Depo., 31-32 (assigns duties to subordinate commanders)];
- supervise, direct, monitor, and coordinate the work of subordinates [Mitchell Depo., Vol. I, 58, 62 (telling corrections officers what to do during commanders' checks); Simpson Depo., [*Id.* 34-35, 56 (“any subordinates that worked under me did what I told them to do”); Whittlesey Depo., 23, 54];
- create work schedules [Mitchell 8/11/07 Depo., p. 25].
- ensure adequate staff coverage, including changing staffing levels to meet the needs of the facility [Mitchell Depo., Vol. III, 26-28; Simpson Depo., 110; Whittlesey Depo., 26];
- appraising employees' performance for purposes of promotions, pay raises, and other changes in status, and reviewing appraisals performed by lower ranking supervisors [Mitchell Depo., Vol. I, 42-47; Simpson Depo., 20-21, 30; Whittlesey Depo., 36-37];
- receive, investigate and respond to employee complaints and grievances [Mitchell Depo., Vol. I, 117, 134; Vol. III, 68-77; Simpson Depo., 121; DeWitt Depo., 35-37];

- investigate and address inmate complaints about custody officers [Mitchell Depo., Vol. III, 69; Whittlesey Depo., 22];
- make recommendations to terminate employees' employment, which have been accepted; [Whittlesey Depo., 45-46 (four or five times); Simpson Depo., 22,33];
- serve on promotion panels and make effective recommendations to the Director about which applicants should be promoted [Whittlesey Depo., 38-39];
- serve on panels to decide whether to allow employees to transfer to other positions in the Division [Whittlesey Depo., 40];
- train employees [Simpson Depo., 20];
- require employees to adjust their hours of work, including holding them over for an extra shift on overtime [Mitchell 8/11/07 Depo pp. 107 - 108 (forced people to stay until someone volunteered); Simpson Depo., 18, 27];
- spend more than half their time on management duties [Whittlesey Depo., 52; Simpson Depo., 18, 113-14];
- review policies, practices, and procedures and recommend changes [Mitchell Depo., Vol. I, 34 (participated in planning for new jail); Whittlesey Depo., 22, 25-26, 51; Simpson Depo., 36-37];
- have discretion to permit employees to take longer rest and meal breaks than provided in the written policy [Simpson Depo., 45, 49; Grillo Depo., Vol. I, 53 - 54; Taylor Depo. 41].
- approve or disapprove time cards and overtime, and maintain the time book [Mitchell 8/11/07 Depo. pp 100, 107, 129, 131; Simpson Depo., 40-41, 46, 68, 111-12, 114];
- perform commander's checks of inmate housing units and direct officers to correct problems noted [Mitchell Depo., Vol. I, 58-65; Simpson Depo., 28-39];
- ensure compliance with all policies and procedures, including the break policy; [Mitchell Depo., 24, 111-119, 132; Simpson Depo., 24, 34, 45; Whittlesey Depo., 74];
- function as the paperwork commander and prepare commanders' activity reports [Mitchell 1/23/08 Depo p. 83; Simpson Depo. 18, 63, 94];

- do not frequently have direct custody of inmates (Mitchell 1/28/08 Depo p. 9);
- coordinate activities with the Fayette County Sheriff's office and the U.S. Marshall's office [Simson Depo., 36].

3. Lieutenants' Job Duties

Attached hereto as Exhibit 5 is the official LFUCG job description of the Community Corrections Lieutenant. All Plaintiff Lieutenants who were asked agreed that it is accurate. [Grillo Depo., Vol. II, pp. 261-263; Cunningham Depo. 16; Jones Depo., 233; DeLeon Depo., 16-44]. Some of the pertinent provisions of the description state:

General Function: [Statement does not necessarily delineate all the concepts (scope and depth of assigned duties and responsibilities) of the position classification.] Performs work of considerable difficulty serving as either an Assistant Commander, Acting Commander or other special assignment with responsibility for the supervision of subordinate Community Corrections Officers. Assignments could be in the area of custody, processing and control or other specialized program or unit.

Essential Functions: (Any one position may not include all of the duties listed nor do the listed examples include all tasks which may be performed.)

Administrative/Supervisory:

Assists in supervising, monitoring and coordinating the activities of subordinates and inmate trustees relative to assigned area ensuring that security is maintained and that there is compliance with established policies and procedures.

Monitors the assessment and the assignment of housing of inmates.

Conducts roll call; makes staff duty assignments; and relays information to staff regarding policy/procedure changes and events occurring on previous shifts.

Functions as Assistant, Junior or Acting Commander as the need requires or as assigned.

Prepares shift duty schedule ensuring adequate coverage of at all times.

Conducts staff inspections ensuring proper uniform care and appearance.

Counsels subordinate staff and commends, corrects, or initiates disciplinary action as appropriate.

Makes command decisions during emergency situations when Commander or other higher ranking official is not available.

Prepares a list of inmates to be transported, upon notice of intent from Sheriff's or Parole Office, and distributes to administrative staff and infirmary as appropriate.

Assists in supervising and managing the activities of assigned area to include planning, development, investigation and analysis; reviews and analyzes statistics and trends to formulate new directions to meet changing community needs.

Investigates staff or inmate grievances and processes grievance forms.

Coordinates activities with processing and control, Computer Services or others concerning computerized records or problems with the system.

Performs duties of Training Officer instructing personnel on court procedures, rules and regulations, etc.

Community Corrections Services:

Inspects inmate holdover areas regularly for contraband, damage, cleanliness and/or anything out of the ordinary which could facilitate an escape.

Conducts intermittent security and inspection tours of the Community Corrections Center.

Checks housing areas of "special-needs" inmates ensuring proper order and care.

Escorts/transport, monitors and supervises inmates to and from various locations; maintains order and control of inmates and visitors.

Intake/Processing:

Enters, processes and verifies information required of the various inmate management and information systems.

Determines which inmates are required to go to court; notifies appropriate personnel; ensures inmate is dressed appropriately.

Verifies identity of person transported, security status, destination and transportation order.

Performs duties on first floor including booking, processing people, fingerprinting and other duties as needed.

Administers Alcohol Intoxicated (AI) Breathalyzer tests.

[Exh. 5, p.1].

The testimony reveals more details about Lieutenants' duties. They:

direct work of subordinates. [Grillo Depo., Vol. I, 14, Vol. II, 213; Jones Depo., 22, 25 (makes sure all duties & tasks are completed); Cunningham Depo., 12; DeLeon Depo. 12-17],

are assistant shift commanders in Custody and acting commanders on the Captain's days off; (Grillo Depo., Vol. II, 191, 272; Jones Depo., 22-23, 53 ("if I'm the highest ranking commander, everything that goes on is basically my responsibility") p.105); Reams Depo., 11, 62];

are shift commanders in Intake [Whittlesey Depo., 19-20; Cunningham Depo., 20];

prepare employees' work schedules [Cunningham Depo., 13-17; DeLeon Depo., 17];

function as the paperwork commander for the whole shift, and remain in the shift command center for the entire shift when performing that function [DeLeon Depo., 49; Taylor Depo., 32, 71];

conduct pre-shift briefings and make duty assignments to all staff [Grillo Depo., Vol. II, 200];

ensure adequate staff coverage, including requiring employees to remain on duty for overtime [Jones Depo., , 23-24, 32; Taylor Depo., 41; Grillo Depo., Vol. II, 271-72];

