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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON
CIVIL ACTION NO. 5:06-CV-00299-JBC

JUSTIN CRAWFORD, et al.,

PLAINTIFFS

v.

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

DEFENDANT

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION
FOR PARTIAL SUMMARY JUDGMENT WITH REGARD TO
NON-EXEMPT STATUS OF LIEUTENANTS AND CAPTAINS**

CERTIFICATE OF SERVICE

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TABLE OF CONTENTS

INTRODUCTION..... 1-2

FACTUAL BACKGROUND. 2-31

I. GENERAL BACKGROUND..... 2-5

A. *The DCC’s Ranks..* 2-3

B. *The LFUCG’s Failure to Properly Verify the Allegedly Exempt Status of Lieutenant and Captain.* 3-5

II. THE PRIMARY DUTIES OF LIEUTENANTS AND CAPTAINS..... 6-29

A. **Lieutenants and Captains must Serve as “First Responders” to Inmate Emergencies.** 6-7

B. **The Primary Job Duties of Lieutenants..... 7-21**

1. *The primary job duties of Lieutenants are the detention and supervision of suspected and convicted criminals.*..... 7-9

2. *The supposedly exempt position of Lieutenant is functionally indistinguishable from non-exempt position of Sergeant.* 10-13

3. *A Lieutenant’s job duties are neither executive nor administrative.* 13-21

C. **The Primary Job Duties of Captains. 21-29**

1. *The primary job duties of Captains are the detention and supervision of suspected and convicted criminals.*..... 21-23

2. *Captains’ job duties are neither executive nor administrative.* 23-29

III. LIEUTENANTS AND CAPTAINS ARE SUBJECT TO DEDUCTIONS IN PAY..... 29-31

ARGUMENT..... 32-70

I. FLSA EXEMPTIONS ARE NARROWLY CONSTRUED, AND THE EMPLOYER BEARS THE BURDEN OF PROVING THAT AN EXEMPTION APPLIES..... 32-33

A. Summary Judgment Standard. 32

Fed. R. Civ. P. 56(c). 32

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). 32

Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986). 32

B. Overview of the FLSA and its Exemptions. 32-33

29 U.S.C. § 207(a)(1). 32

Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960). 32

A.H. Phillips, Inc. v. Wallings, 324 U.S. 490, 493 (1945). 33

Martin v. Indiana Michigan Power Co., 381 F.3d 574, 578 (6th Cir. 2004). 33

Acs v. The Detroit Edison Co., 444 F.3d 763, 767 (6th Cir. 2006). 33

II. THE “FIRST RESPONDER” REGULATION PROVIDES THAT DCC LIEUTENANTS AND CAPTAINS ARE NON-EXEMPT. 33-39

29 C.F.R. § 541.3(b)(1). 34, 37

KRS 61.592(2). 35

KRS 61.592. 35

KRS 61.592(a). 35

KRS 61.592(2)(b). 36

29 C.F.R. § 541.3(b)(2). 36

III. THE LFUCG HAS NO BASIS FOR CLASSIFYING ANY DCC EMPLOYEES AS EXEMPT. 39

Harris v. District of Columbia, 741 F.Supp. 254, 260 (D.C. Cir. 1990). 39

IV. LIEUTENANTS AND CAPTAINS DO NOT PERFORM EXECUTIVE JOB DUTIES. 40-57

A. Overview of the Executive Exemption..... 40-45

1. The 2004 amendments. 40-43

29 U.S.C. §13(a)(1). 40, 43

29 C.F.R. § 541.100..... 40, 41

Davis v. Mountaire Farms, Inc., 453 F.3d 554, 557 (3rd Cir. 2006). 40, 41

Aguirre v. SBC Communications, Inc., 2007 WL 2900577, *17 (S.D. Tex. 2007)..... 41

29 C.F.R. § 541.105..... 41

29 C.F.R. § 541.102..... 42

29 C.F.R. § 541.100(2). 42

29 C.F.R. § 541.700(a)..... 42

29 C.F.R. § 541.700(b). 42

29 C.F.R. § 541.106(c)..... 42-43

29 C.F.R. § 541.106(a)..... 43

29 C.F.R. § 541.704..... 43

2. The pre-2004 amendments..... 43-45

29 U.S.C. §13(a)(1). 43

29 C.F.R. § 541.1(f) (2003)..... 44, 45

29 C.F.R. § 541.103 (2003)..... 44

29 C.F.R. § 541.100(4) (2007)..... 45

Sack v. Miami Helicopter Services, Inc., 986 F.Supp. 1456, 1467 n. 8 (S.D. Fla. 1997). 45