appraise productivity and efficiency of subordinates for purposes of recommending promotions or other changes in status (e.g., pay; demotions, etc.) [Jones Depo., 25-27; Lennon Depo., Vol. II, 54-55; Reams Depo., 63; DeLeon Depo., 26. Cunningham Depo. 21];

receive, investigate and respond to employee complaints and grievances [Grillo Depo., Vol. II, 194-95; DeLeon Depo., 18-19; Cunningham Depo. 14]; Reams Depo., 63; Morgerson Depo., 75, 78];

make recommendations to discharge employees which have been accepted [Cunningham Depo., 27-28; Case Affidavit [Exhibit 8];

have authority to recommend discharge of other employees [DeLeon Depo., 39; Cunningham Depo., 27-28]

disciplining employees and recommend discipline [Jones Depo., 24; Crawford Depo., Vol. I, 32-34; Lennon Depo., Vol. I, 32;

make effective recommendations about promotions [Cunningham Depo., 22, DeLeon Depo., 26-27];

sit on transfer panels and make recommendations about which employees' requests to transfer to a different unit should be granted or not granted [DeLeon Depo., 34-36; Cunningham Depo., 23];

interview prospective employees and make recommendations about hiring [DeLeon Depo., 26-27]

assign work duties (e.g., decide which custody employees will be in which units or work as rovers, or which Intake employees will man the triage desk, do pat/frisk, etc.). [Grillo Depo., Vol. II, 202 - 203; Jones Depo., 37; DeLeon Depo., 17; Cunningham Depo., 13, 18];

prepare staff work schedules [Cunningham Depo., 13, 17];

provide for the safety of employees, inmates, and property;
Grillo Depo., Vol. II, 241-42;

Train employees; [Grillo Depo., Vol. II, 192; Bartlett
Depo., 64; Morgerson Depo. 51]

are in charge in emergency situations such as at the scene
of a code, and assign duties to lower ranking officers who
respond [Brookshire Depo p. 64];

being in charge of escorting high risk inmates when it
requires two officers plus a commander. (Grillo Depo., Vol.
II, 213).

approving or disapproving time cards and overtime, [Jones
Depo., 44; Crawford Depo., Vol. I, 29 (gives his card to
Lt. DeLeon)];

approving or disapproving reasons for being late returning
from break [Grillo Depo., Vol., I, 220 – 221];

approving extra pay for missed meal breaks [Grillo Depo.,
Vol. II, 220 - 221

performing commanders checks and directing officers to
fix problems noted [Grillo Depo., Vol. II, 212; Jones
Depo., 55, 236; DeLeon Depo., Vol. I, 15; Crawford Depo.,
Vol. I, 25; 49)

reviewing officers activity reports for completeness and
accuracy [Grillo Depo., Vol. II, 217 – 218];

reviewing activity reports to be sure that they are not taking
excessive breaks; (Grillo, Vol. II; pp. 218 - 219)

discretion to decide how much break time is excessive
(Grillo Depo. Vol., II, p. 222).

reviewing break sheets, requiring employees to sign if they
forget, and disciplining those who are repeat offenders
(Grillo Depo Vol. II p. 221)

approving leave requests [Jones, 30-31].

ensuring compliance with all policies and procedures,
including break policy; (Jones, 23-24, 224; Grillo Vol. I, 14;
Cunningham Depo., 12, 28, 29];

preparing other reports (overtime spreadsheet, others.
[Jones, 52-53; Jones shift report, 5/24/07 (time served list)

assign themselves non-exempt duties [Grillo Depo., Vol. II,
202].

do not regularly direct supervis inmates [Jones Depo., 111-
12, 149, 239; Reams Depo p. 61; Grillo Depo., Vol II, 310;
Taylor Depo., 67-68; Korb Depo., 95, 152.

Two of the important functions of Lieutenants are to serve as paperwork commander in Custody and Intake, and, when not serving that role in Custody, to perform commanders' checks. The shift commander decides who will perform those duties and can assign to himself or herself. Paperwork commander duties include many of the duties listed above. [Deleon Depo., 8/16/07, p. 57 – 58; 62, 65; 87 – 88; 124; Grillo Depo., 11/30/06, p. 119; Crawford Depo., 11/1706, Vol. 1 p. 180; Barker Depo., p.. 75; Capillo Depo., p. 40; Hall Depo., 7/27/07, pp. 35-36; 57; Isaacs Depo., p. 11; Hughes Depo., pp. 56, 99, 168; Hershey Depo., 37]. Commanders' checks involve checking on the health and welfare of the CCO and inmates, the condition of the unit, and making sure that the CCO is correctly performing all duties assigned. [Taylor Depo. 30].

D. Plaintiffs' FLSA Classifications

The Plaintiffs who are the subject of this Motion, like all lieutenants, captains, and majors in the Division, are classified as exempt from the minimum wage and maximum hours provisions of the FLSA. The LFUCG does not pay them additional wages or salary for hours worked in excess of 40 hours in any work week. However, while under no legal obligation to do so, the LFUCG gives them an hour of compensatory time off for each hour they work in excess of forty hours in a work week.

CCO's and sergeants in the Division are paid on an hourly basis and are classified as non-exempt under the Fair Labor Standards Act. [Stevenson depo 67 – 68]. Hence,

they are eligible for, and they are paid, one and one half times their regular hourly rate of pay for all hours in excess of the statutory maximum hours per week. The LFUCG's practice is to pay such employees the applicable overtime rate for all hours worked in excess of 40 hours in a single work week.¹⁴

Former director of the Division, Glenn Brown, testified that the Majors and Captains are properly classified as exempt. [Brown Depo. p. 78]. He also testified that the LFUCG human resources department did an analysis of the position of lieutenant, to determine whether or not it was properly classified as exempt, and they concluded that the lieutenants were properly classified. [*Id.*, 21].

Current Director Ronald Bishop said that the bulk of lieutenants and captains duties is supervising lower level staff. [Bishop Depo at 94]. He further testified that lieutenants and captains generally do not supervise inmates directly, though they might for brief periods of time. [*Id.* at 96] . He said that generally their responsibility is the overall security of the facility. [*Id.* 96-97].

Majors, Captains, and Lieutenants are Paid on a Salary Basis.

Majors, Captains and Lieutenants receive the same amount of pay every work week regardless of the number of hours they work. [Pitts Depo., 20; Mitchell Depo., Vol. III, 32, 39-40; Jones Depo., 70-71; Williams Depo., 9; Grillo Depo., Vol. II, 232 (all stating that they received the same amount of pay every pay day)]. In addition, since September 6, 2003, each of the eleven Plaintiffs was paid at least \$455 per week for the

¹⁴ While this is the LFUCG's current practice, the LFUCG's position is that it is not legally obligated to pay overtime compensation to non-exempt Division employees until they have worked more than 43 hours in a workweek, pursuant to Section 7(k) of the FLSA, 29 U.S.C. § 207(k).

periods of time when he or she was classified as non-exempt. [Cooper Aff., Exh. A (Exhibit 3 hereto); Cunningham Depo., 9 (she earns \$54,000 per year).

Submitted herewith as Exhibit 7 is an affidavit of Jamie Cooper, Payroll Coordinator of the Division, with an attached computer generated report of the gross and net pay and related data of each of the eleven Plaintiffs at issue here. The lowest paid person in this group was Justin Crawford, whose lowest salary as a lieutenant (pay grade 114E) was \$1,276.00 for the bi-weekly pay period ending September 7, 2003. This is the equivalent of \$638 per week.