29 C.F.R. § 541.115 (2003)..... 45

B. Lieutenants Do Not Qualify as Executive Employees..... 45-55

1. Lieutenants do not have authority to hire or fire other Employees, nor do their suggestions or recommendations about, hiring, firing, or promotions receive any particular weight. 45-48

29 C.F.R. § 541.100..... 46

Sack v. Miami Helicopter Services, Inc., 986 F.Supp. 1456, 1467 n. 8 (S.D. Fla. 1997). 46

Davis v. Mountaire Farms, Inc., 453 F.3d 554, 557 (3rd Cir. 2006). 46

29 C.F.R. § 541.105..... 47

29 C.F.R. § 541.100(4). 48

2. The Lieutenants’ primary duty is not the “management” of the DCC or any subdivision thereof...... 48-55

Harris v. District of Columbia, 741 F.Supp. 254, 260 (D.C. Cir. 1990)..... 48-49

Schuller v. City of Livermore, 1987 WL 46348 (N.D. Cal. 1987) (not reported). 49, 50

Department of Labor v. City of Sapula, Oklahoma, 30 F.3d 1285 (10th Cir. 1994). 50

Donovan v. Great Lakes Recreation Co., 1983 WL 2057 (E.D. Mich. 1983) (not reported). 50

29 C.F.R. § 541.102..... 51, 52

29 C.F.R. § 541.102 (2003)..... 51, 52

Davis v. Mountaire Farms, Inc., 453 F.3d 554, 557 (3rd Cir. 2006). 51

29 C.F.R. § 541.106..... 52

29 C.F.R. § 541.111 (2003)..... 52

29 C.F.R. § 541.115(b) and (c) (2003)..... 52

Ale v. Tennessee Valley Authority, 269 F.3d 680 (6th Cir.2001). 53

International Ass’n of Fire Fighters, Alexandria Local 2141 v. City of Alexandria, Va.
 720 F.Supp. 1230, 1233 (E.D. Va. 1989). 53

Jackson v. City of San Antonio, 2006 WL 2568545 (W.D. Tex. 2006) (unpublished). 53-54

29 C.F.R. § 541.700(a).. 54

29 C.F.R. § 541.704.. 54

29 C.F.R. § 541.700.. 54

Thomas v. Speedway SuperAmerica, LLC, 506 F.3d 496 (6th Cir. 2007). 55

Light v. MAPCO Petroleum, Inc., 2005 WL 1868766 (M.D. Tenn. 2005) (unpublished). 55

C. Captains Do Not Qualify as Executive Employees. 55-57

29 C.F.R. § 541.100.. 55

29 C.F.R. § 541.102 (2007).. 57

29 C.F.R. § 541.102 (2003).. 57

V. LIEUTENANTS AND CAPTAINS DO NOT PERFORM ADMINISTRATIVE DUTIES.. . . . 58-67

A. Overview of the Administrative Exemption. 58-62

1. The 2004 amendments. 58-60

29 C.F.R. § 541.200(a).. 58

29 C.F.R. § 541.201.. 59

29 C.F.R. § 541.200(a)(2). 59

29 C.F.R. § 541.202(a).. 59

29 C.F.R. § 541.202(b). 59-60

29 C.F.R. § 541.202(e).. 60

29 C.F.R. § 541.202(f).. 60

29 C.F.R. § 541.203..... 60

2. Pre-2004 regulations..... 60-62

29 C.F.R. § 541.2(2) (2003)..... 61

Mohorn v. Tennessee Valley Authority, 2007 WL 2077549, *6 (E.D Tenn. 2007). 61

29 C.F.R. § 541.205(a) (2003)..... 61

29 C.F.R. § 541.207(b) (2003)..... 61

29 C.F.R. § 541.207(c)(1) (2003). 62

Sack v. Miami Helicopter Services, Inc., 986 F.Supp. 1456, 1467 n. 8 (S.D. Fla. 1997). 62

29 C.F.R. § 541.201(a)(1)-(3) (2003). 62

B. Lieutenants and Captains Are Not Administrators. 62-67

29 C.F.R. § 541.201 (2007)..... 62, 63

29 C.F.R. § 541.207 (2003)..... 62

29 C.F.R. § 541.201..... 63

Renfro v. Indiana Michigan Power Co., 370 F.3d 512, 517-18 (6th Cir. 2004)..... 64