Pitts and Mitchell initially testified that they were paid on an hourly basis because their pay check stubs state an hourly equivalent rate of pay. [Mitchell Depo., Vol. I, p. 16; Pitts Depo. p. 17]. However, both Mitchell and Pitts also testified that they received the same amount of pay each week regardless of the number of hours they worked. [Mitchell Depo. Vol. III, pp. 32, 39-40; Pitts Depo. p. 20].

Exhibit A to the Cooper affidavit shows that the salary for these eleven plaintiffs was the same for long periods of time. Occasionally the salary would change due to various factors, such as annual pay raises that went into effect after the beginning of the fiscal year on July 1st, increases of \$1.00 in longevity pay which went into effect after the employee's employment anniversary date, payment of accrued sick pay at the beginning of the calendar year, and payment of additional hours in sick pay. Also, Exhibit A shows that in August 2007, each employee employed then received a large extra check, which was a retroactive pay increases resulting from collective bargaining. [Cooper Aff., ¶3; Ex. 7]. None of these variations in pay were due to variations in the quantity or quality of work performed.

Antonio DeLeon's pay illustrates this point. Beginning with the pay period ending September 7, 2003 (shown as 03/09/07), he was a nonexempt community corrections officer (pay grade 110N).¹⁵ He was promoted to the position of nonexempt sergeant (pay grade 112N) effective during the pay period ending April 18, 2004. Between September 2003 and the pay period ending September 4, 2005, when he was promoted to lieutenant (pay grade 114E), his pay varied widely every biweekly pay period, depending on the number of hours he worked. However, after his promotion to lieutenant, his salary remained constant at \$1,749.60 per pay period, until the payroll period ending July 9, 2006 (the first pay period of the new fiscal year), when he received a pay raise to \$1,816.16 per pay period. He received another pay raise to \$1,996.88 per pay period, beginning November 11, 2007.

Further demonstrating that the pay was on a salary basis is the change in gross pay of Justin Crawford after he voluntarily demoted to Sergeant in March 2004. Starting in September 2003 his salary was consistently \$1276.00 per pay period until the pay period ending December 14, 2003 (shown as 03/12/14), when it went up to \$1301.52. Beginning with the pay period ending March 21, 2004 (shown as 04/03/21), his pay grade changed from 114E (Community Corrections Lieutenant--Exempt) to 112N (Community Corrections Sergeant--Non-exempt)¹⁶ Thereafter his gross pay varied significantly each week because of the variation in the number of overtime hours he worked each week. In 2004 alone, he made as little as \$1460 and as much as \$2736 in a pay period.

¹⁵ These pay grades and related pay schedules have at all relevant times been set forth in Section 21 of the LFUCG Code of Ordinances, and the Court may take judicial notice of these facts pursuant to FRE 201.

During the period of time between July 8, 2007 and December 23, 2007, unlike previous and subsequent periods of time, Crawford did not work any overtime hours. However, his straight time hours varied slightly due to payment of sick pay hours. [Cooper Aff., Exh. 7]. These small variations in straight time hours resulted in direct variations in the amount of pay.

Likewise, the pay of John Reams fluctuated significantly every pay period between September 7, 2003 and his promotion to lieutenant beginning with the pay period ending March 21, 2004. Beginning then, his salary each pay period was \$1,300.24, until it was increased to \$1,348.22 beginning in June 2004. He was demoted to sergeant beginning with the pay period ending September 5, 2004, after which his pay again began to fluctuate significantly due to the amount of overtime he was working.

E. Collective Bargaining Agreement

Pursuant to KRS 67A.6901, the Kentucky General Assembly required the LFUCG to engage in collective bargaining with duly authorized representatives of community corrections employees. These employees, up to and including the rank of Captain, appointed the Communications Workers of America (CWA) as their collective bargaining representative. At the CWA's request, two separate bargaining groups were established: (1) officers and sergeants; and (2) lieutenants and captains. Separate collective bargaining agreements have been negotiated for these two bargaining units. Current LFUCG human resources director Michael Allen was the chief negotiator in each set of negotiations. In addition to representatives of the Communications Workers of America, the lieutenants and captains were represented at the bargaining table by Suzanne Whittlesey, Randy Jones and Sergeant John Taylor. [Taylor Depo. pp. 71 - 72].

The collective bargaining unit for the lieutenants and captains was ratified by that bargaining unit and went into effect in July 1, 2007. Both Lieutenant Rebecca Grillo and Captain Geneva Mitchell testified that they voted in favor of this agreement. [Grillo Depo Vol. 2; p. 234; Mitchell 1/28/08 Depo p. 72]. In Article 21, Section VI on page 29 of this agreement, the LFUCG and the union agreed that lieutenants and captains would receive compensatory time, not overtime compensation, for all hours worked in excess of forty hours in a work week.

Michael Allen is also an attorney. [Allen Depo p. 6]. He testified that in preparation for both sets of collective bargaining negotiations, he looked at the job duties of the officers, sergeants, lieutenants and captains. He compared these duties with the standards established pursuant to the Fair Labor Standards Act for determining whether an employee's duties satisfy the requirements for the executive exemption under the FLSA. He concluded that the lieutenants and captains were exempt. [Id. at 14]. At the bargaining table he communicated his conclusion to the bargaining representative of the captains and lieutenants, and they accepted this conclusion. In his deposition, Allen discussed the various factors and duties which lead him to conclude that the lieutenants and captains are exempt under the FLSA. [Id. at 23-38].

II. ARGUMENT

A. Summary Judgment Standard under Fed. R. Civ. P. 56

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "The movant has the burden of establishing that there are no genuine issues of material fact, which may be accomplished

by demonstrating that the non-moving party lacks evidence to support an essential element of its case.” *Hunley v. DuPont Auto.*, 341 F.3d 491, 496 (6th Cir. 2003), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Once the moving party shows an absence of a genuine issue of material fact, the non-moving party may not “rely merely on allegations or denials in its own pleading; rather, its response must ... set out specific facts showing a genuine issue for trial.” Fed. R. Civ. P. 56(e). A fact is “material” only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “A dispute is ‘genuine’ only if based on evidence upon which a reasonable jury could return a verdict in favor of the non-moving party.” *Henderson v. Walled Lake Consol. Schools*, 469 F.3d 479, 487 (6th Cir. 2006). Thus, the mere existence of a scintilla of evidence in support of the non-movant is not sufficient; there must be sufficient evidence upon which a jury could reasonably find for the non-movant. *Henderson*, 469 F.3d at 252; *Thomas v. Speedway SuperAmericia, LLC*, 506 F.3d 496, 500 (6th Cir. 2007). Summary judgment should be granted if the non-movant who bears the burden of proof at trial does not establish an essential element of his case. *Prebilich-Holland v. Gaylord Entm’t Co.*, 297 F.3d 438, 442 (6th Cir. 2002).

B. Fair Labor Standards Act, Standard of Review, and Employer’s Burden

Sections 6 and 7 of the FLSA provide respectively for the minimum hourly wage which a covered employer must pay, and the maximum hours which an eligible employee may work in a workweek without receiving overtime compensation. 29 U.S.C. §§ 206, 207. Section 13 of the FLSA contains numerous exemptions from Sections 6 and 7, including, as applicable here, “any employee employed in a bona fide executive, administrative, or professional capacity” *Id.* § 213. The LFUCG

contends that the eleven Plaintiffs named above are exempt under either the executive or the administrative exemption of Section 13.¹⁷

The FLSA does not define the terms “executive” and “administrative,” but regulations promulgated by the U.S. Department of Labor (“DOL”) define them and provide criteria for determining whether employees fall under these exemptions.¹⁸ Those regulations are published at 29 C.F.R. Part 541 (2006). Numerous court decisions and opinions of the Administrator of the Wage & Hour Division of the DOL also address the issue.

The question of whether an employee’s duties are exempt under either the executive or the administrative exemption is a question of law for the court. *Ale v. Tenn. Valley Auth.*, 269 F.3d 680, 691 (6th Cir. 2001) (quoting *Icicle Seafoods, Inc., v. Worthington*, 475 U.S. 709, 714, (1986)); *Shockley v. City of Newport News*, 997 F.2d 18, 26 (4th Cir. 1993). The question of the frequency with which an employee performs certain duties, and the significance of those duties to the employer’s business, are questions of fact. *Shockley*, 997 F.2d at 26; *Martin v. W.E. Monks & Co.*, 1993 WL 300332 at *2 (6th Cir. 1993).

The Sixth Circuit has held that “[e]xemptions under the FLSA are narrowly construed against the employer.” *Takacs v. Han Automotive Corp.*, 246 F.3d 776, 779 (6th Cir. 2001). An employer must prove by “clear and affirmative” evidence

¹⁷ The Plaintiffs do not allege that their rights under Section 6 of the FLSA have been violated, but only their rights under Section 7. [Ninth Amended Complaint, ¶¶ 181 – 193].

¹⁸ See discussion of the DOL Regulations in Section C, *infra*.

that an employee is exempt. *Ale v. Tenn. Valley Auth.*, 269 F.3d 1680, 691 n.4 (6th Cir. 2001). The Sixth Circuit recently discussed the meaning of “clear and affirmative” evidence. *Renfro v. In. Mich. Power Co.*, 497 F.3d 573 (6th Cir. 2007). In *Renfro*, the court clarified that references in previous cases to “clear and affirmative evidence” did not create a heightened burden for the employer moving for summary judgment. *Id.* at 576. Instead, “[t]he word ‘clear,’ as used in this phrase, traces to the ‘clearly erroneous’ Rule 52(a) standard, but that standard is inapposite to our current review of a motion for summary judgment.” *Id.* Furthermore, references to “affirmative” refer to the fact that the defense is affirmative. The court held that because there is no heightened burden, the employer must prove this affirmative defense by a preponderance of the evidence. *Id.*

Despite this burden, federal courts have entered summary judgment for employers in many FLSA exemption cases, including this Court in 2000 in an exemption case involving the LFUCG and eight plaintiffs, one of whom was a Lieutenant in the Division of Community Corrections. *See, e.g., Acs v. The Detroit Edison Co.*, 444 F.3d 763 (6th Cir. 2006); *Whisman v. Ford Motor Co.*, 157 Fed. Appx. 792 (6th Cir. 2005); *Aiken v. City of Memphis*, 190 F.3d 753, 761-62 (6th Cir. 1999) (police captains are exempt as executives); *Douglas v. Argo-Tech Corp.*, 113 F.3d 67 (6th Cir. 1997); *McGure v. City of Portland*, 159 F.3d 460 (9th Cir. 1998); *Mich. Ass’n of Governmental Employees v. Mich. Dep’t of Corrs.*, 992 F.2d 82 (6th Cir. 1993) (corrections supervisors are exempt); *Johnson v. Lexington-Fayette Urban County Gov’t*, 198 F.3d 246 (6th Cir. 1999) (affirming summary judgment for LFUCG against Corrections Lieutenant and seven other plaintiffs on salary test and remanding for determination on duties test); *Johnson v. Lexington-Fayette Urban-County Gov’t*, Civil Action No. 97-155 (E.K.Ky.

Nov. 8, 2000) (on remand from Sixth Circuit, summary judgment for LFUCG on duties test); *Anderson v. City of Cleveland*, 90 F. Supp. 2d 906, 912-22 (D. Tenn. 2000) (police lieutenants qualify as exempt executives); *Horne v. Singer Business Machines, Inc.* 413 F. Supp. 52 (D.C. Tenn. 1976).

C. DOL Regulations

1. 2004 DOL Regulations

In 2004, the U.S. Department of Labor promulgated final revisions to Title 29, Part 541, of the federal wage and hour regulations, concerning the executive, administrative and professional exemptions, and it published these revisions as a Final Rule in the Federal Register on April 23, 2004. 69 FED. REG. 22122).¹⁹ The revised Part 541 regulations went into effect on August 23, 2004. 69 FED. REG. 22122. The purpose of the new regulations was to update and simplify previous regulations which had been in effect for many years. “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” 69 F.R. 22122, 22126 (Apr. 23, 2004). Like the previous regulations, the new regulations set forth two general requirements to qualify for either the executive or the administrative exemption. First, the employee must be paid on a salary basis. 29 C.F.R. §§ 541.600. The 2004 regulations raised the minimum salary applicable to the executive and administrative exemptions to \$455 per week. *Id.*, §600(a). Second, the employee must have the requisite duties. *Id.*, §§ 100-204.

¹⁹ The Department of Labor’s interpretation of regulations as stated in its Final Rules and Wage & Hour Administrator Opinions, is entitled to deference by this Court. *Spralding v. City of Tulsa*, 95 F.3d 1492, 1495 (10th Cir. 1996).

In addition to raising the minimum salary requirement, the new regulations streamlined the duties test. As interpreted by the Sixth Circuit, the new regulations “eliminated the distinction between the short and long test. The lone test in the current regulations mirrors the short test in the former regulations, albeit with a higher weekly salary and an additional element.” *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 502 n.3 (6th Cir. 2007). The additional element is the “particular weight” element discussed below. *Thomas* also held that the former regulations are so similar to the new regulations for the primary duty and management requirements that its interpretation of the former regulations “provides guidance to courts performing the primary duty analysis under the current regulations.” *Id.* at 503 n.5.

a. The Executive Exemption

Section 541.100(a) of the 2004 regulations states:

(a) The term “employee employed in a bona fide executive capacity” in Section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary basis at a rate of not less than \$455 per week ... exclusive of board, lodging or other facilities;

(2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other employees; and

(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

20 C.F.R. § 541.100 (2006). Each element will be discussed in turn.

i. Payment on a Salary Basis

An employee is paid on a salary basis if “the employee regularly receives each pay period on a weekly, or less frequent, basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.” *Id.*, § 541.602(a). Permissible deductions are delineated in 29 C.F.R. § 541.602 and include, but are not limited to, deductions for an employee missing one or more full days due to personal reasons; off-setting amounts paid by military or court systems due to authorized leave; penalties for safety infractions; certain workplace conduct infractions; and FMLA qualifying leave.

ii. Primary Duty of Management.