Shockley v. City of Newport News, 997 F.2d 18 (4th Cir. 1993). 64, 65

Bratt v. County of Los Angeles, 912 F2d 1066, 1070 (9th Cir. 1990)..... 65

Harris v. District of Columbia, 741 F.Supp. 254, 260 (D.C. Cir. 1990)..... 65

West v. Anne Arundel County, Maryland, 137 F.3d 752 (4th Cir. 1998). 65

29 C.F.R. § 541.203..... 66

Ale v. Tennessee Valley Authority, 269 F.3d 680 (6th Cir.2001). 66

29 C.F.R. § 541.200(a)..... 67

29 C.F.R. § 541.202(e)..... 67

VI. LIEUTENANTS AND CAPTAINS ARE NOT PAID ON A SALARY BASIS.. 68-70

Aaron v. City of Wichita, 54 F.3d 652, 657 (10th Cir.), cert. denied, 516 U.S. 965 (1995). 68

29 C.F.R. § 541.602. 68

Spradling v. City of Tulsa, Okla. 95 F.3d 1492, 1501 (10th Cir. 1996). 68, 69

29 C.F.R. § 541.602(b)(3). 68

29 C.F.R. § 541.118(a)(5). 68

29 C.F.R. § 541.710. 69

29 C.F.R. § 541.602(b)(3). 70

CONCLUSION. 70-71

29 U.S.C. § 541.3(b)(1). 71

29 C.F.R. § 541.100. 71

Come the Plaintiffs, by counsel, and for their Memorandum in support of their Motion for Partial Summary Judgment with regard to the non-exempt status of Plaintiffs who have been or are employed by the Lexington-Fayette Urban County Government (“LFUCG”) as Division of Community Corrections (“DCC”) Lieutenants and Captains, state as follows:

INTRODUCTION

The Plaintiffs allege that the LFUCG’s admitted policy and practice of refusing to pay overtime compensation to DCC Lieutenants and Captains, and instead awarding “compensatory time” to those Employees at a one-hour to one-hour rate, violates the Fair Labor Standards Act (“FLSA”). (See Defendant’s Response to Plaintiffs’ First Set of Requests for Admissions, Request Nos. 1 and 2 (admitting that DCC Lieutenants and Captains receive one hour of compensatory time for each hour worked over forty (40) hours per week)). The Plaintiffs have further alleged that, regardless of rank, they are required to perform work during time periods for which they are not paid (including, but not limited to, their so-called “meal periods”), and are therefore entitled to compensation (including overtime compensation) under the FLSA. Whether any Plaintiffs who hold (or who have held) the ranks of Lieutenant and Captain may assert those claims depends upon a determination of whether the LFUCG has properly classified those ranks as “exempt”.¹

The Plaintiffs have asked the Court to recognize Subclasses comprised of Plaintiffs who hold or who have held these allegedly exempt ranks. (Plaintiffs’ Motion to Certify Subclasses, D.E. No. 169). The LFUCG has no objection to the recognition of two (2) Subclasses, one comprised of Plaintiffs who hold or who have held the rank of Lieutenant, and one comprised of Plaintiffs who

¹ The Plaintiffs believe that the statute of limitations governing their claims is the three-year period provided by 29 U.S.C. § 255(a). Under that statute, the time period relevant to this action began on September 6, 2003, and continues to the present.

hold or who have held the rank of Captain, for purposes of the LFUCG's exemption defense. (LFUCG's Response, D.E. No. 179, p. 6-7). The LFUCG has deposed each Plaintiff who holds or who has held the rank of Lieutenant, Captain, or Major.²

As a matter of law, partial summary judgment should be entered against the LFUCG's exemption defense. The Plaintiffs holding the allegedly exempt ranks are "first responders", who cannot qualify as exempt pursuant to a 2004 regulation issued by the Department of Labor ("DOL"). Moreover, the Plaintiffs satisfy neither the "duties test" nor the "salary basis test" for any potentially applicable exemption.

FACTUAL BACKGROUND

I. GENERAL BACKGROUND

A. The DCC's Ranks

The LFUCG operates a detention center which houses hundreds of inmates, all of whom are suspected or convicted of committing crimes. According to the DCC's Assistant Director, James Kammer ("Kammer"), the DCC's mission is "to house those incarcerated or held pursuant to the order of the Court, provide them a safe and secure location, provide [for] the safety and security of the public inside, the staff, while providing a constitutional level of care to those housed within."

² The Plaintiffs who hold (or, since September 6, 2003, have held) the allegedly exempt rank of Lieutenant are LaTrease Cunningham, Antonio Deleon, Rebecca Grillo, Kevin Johnson, John Reams, and Randolph Jones. The Plaintiffs who hold (or have held) the allegedly exempt rank of Captain are Geneva Mitchell, Robert Simpson, Suzanne Whittlesey, and Billy Williams. The Plaintiffs' counsel also represents retired Major Mickey Pitts, who challenges his exempt classification. However, because Major Pitts is the only Plaintiff who has held the rank of Major, he intends to proceed in his individual capacity rather than collectively, and does not seek partial summary judgment as to his exempt classification.

(Transcript of January 3, 2007, hearing (“1/3/07 Tr.”) at 28 (Kammer Testimony)).³

DCC Employees hold military-like ranks. In ascending order, those ranks are: Officer, the honorary rank of Corporal, Sergeant, Lieutenant, Captain, and Major.⁴ As a matter of undisputed fact, the LFUCG considers only the rank of Major to hold any sort of “administrative” status. (1/3/07 Tr. at 37, 50 (Kammer testimony) (identifying only the rank of Major, not the ranks of Lieutenant or Captain, as the “first line of administration”); November 26, 2007, deposition of Michael Korb (“Korb depo.”) at 67 (as a Major, he is the “first line of administration”); July 25, 2007, deposition of Mary C. Hester at 81 (as the Assistant Director of the DCC, she defines “administration” as including only Majors, the Assistant Directors, and the Director)). Major James Capillo, who is not a Plaintiff, characterized the rank of Major as a “liaison” between the Assistant Director and all other ranks, which he described as the DCC’s “boots on the floor”. (February 4, 2008, deposition of James Capillo (“Capillo depo.”) at 48). However, a Plaintiff becomes a “commander” upon reaching the non-exempt rank of Sergeant. (July 24, 2007, deposition of James Kammer (“Kammer depo.”) at 175).

B. The LFUCG’s Failure to Properly Verify the Allegedly Exempt Status of Lieutenant and Captain

Despite its blanket classification of all DCC Lieutenants and Captains as exempt, the LFUCG

³ Assistant Director Kammer reports directly to the DCC’s Director, Ron Bishop, and occupies the “number two position” within the DCC. (1/3/07 Tr. at 23 (Kammer testimony)). A copy of the organizational structure of the DCC is attached hereto as Exhibit 1.

⁴ The ranks of Corporal and Officer do not differ with regard to either job duties or pay level. (1/3/07 Tr. at 50 (Kammer testimony)). The DCC’s Director, Ron Bishop (“Bishop”) testified that the rank of Corporal is being “phas[ed] out” and that it ceased to officially exist in late 2006, but that those who held the rank prior to that date continue to do so. (November 30, 2007, deposition of Ronald L. Bishop (“Bishop depo.”) at 17).

has made almost no effort since 1996 to review or confirm the propriety of that classification.

Walter Skiba, who worked in the LFUCG's Human Resources ("H.R.") Division from 1994 until 2004, and who served as that Division's Director, testified that the LFUCG performed a classification study between 1994 and 1996 of "all the jobs in the City" in order to establish a new compensation system. (February 11, 2008, deposition of Walter Skiba ("Skiba depo.") at 8). As part of that study, the LFUCG allegedly applied the FLSA's "duties test" in order to determine which Employees could be classified as exempt from that statute. (*Id.* at 29-30). The LFUCG's decisions regarding that classification were based on Personnel Analysis Questionnaires, or PAQs, used to "capture information" about the Employees' positions. (*Id.* at 38). Although the LFUCG apparently required all Employees to sign PAQs as part of that study, the Employees themselves did not necessarily provide the information contained in those forms. Instead, the LFUCG sometimes relied upon "master questionnaires", which purportedly reflected the job duties of hundreds of Employees. In other instances, the LFUCG "hired a number of HR students for people who were not real proficient in writing and they were distributed all over, so if somebody wanted to come in and have somebody else help them do it they would do it for them just so that we had a written document". (*Id.* at 43).