An employee’s primary duty is management of an enterprise if it is “the principal, main, major or most important duty that the employee performs.” *Id.*, § 541.700(a). **Whether a duty is primary is considered on a case-by-case basis looking at the character of the employee’s job.** *Id.* Factors to consider are:

the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee’s relative freedom from direct supervision; and the relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

Id. The amount of time spent performing exempt duties is also a factor, but it is not dispositive. *Id.* If over 50% of the time is spent in performing management duties, then the employee is probably exempt. However, if it is less than 50%, then the employee can

still be exempt based on the other factors. *Id.* It is permissible for an employee's primary duty to be a combination of administrative and executive duties. *Id.*, § 541.708.

The term "management" includes:

interviewing, selecting, and **training** of employees; **setting and adjusting** their rates of pay and **hours of work**; **directing the work of employees**; **maintaining** production or sales **records for use in supervision or control**; **appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status**; **handling employee complaints and grievances**; **disciplining employees**; **planning the work**; determining the techniques to be used; **apportioning the work among the employees**; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; **providing for the safety and security of the employees or the property**; planning and controlling the budget; and **monitoring or implementing legal compliance measures**.

Id., § 541.102 (emphasis added).

For a department or subdivision to be "customarily" recognized, the department or subdivision must have a "permanent status and function." *Id.*, § 541.103(a).

iii. Customary and Regular Direction of the Work of Two or More Employees.

The phrase "customarily and regularly" means greater than occasional but less than constant and includes "work normally and recurrently performed every workweek; it does not include isolated or one-time tasks." *Id.*, § 541.701. "The phrase 'two or more other employees' means two full-time employees or their equivalent." [*Id.*, §541.104(a)] Supervision may be distributed among more than one executive, but each

must customarily and regularly direct the work of two or more employees. *Id.*, § 541.104(b).

iv. Authority to hire or fire or whose suggestions as to hiring, firing, advancement, promotions, or other changes in status are given particular weight

The regulations provide a non-exhaustive list of factors to assess in determining whether an employee's suggestions and recommendations are given particular weight:

whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a coworker. **An employee's suggestions and recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.**

Id. § 541.105 (emphasis added).

b. The Administrative Exemption

In order to qualify as an exempt administrative employee under the 2004 regulations, an employee must be:

(1) Compensated on a salary or fee basis at a rate of not less than \$455 per week ... exclusive of board, lodging or other facilities;

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Id., § 541.200(a).

i. Salary.

The same regulations that are applicable to the salary requirement for executive employees are applicable for this requirement, including the salary basis test discussed *supra*.

ii. Primary duty of office or non-manual work directly related to management or general business operations.

The phrase “directly related to management or general business” means “directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.” Examples in the regulation include:

work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

Id., § 541.201. The definition of “primary duty” is the same as that discussed *supra* for executive employees.

iii. Exercise of discretion and independent judgment on significant matters.

The exercise of discretion “involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various

possibilities have been considered.” *Id.*, § 541.202. A non-exhaustive list of factors to consider in determining whether a task involves the exercise of discretion and independent judgment, includes:

whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; **whether the employee performs work that affects business operations to a substantial degree**, even if the employee’s assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; **whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.**

Id., § 541.202 (emphasis added). “The fact that an employee’s decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For example, the policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies.” *Id.* Finally, it is permissible if the nature of the business so requires to have more than one person doing the employee’s job. *Id.* Examples of administrative employees are given in 29 C.F.R. § 541.203.

c. Other Pertinent Regulatory Sections

It is permissible for an employee to perform exempt and non-exempt duties concurrently so long as the employee is the one that determines whether he or she will perform non-exempt work and remains “responsible for the success or failure of business operations under their management while performing the nonexempt work.” *Id.*, § 541.106. Work that is “directly and closely related” to exempt work “that contribute[s] to or facilitate[s] performance of exempt work” is considered exempt work. *Id.*, § 541.703. For instance, the following work is considered to be directly related to exempt work: “recordkeeping; monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine.” *Id.*

Normally, nonexempt work performed in an emergency is considered exempt work if an emergency arises that “threatens the safety of employees, a cessation of operations or serious damage to the employer’s property. *Id.*, § 541.706. In addition, “[o]ccasional, infrequently recurring tasks that cannot practicably be performed by nonexempt employees, but are the means for an exempt employee to properly carry out exempt functions and responsibilities, are considered exempt work.” *Id.*, § 541.707.

2. Prior Regulations²⁰

Prior to the revision of the DOL regulations in 2004, two tests (called the long and short tests) were used to determine whether an employee was entitled to an exemption. Whether the long or short test was used depended on the employee’s salary.

²⁰ Because the LFUCG’s position is that the two year statute of limitations contained in 29 U.S.C. § 255 is applicable, the LFUCG does not believe that the previous DOL regulations are applicable. However, in the event that the Court determines that a three year statute of limitations applies, the LFUCG will discuss the previous regulations briefly.

Because the regulations had not been updated in over thirty years, and the salary amount was a mere \$250 per week to use the less stringent “short” test, the short test was always used. *Thomas v. Speedway Super America, LLC*, 506 F.3d 496, 502 (6th Cir. 2007). See *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 F.R. 22122, 22126 (Apr. 23, 2004). In the instant case, the short test would apply, as the undisputed evidence is that the eleven Plaintiffs here were paid more than \$250 per week during the relevant time period.

i. Executive Exemption

Under the short test, an employee qualified for the executive exemption if: “(1) her primary duty consists of the management of the enterprise, and (2) her primary duty includes the customary and regular direction of the work of two or more other employees.” *Thomas*, 506 F.3d at 502 (internal quotations omitted).²¹ Where there is an overlap of management and non-management duties, the time factor is not given undue weight. *Thomas*, 506 F.3d at 505. In *Thomas*, the court held that a store manager for a convenience store was exempt even though she worked only approximately 40% of her time on management duties, because her management duties were more important to the company; she daily exercised discretion; she operated from over the shoulder oversight; and she was paid 30% more than non-exempt employees. *Id.* at 505-09. Also, see 29 C.F.R. § 541.108 (2003) for a discussion of how work that is directly and closely related to exempt work is considered to be exempt work.

²¹ In the interest of saving space, the LFUCG will not discuss the definitions of “management,” “primary duty,” and other applicable terms but will simply refer the Court to Section 541.102-107 of the 2003 edition of the Code of Federal Regulations for those definitions. These definitions are very similar to the 2004 definitions. *Thomas, supra*, 506 F.3d at 503n.5.

ii. Administrative Exemption.

The short test for administrative employees provided exemption for those employees “whose primary duty consists of the performance of [office or non-manual work directly related to management policies or general business operations of his employer or his employer’s customers ...,] which includes work requiring the exercise of discretion and independent judgment.” *Ale v. Tennessee Valley Authority*, 269 F.3d at 684 (quoting 29 C.F.R. § 541.2(e) (2003)).