Remarkably, and despite the LFUCG's opening of a new DCC facility in May 1999 featuring a "completely different type of structure" (*id.* at 48), the LFUCG did not bother to revisit its exempt classifications of the ranks of Lieutenant and Captain, nor did it solicit any PAQs from Employees after 1996. (*Id.* at 72). Former H.R. Director Skiba explained that, prior to the opening of the new facility, the DCC operated as "a lockdown facility and so you were behind a wall, you looked through the glass and, you know, the inmates were out there". (*Id.* at 48). "In the new facility it was

a completely different type of structure and when - you know, you had the administration upstairs and way away”, while Officers were physically in the pods with the inmates. (*Id.*) The new building, which presented “a whole new concept for the city”. This new structure especially required the Lieutenants to be “more closely approximated to the inmate population”. (*Id.*)

Michael Allen, Skiba’s successor and the current H.R. Director, testified that he did consider the exempt classification of Lieutenants as part of the collective bargaining undertaken by those Employees after 2005. (February 21, 2008, deposition of Michael Allen (“Allen depo.”) at 14). At that time, Allen concluded that the Lieutenants qualified as exempt “executives” under the FLSA. His analysis, however, was limited to the LFUCG’s position descriptions and verifications of those descriptions by DCC administrators and a Major. (*Id.* at 15-16). The accuracy of the LFUCG’s descriptions for the rank of Lieutenant was apparently not verified by anyone currently serving in that position. (*Id.* at 17). Allen admitted that he did not invest “a great deal” of “sweat” in the task of reviewing the accuracy of the job descriptions. (*Id.* at 18). No documentation was kept of his exemption analysis. (*Id.* at 17).

A senior LFUCG H.R. Manager, Tracey Stephenson, confirmed that the LFUCG has undertaken no “formal” analysis to confirm the propriety of the exempt classification of any DCC position since she began working in the H.R.’s “classification compensation section” in October 2004. (December 3, 2007, deposition of Tracey Stephenson (“Stephenson depo.”) at 52). Indeed, she was unable to articulate which exemption applied to either the Captains or the Lieutenants. (*Id.* at 82).

II. THE PRIMARY DUTIES OF LIEUTENANTS AND CAPTAINS

A. Lieutenants and Captains must Serve as the “First Responders” to Inmate Emergencies

Assistant Director Kammer testified that the DCC’s essential function and mission is to provide inmates with “a safe and secure location” and to provide for “the safety and security” of the public and staff inside the facility. (1/3/07 Tr. at 28). In keeping with that mission, the primary duty of all DCC Employees, including Lieutenants and Captains, is the detaining and supervising of suspected and convicted criminals. Accordingly, in late 2003, DCC Employees (including Officers, Lieutenants, Captains, and Majors) were certified as “hazardous duty” workers for purposes of their participation in a state retirement program. (Skiba depo. at 53). (See also LFUCG’s Response to Plaintiffs’ Third Set of Interrogatories, No. 4).

Major Michael Korb, who is not a Plaintiff in this case but who purportedly serves as the DCC’s “administration”, aptly described the primary job duty of all DCC Employees, regardless of their ranks:

A. . . . In the army, you asked earlier if we had different job titles and I told you I was in communications and I was in military intelligence. When it comes down to it, though, I’m still bottom line if something goes up, I’m infantry. **So irregardless of where you’re assigned in the facility, your number-one job is still safety, proper care and custody, safety and security of the inmates.**

Q. Let me interrupt you right there. **That’s the responsibility of everybody that works at the jail; is that fair?**

A. **Yes, sir**

(Korb depo. at 49 (emphasis added)).

Lieutenants and Captains bear responsibility for inmate care and custody in a real and physical sense. One of their most important job duties is to respond to “codes” or “signals” that

sound inside the DCC facility. These are not rare events, but “very regular” occurrences at the facility. (1/4/07 Tr. at 120 (testimony of LFUCG witness Robert Walker)). For example, a “Signal 7” signifies that a staff member or inmate needs assistance, or simply that “the atmosphere in the [housing] unit has gotten tense” (*Id.* at 114 (Kammer testimony); Capillo depo. at 59). A “Code 100” and a “Code 101” both signify medical emergencies to which all “commanders” (a term defined by Assistant Director Kammer to include Lieutenants and Captains) must respond. (1/3/07 Tr. at 116 (Kammer testimony)). As a matter of undisputed fact, DCC Employees of all ranks are required to respond to codes and signals. (*Id.* at 115 (Kammer testimony)).⁵ Once at the site at which the code or signal originated, DCC Employees, regardless of rank, may be required to physically restrain involved inmates. (Korb depo. at 51 (the “first responder” to a code or signal must stop the altercation, even if that responder is a “commander”).

As described below, the remaining duties performed by the supposedly exempt Plaintiffs are part of their “number one” job of ensuring inmates’ safety and security.

B. The Primary Job Duties of Lieutenants

1. *The primary job duties of Lieutenants are the detention and supervision of suspected and convicted criminals*

The primary job duties of the Plaintiffs who are or who have been ranked as Lieutenants are the detention and supervision of suspected and convicted criminals. Lieutenants assigned to the Custody Bureau must conduct “commander checks”, during which they walk through each housing unit to ensure that all inmates are in “proper care and custody”. (Kammer depo. at 130, 254). Major

⁵ This duty to respond is so important that it continues even during the Captains’ and Lieutenants’ “breaks” (Kammer depo. at 127), a rule which Director Bishop admits to be necessary for the safe and effective operation of the DCC facility. (November 11, 2007, deposition of Ronald Bishop (“Bishop depo.”) at 59).

Korb testified that commander checks require “commanders” (a term which includes Lieutenants as well as admittedly non-exempt Sergeants) to ascertain that inmates “are being treated properly”. (Korb depo. at 72). Commander checks may consume up to five (5) hours of a Lieutenant’s workday. (August 16, 2007, deposition of Lieutenant Antonio Deleon (“Deleon depo.”) at 45, 124). While performing commander checks, Lieutenants must walk through and inspect cells, “sub-day rooms” and inmate bathrooms to ensure the inmates’ “proper order and care” and to answer “every question [the inmates] have about everything under the sun”. (*Id.* at 19, 124). Lieutenant Deleon testified that, unless he happens to be assigned to “paperwork” duty for a particular workday, he spends his time “out on the floor and in the units”. (*Id.* at 124).⁶ Randy Jones, who served as a Custody Lieutenant until April 2007, described commander checks as requiring “all kinds of contact with the inmates”. (July 9, 2007, deposition of Randolph Jones (“Jones depo.”) at 111, 220). “Every night, you’re right at ground zero every night.” (*Id.*). (*See also* November 30, 2006, deposition of Rebecca Grillo (“Grillo depo.”) at 31 (a Lieutenant’s commander checks require talking with inmates and fielding their complaints). Lieutenants’ primary duties inevitably require interaction with (and therefore supervision of) the inmates. (Kammer depo. at 133).

Even when not conducting commander checks, the Lieutenants’ primary job duty remains the detaining and supervising of suspected and convicted criminals. Custody Lieutenants must investigate inmate complaints and incidents. (Deleon depo. at 20). Captain Dwight Hall, who is not a Plaintiff, admitted that Lieutenants are sometimes required to work as “rovers”, performing the very same work and interacting with inmates to the very same degree as Officers or Corporals. (July

⁶ A Lieutenant’s interaction with the inmates may become dangerous. Lieutenant Deleon recalled a recent incident which required him to enter an inmate’s cell with the protection of an electronic shield. (*Id.* at 115).

27, 2007, deposition of Dwight Hall (“Hall depo.”) at 66).⁷ Whether acting as rovers or as “commanders”, Lieutenants must also physically escort inmates from place to place within the facility. (*Id.* at 67). When assigned responsibility for “paperwork”, Custody Lieutenants document which inmates are in the hospital or in restraints, review incident reports reflecting any problems with particular inmates that occurred on the prior shift, and update “speed notes” pertaining to the status of particular inmates (such as those who have been placed on suicide observations). (Jones at 47-48, 51). Such paperwork is integral to the supervision and detention of inmates.

Lieutenants who work in areas other than Custody also have the primary job duty of detaining and supervising suspected and convicted criminals. A Lieutenant in the Intake area, where inmates are processed upon their arrival at the facility, must personally “book” inmates and perform “pat-down” frisks or other searches. (August 14, 2007, deposition of LaTrease Cunningham (“Cunningham depo.”) at 9, 78). (*See also* Jones depo. at 110 (the Intake Lieutenant position requires interaction with inmates entering the facility)). Intake Lieutenants must ask standardized screening questions to new inmates, process bonds, and perform regular visual observations and “wellness checks” on inmates being held in their area. (*Id.*). The primary job duty of a Lieutenant in the “CAP” Bureau, which is responsible for drug testing and electronic monitoring, is also the supervision of suspected and convicted criminals. Lieutenant Grillo, who worked in CAP from 2003 until 2006, conducted drug testing of suspected and convicted criminals, personally collecting their urine samples. (Grillo depo. at 163).