D. Division Majors, Captains, and Lieutenants Are Exempt Under Either the Executive or the Administrative Exemption.

1. Executive Exemption

All three groups of employees at issue here are exempt executives because (a) they are paid on a salary basis, (b) their primary duty is management of the LFUCG detention center or of a customarily recognized department or subdivision thereof, (c) they all customarily and regularly direct the work of two or more employees, and (d) their recommendations as to hiring, firing, promotion, advancement, or other changes in status are given particular weight.

a. They are Paid on a Salary Basis

The pay records submitted herewith demonstrate that the Plaintiffs, when in the ranks of Lieutenant and above, receive a predetermined amount that does not vary with the quantity or quality of the work performed. Each of them who was asked confirmed this in their testimony. Some of these Plaintiffs testified that they were paid by the hour because their pay stub stated the equivalent hourly rate of pay. [Mitchell Depo. Vol. 1 p. 16; Pitts Depo., 17]. Indeed, the LFUCG ordinances which set the pay ranges for all LFUCG employees state each pay grade’s pay on an annual, monthly, bi-

weekly, and hourly basis. However, courts faced with such evidence have consistently held that calculation of hourly equivalent rates of pay does not prove that the employees are not salaried. *Acs v. Detroit Edison Co.*, 444 F.3d 763, 768 (6th Cir. 2006), ("And it has long been clear that an employer may satisfy the salary-basis test even though it chooses to pay salaried employees on an hourly basis.") (citing *Douglas v. Argo-Tech Corp.*, 113 F.3d 67, 71 (6th Cir. 1997)). In *Wright v. Aargo Security Services, Inc.*, No. 99-9115, 2001 WL 91705 (S.D.N.Y. Feb. 2, 2001), the court ruled that "[t]he label an employer or a time record furnishes an employee for internal purposes is not determinative of the employee's status under the FLSA." *Id.* at *7. Rather, the court held that the determinative factors in analyzing an employee's status as salaried are whether the employee receives a "predetermined amount" that is "not subject to reduction" due to the quality or quantity of work. *Id.* at *8 (citing 29 C.F.R. § 541.118). The court in *Wright* cited and followed numerous other federal courts which have held likewise. *See, e.g., McGuire v. City of Portland*, 159 F.3d 460, 464 (9th Cir. 1998); *B.N. Spradling v. City of Tulsa, Oklahoma*, 95 F.3d 1492, 1500 (10th Cir. 1996); *Aaron v. City of Wichita, Kansas*, 54 F.3d 652, 658 (10th Cir. 1995); *Palazzo-Robinson v. Sharis Mgmt. Corp.*, 68 F.Supp.2d 1186, 1192 (W.D. Wash. 1999).

b. They Have the Primary Duty of Management

The organization charts, job descriptions and the testimony prove that these Plaintiffs were and are managers of recognized subdivisions of the LFUCG Detention Center. Major Pitts was in charge of the entire Bureau of Professional Standards, one of five major subdivision of the Division. Although it is the smallest bureau in terms of the number of personnel, he still supervised three employees.

Moreover, it is a significant bureau because it includes internal affairs and safety. Prior to taking over Professional Standards, he was in charge of the 3rd shift at the juvenile facility.

Likewise, Major Dabney commands the Bureau of Programs, Services, and Community Placement. [Exh. 1, 2]. Major Hill is in charge of the Intake and Auxiliary Services units. In Custody, the Majors are each in charge of a shift comprised of over sixty employees, more than thirty of whom are always on duty.

Captains Whittlesey and Simpson are in charge of the Intake and Auxiliary Services units, respectively. Captain Mitchell is currently the Shift Commander on 1st shift in Custody and previously was the Shift Commander on 3rd shift. On 3rd shift she was the highest ranking officer on duty and was in charge of the entire facility. [Mitchell 8/11/07 Depo pp. 15 – 16]. Even on 1st shift, when Major Korb and other higher ranking officers are on duty, she operates relatively free from direct supervision by Major Korb. Major Korb has given her only general guidance about how to handle matters such as assignment of duties to staff, and his role is to be there as a resource to help her when she has trouble making decisions. [Korb Depo, 66.] When testifying about her many duties and responsibilities in her deposition, she made clear that she is in charge of the shift. [Mitchell 8/11/07 Depo p. 14, 24, 48].

Lieutenant Charlesetta Johnson commands all three shifts in Master Control. Lieutenants Cunningham and Jones, who work in Intake on 1st and 3rd shifts, respectively, are shift commanders like the Captains in Custody.

Lieutenants Crawford, DeLeon, Grillo, and Reams have all worked in Custody, where they were Assistant Shift Commanders and were in complete charge of

their shifts and, indeed, in charge of the entire facility on the Captain's days off. Lt. Williams commanded worked in Auxiliary Services, where he was the highest ranking officer and supervised several Sergeants and numerous CCO's.

Second, all of these officers have or had primarily management duties. They work in offices and prepare reports and other paperwork such as work schedules, overtime reports, commander shift reports, memoranda on investigations of complaints against employees, oral warnings, Coachings & Counselings, and recommendations for more serious discipline. They also review paperwork prepared by other employees, such as break sheets and officer shift reports, to ensure that they are filled out correctly and accurately. They assign work duties such as deciding which duty posts officers will man each shift; they instruct employees what to do or not to do, such as when they perform commanders' checks and find something that needs to be done; they adjust hours of work, including assigning overtime or allowing employees to leave early; they decide if tardiness will be excused or unexcused; they receive and address employee complaints and grievances; they issue oral warnings and Coachings and Counselings; they recommend disciplinary suspensions and termination; they conduct performance evaluations of subordinates which are used for purposes of determining pay raises; they train employees; they are responsible for the safety and security of the inmates and employees, and if something goes wrong, they are responsible; they review policies and procedures and recommend changes; they write training manuals; and in general they are responsible for enforcing and implementing all Division policies and procedures.

c. They Customarily and Regularly Direct the Work of Two or More Employees

Each Plaintiff customarily and regularly directs the work of two or more employees. Even when all of the Majors, Captains, and Lieutenants are added together,

the ratio of Sergeants and CCO's to them far exceeds 2:1. The lowest ratio is probably in Intake, where the Lieutenant in charge of the shift supervises eight to twelve employees per shift. [Brookshire Depo p. 24; B. Herbel Depo p. 21; LaFoe Affidavit (Exh. 6)]. In Custody, even when the Captain and Lieutenant are on duty, they supervise thirty other employees. Finally, the Plaintiffs exercise their supervisory duties every single day, not just occasionally or sporadically. Even when they use their discretion to assign themselves duties of a CCO, such as taking out the trash or working as a Rover, they are not relieved of their supervisory duties. Each one of them who was asked testified that he or she was **never** relieved of supervisory responsibility while on duty. *See* 29 C.F.R. § 541.106 ("Generally, exempt executives 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.")

d. Their Recommendations About Firing, Promotions, Advancement, and other Changes in Status are Given Particular Weight.

The evidence shows that all three ranks, Lieutenants, Captains, and Majors, have made recommendations to terminate employees which have been accepted. They acknowledged this in their testimony, and/or it is shown in the documents submitted herewith. [Exh. 8 (Case Aff., and attachments)]. In the files submitted with the Case Affidavit, it is clear that the recommendation of Lt. Morgerson to discharge Michael Church was accorded weight and was approved as it went up the chain of command. Lt. Cunningham testified that she made a recommendation to terminate an employee which was accepted. [Cunningham Depo., 27]. Captain Whittlesey recommended terminations on four or five occasions, which were also accepted [Whittlesey Depo., 45-46], and Captain Simpson did the same on once occasion. [Simpson Depo., 22, 33].

All of these plaintiffs have the authority to issue Coachings and Counselings (positive and negative) and oral warnings, which go in their personnel file and can affect their opportunities for transfer, pay raises, and promotions. They can also recommend more serious discipline, which have the same effect.

In addition, Captain Mitchell has recommended employees for promotion and commendations, which they have received. All of them have conducted regular annual performance evaluations which are used for the purpose of determining pay raises, and they have conducted other, quarterly evaluations. Similarly, they have interviewed applicants, sat on promotion panels and made recommendations to the director about promotions, participate in group decisions to approve or disapprove requests of employees to transfer to other units. They have also sat on panels which reviewed employees' requests for transfers to other units and have made recommendations about whether or not to grant such requests. Altogether, the foregoing facts amply demonstrates that the Majors, Captains, and Lieutenants satisfy this requirement of the executive exemption.

e. Applicable Case Law

In *Johnson v. Lexington Fayette Urban County Gov't*, Civil Action No. 97-155 (E.D.Ky. Nov. 8, 2000), this Court held that Lt. Richard Kukuk, a Lieutenant at the Division of Community Corrections, was exempt under the first and third prongs of the shorter test of the old regulations. He was paid a salary of at least \$250 per week,²² and he customarily and regularly supervised the work of two or more employees on the

²² The Court had previously held in a summary judgment that Kukuk and the other plaintiffs were paid on a salary basis, and the Sixth Circuit had affirmed this judgment. *Johnson v. Lexington Fayette-Urban County Gov't*, 198 F.3d 246.]

third shift, where the chain of command, started with the captain, then the lieutenant, then the sergeant, then the CCO's, just as it still does now. The Court also found that the third shift was a recognized subdivision of the detention center. Finally, the Court held that the majority of Kukuk's time was spent in performing the management duties of supervising staff, touring officer work stations (i.e., commanders' checks), dealing with staff matters, documenting events, assessing inmates, and dealing with other agencies. Finally, the Court relied on the fact that Kukuk was the acting Captain two days each week on the Captain's regular days off, and also when the Captain was sick or on vacation.

Except for the requirement of effective recommendation of hiring and firing, which was not an element of the executive exemption at the time, the case of Lt. Kukuk is on all fours with the facts of the instant case. As set forth in the affidavit of James Kammer [Exh. 10] submitted herewith, the duties of the commanders who work in Custody have not materially changed since the decision in the *Johnson* case. Moreover, the fact that Lt. Kukuk was exempt means, *a fortiori*, that the Captains and Majors are exempt as well.

While there are numerous published FLSA cases involving correctional facilities, none that the LFUCG has been able to find, other than *Johnson*, directly involve the issue of the duties of the officers. In *Mich. Ass'n of Governmental Employees v. Mich. Dep't of Corrs.*, 992 F.2d 82 (6th Cir. 1993), correction shift supervisors brought an FLSA action seeking overtime pay for pre-shift briefings. The lower court granted the defendant's motion for summary judgment and held that the supervisors were exempt, which was affirmed by the Sixth Circuit. *Id.* at 83. The plaintiffs conceded the

supervisory nature of their duties but argued that they were not paid on a salary basis because once sick and compensatory leave is exhausted, their pay was subject to reduction for absences of less than one day. *Id.* at 84-85. The courts rejected this argument.

In *Rushing v. Shelby County Gov't*, 8 F. Supp. 2d 737 (W.D. Tenn. 1997), the plaintiffs were correctional center supervisors (sergeants, lieutenants, and captains) who claimed overtime violations under the FLSA. The court noted in *dicta* that the supervisors regularly directed the work of correctional officers and that their primary duty was to manage the facility. *Id.* at 740. The court also noted that the officers were paid on a salary basis regardless of the fact that their monthly pay was based on an hourly rate because the “purpose of the stated hourly rate is to calculate benefits, bonus pay, annual leave and holiday pay.” *Id.* at 742.

A recent case discussed the management requirement as it applied to police officers. In *Murphy v. Town of Natick*, 516 F. Supp. 2d 153 (D. Mass. 2007), the court held that the police sergeants satisfied the duties test under the new regulations. In particular, the court held,

As defendants note, sergeants are usually assigned as Station Supervisors during two of their four weekly shifts each month. **Sergeants assigned to the Patrol Services Division direct as many as nine to ten patrol officers who are assigned to a shift.** They work relatively free from supervision and exercise their judgment and discretion without direct oversight by their commanding lieutenants. **They are often the only superior officers on duty** at the station or on patrol. They direct the response to and the investigation of crimes and accidents. **They are more highly compensated than patrol officers, and receive additional compensation as supervisors.**

Id. at 159.

In *Mullins v. City of New York*, 523 F. Supp. 2d 339, 357 (S.D.N.Y. 2007), the court held that police sergeants met the primary duty test because they “do not simply work alongside their subordinates, but concurrently hold more responsibility over their units.” The court found significant that,

Indeed, the parties do not dispute that defendants depend upon plaintiffs to exercise discretion and make significant decisions based on their judgment while in the field, including 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. Because they customarily serve as the “ranking officers at any accident or arrest scene,” they are relatively free from direct supervision and can “make any of the spot decisions that [are] required, ensure that proper safety precautions [are] taken, and [] supervise, correct, train, and evaluate their officers.” In doing so, they “exercise a great deal of management and discretion ” over the officers they accompany in the field. The record also shows that plaintiffs are responsible for ensuring that their subordinates perform their assignments, and they are personally subject to discipline for failure to do so.

For cases finding high ranking police and fire employees exempt under the former regulations, see *Aiken v. City of Memphis*, 190 F.3d 753, 761-62 (6th Cir. 1999) (police captains are executives); *Anderson v. City of Cleveland*, 90 F. Supp. 2d 906, 912-22 (E.D. Tenn. 2000) (police lieutenants qualify as executives under the circumstances even though they sometimes work in the field); see also *Atlanta Prof. Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 805-06 (11th Cir. 1991) (fire captain exempt as an administrator); *West v. Anne Arundel County, Md.*, 137 F.3d 752, 761-63 (4th Cir. 1998) (emergency medical technician lieutenants and captains were executives).

2. The Administrative Exemption

Assuming for the sake of argument that these Plaintiffs did not qualify for the executive exemption because they did not have the requisite management duties, or their recommendations as to firing, promotions, advancement, or other changes in status, were not given particular weight, they would still be exempt under the administrative exemption, due to their primary duty of office or non-manual work directly related to management or general business operations, and their discretion with respect to matters such as administration and enforcement of Division policies and procedures on matters regarding custody and care of inmates, personnel matters such as discipline and handling of employee and inmate complaints and grievances. These Plaintiffs, down to the rank of Lieutenant, exercise discretion on such matters as duty assignments of subordinates, whether to approve overtime (a major issue in this action), whether to allow CCO's to extend interrupted breaks or pay them instead [Grillo Depo., Vol. II, 306], whether to perform certain duties themselves or assign them to others, and other matters discussed in detail in Sections I.B and I.C. *supra*. That their decisions or recommendations are subject to review by hire ranking personnel does not preclude them from having the requisite discretion. 29 C.F.R. § 541.202.

E. Section 541.3(b)(1) Does Not Preclude Application of the White Collar Exemptions to this Case.

The 2004 DOL regulations state that the white collar exemptions in Section 13 of the FLSA do not apply to “police officers ... firefighters ... [or] correctional officers ... regardless of rank or pay level, who perform work such as ... detaining or supervising suspected and convicted criminals, including those on probation or parole.” 29 C.F.R. § 541.3(b)(1) (2006). Plaintiffs have previously argued in this case

that this provision makes the white collar exemptions inapplicable to *any* correctional officer, including high ranking employees.

Prior to 2004, the Department of Labor regulations did not explicitly address the exempt status of police officers, firefighters and other first responders. There had been significant litigation over the status of such employees, so in 2004 the Department of Labor added Section 3(b)(1) to Part 541 for the purpose of recognizing established case law holding that the white collar exemptions do not apply to those public safety employees whose primary duties are not managerial or directly related to the management of the business operations of the employer. 69 Fed.Reg. 22122, 22129-22130. The Department of Labor's Final Rule points out that the revised Part 541 regulations retain the "long" duties test for exempt executives and notes that the exemptions in Section 13(a)(1) of the statute can apply to high level police and fire officials, including specifically police and fire lieutenants and captains, and fire battalion chiefs, so long as the employees in these positions meet all of the requirements set out in the white collar regulations. See 69 FED. REG. 22122, 22130 (April 23, 2004) (citing e.g., *West v. Anne Arundel County, Maryland*, 137 F.3d 752 (4th Cir.), *cert. denied*, 525 U.S. 1048 (1998)) (emphasis added). The Final Rule states:

Federal 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, such as directing the work of two or more other full time employees as required for the executive exemption, their primary duty is performing managerial tasks such as evaluating personnel performance; enforcing and imposing penalties for violations of the rules and regulations; making recommendations as to hiring, promotion, discipline or termination; coordinating and implementing training programs; maintaining company payroll and personnel records; handling community

complaints, including determining whether to refer such complaints to internal affairs for further investigation; preparing budgets and controlling expenditures; ensuring operational readiness through supervision and inspection of personnel, equipment and quarters; deciding how and where to allocate personnel; managing the distribution of equipment; maintaining inventory of property and supplies; and directing operations at crime, fire or accident scenes, including deciding whether additional personnel or equipment is needed.

Id. at 22130. Thus, application of the white collar exemptions depends upon whether the employee classification at issue meets the salary and primary duty requirements of the revised Part 541 regulations, not the title or rank given to the position. 29 C.F.R. §541.2.

In 2005, the U.S. Department of Labor issued an official Wage and Hour Opinion addressing the issue of whether a particular city's police lieutenants, police captains, and fire battalion chiefs were exempt from the minimum wage and overtime provisions of the FLSA under the revised Part 541 regulations. In this Opinion, the Department of Labor stated that, "the 13(a)(1) exemptions *may apply* to police lieutenants, police captains, and fire battalion chiefs positions so long as these positions meet all of the requirements set out in the Regulations. FLSA 2005-40, DOL Wage & Hour Op'n, (October 14, 2005) (citations omitted) (emphasis added) (copy attached as Exhibit A). Specifically, the Department of Labor explains that "they *may fit within the regulatory exemption for Executive Employees ... employed in a "bona fide executive capacity."* *Id.* (emphasis added). The Opinion goes on to analyze these employees' positions under the primary duty test of 29 C.F.R. §541.100 and holds that these employees are in fact exempt. *Id.* In reaching this conclusion, **the Department of Labor focused on the fact that while directing the work of two or more employees,**

these employees performed management duties, including, but not limited to: selecting and training other employees; setting work schedules; directing the work of others; evaluating worker productivity; handling complaints and grievances; disciplining employees; determining techniques, materials, and equipment to be used; and determining supplies, equipment and tools to be purchased; and making recommendations regarding hiring, firing, advancement, or promotion of other employees. *Id.* Thus, as interpreted by the U.S. Department of Labor itself, Section 541.3(b)(1) does not preclude correctional employees with the requisite duties from being exempt.

In accordance with the foregoing Opinion, one commentator has noted:

high-level police, fire, and correctional officials continue to be exempt if they meet the standards of the exemption (i.e. having their primary duty as performance of managerial tasks).

Schneider, Les A. & J. Larry Stine, 1 Wage and Hour Law: Compliance and Practice § 5:2.50 (Feb. 2007) (copy attached hereto as Exh. B) (citing 69 FED. REG. 22122-01 p. 18).

Courts which have construed Section 541.3(b)(1) have done so with respect to police officers, and they have held that the primary duties test is still used to determine whether police officers are exempt. *See Bennett v. City of Gould*, No. 5:06CV00182, 2007 WL 1288612, at *3 (E.D. Ark. Apr. 2007) (holding that despite § 541.3(b)(1), the Chief of Police was an exempt executive because he was the manager of the Department of Police; his managerial duties were significant; and the City gave him authority to hire and fire upon final approval of the City.); *Jackson v. City of San Antonio*, No. SA-03-CA-0049-RF, 2006 WL 2548545, at *11 (W.D. Tex. Aug. 31,

2006) (court denied summary judgment to employer police department because the lieutenants and sergeants only had *some* managerial duties, but did not have the authority to hire and fire and did not reach plaintiff's argument on the conclusiveness of § 541.3(b)(1)); *Mullins, supra*, 523 F. Supp. 2d at 339 (notwithstanding preamble to regulations mentioning sergeants as examples of non-exempt first responders under the new regulations, the court applied the duties test); *Murphy, supra*, 516 F. Supp. 2d at 153 (holding that police sergeants and lieutenants were exempt executives under both the pre and post 2004 regulations without discussion of 29 C.F.R. § 541.3(b)(1)).

These holdings, by analogy, demonstrate that the Major, Captains, and Lieutenants at issue here can be, and are, exempt despite Section 541.3(b), because they have the requisite duties and are salaried. These LFUCG employees have precisely the same duties found to be exempt in the cases cited above.

In the alternative, even if Section 541.3(b) had to be construed by itself, without regard to the duties of the employees, these LFUCG employees would not fall within its scope because the evidence shows that they do not detain or supervise suspected or convicted criminals. That is the job of the CCO's, not the supervisors. [Mitchell 1/28/08 Depo p. 9] Numerous witnesses testified that the CCO's supervise the inmates, and the commanders supervise the CCO's. As Lt. Jones put it, in both the Custody and the Intake units: "My job is [the CCO's] safety, so, you know, it's kind of one of these situations where they're watching the arrestees, I'm watching them. [Jones Depo., 149, 239]. Even when an inmate must be escorted with a commander present, the CCO's have custody of the inmate, and the commander is supervising the CCO's. [Grillo Depo., Vol. II, p. 224].

III. CONCLUSION

For all of the preceding reasons, the LFUCG is entitled to summary judgment on the allegations of the eleven plaintiffs named above. All of these plaintiffs are exempt under Section 13 of the FLSA and, thus, are not legally entitled to the payment of overtime compensation for hours worked in excess of the applicable statutory maximum. A proposed order is tendered herewith.

Respectfully submitted,

s/George J. Miller
George J. Miller
LaToi D. Mayo
Brian C. Baugh
Sharon L. Gold
WYATT, TARRANT & COMBS, LLP
250 West Main Street, Suite 1600
Lexington, KY 40507-1746
859.233.2012

Mitzi D. Wyrick
WYATT, TARRANT & COMBS, LLP
500 West Jefferson Street, Suite 2800
Louisville, Kentucky 40202-2898
502.598.5235

Counsel for Defendant

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been electronically filed through the ECF system this 3rd day of April, 2008, which will send a notice of electronic filing to all parties' counsel in the electronic filing system in this case:

Thomas W. Miller
Don A. Pisacano
Michael J. Cox
David T. Faughn
Elizabeth C. Woodford
Miller, Griffin & Marks, PSC
271 West Short Street, Suite 600
Lexington, KY 40507-1292

s/George J. Miller
Counsel for Defendant

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