⁷ Assistant Director Kammer testified that rovers serve as “relieving officers”, replacing the Custody Officers in the housing units during the Officers’ purported meal and rest breaks. (1/3/07 Tr. at 72 (Kammer testimony)).

2. *The supposedly exempt position of Lieutenant is functionally indistinguishable from the non-exempt position of Sergeant*

As a matter of undisputed fact, the duties of the supposedly exempt Lieutenants are indistinguishable from the duties assigned to Sergeants, a rank which the LFUCG classifies as non-exempt. Recognizing the non-exempt nature of the Lieutenants' primary job duties, former DCC Director Glen Brown attempted (unsuccessfully) to persuade the LFUCG's H.R. Division to reclassify that rank as non-exempt. (October 23, 2007, deposition of Glenn Brown ("Brown depo.") at 19).⁸ Brown recognized that "[m]ore so times than many", Lieutenants perform the same job duties as Sergeants. (*Id.*). Indeed, the only occasions when Brown views Lieutenants as performing any exempt duties are Saturdays or Sundays, when a Captain happens not to be inside the Facility. (*Id.*). Another former Director of the DCC, Tony Dehner, agreed that only a "fine line" separates the duties of a Sergeant and a Lieutenant. (October 19, 2007, deposition of Tony Dehner ("Dehner depo.") at 18).⁹

The type of work performed by Employees holding the non-exempt rank of Sergeant is identical to the type of work performed by Lieutenants. Sergeants and Lieutenants have the same authority to "approve" overtime requests. (1/3/07 Tr. at 125 (Kammer testimony)). Employees of both ranks may be required to serve as "paperwork commanders", to respond to codes or signals, to "break up" inmate altercations, to supervise inmates at the hospital, and, if assigned to the Auxiliary Bureau, to supervise inmates making court appearances. (Kammer depo. at 25, 239; 1/3/07 Tr. at

⁸ Brown was the Director of the DCC from September 2001 until January 1, 2004 (Brown depo., pp. 4, 37), for at least four (4) months of the time period included in the Plaintiffs' claims for compensation.

⁹ Dehner was the interim director of the facility prior to Glen Brown's tenure.

126 (Kammer testimony)). Employees of either rank may conduct pre-shift briefings (August 22, 2007, deposition of Robert Simpson (“Simpson depo.”) at 12), perform staff inspections (August 21, 2007, deposition of Mickey Pitts (“Pitts depo.”) at 44), serve as shift commander (August 25, 2007, deposition of Suzanne Whittlesey (“Whittlesey depo.”), prepare duty schedules (August 11, 2007, deposition of Geneva Mitchell (“Mitchell depo. I”) at 25), conduct security “perimeter checks” (Pitts depo. at 210), review time cards for accuracy and “sign off” on them (Cunningham depo., p. 68), serve on hiring or promotion panels (Pitts depo., p. 53), assign particular work stations to particular employees (Cunningham depo., p. 18), serve as Floor Training Officers (“FTOs”) (Deleon depo., p. 123), and ensure proper uniform care and appearance (Mitchell depo. I, p. 26). The work performed by the two ranks does not differ. (Simpson depo., p. 94; Deleon depo., p. 55; Whittlesey depo., p. 103). Lieutenant Cunningham testified that there are no duties or responsibilities assigned to Sergeants which she, as their supposedly superior officer, does not also perform. (Cunningham depo., p. 79).¹⁰

The identical nature of the job duties performed by DCC Sergeants and Lieutenants is conceded by DCC Employees who are not Plaintiffs in this action. Lieutenant Charlesetta Johnson,

¹⁰ Justin Crawford, who has held both ranks, testified that his duties as an “exempt” Lieutenant were identical to the duties which he now performs as a non-exempt Sergeant. (November 20, 2006, deposition of Justin Crawford (“Crawford depo. II”) at 4). Having occupied both ranks, Crawford testified that the two positions are functionally indistinguishable. (*Id.* at 8). Indeed, in many respects, the primary job duties of a Lieutenant are scarcely distinguishable from those of an Officer or Corporal. One of the primary job duties assigned to a Custody Lieutenant, for example, is the performance of “commander checks” of the inmates’ housing units. However, even a Corporal may perform commander checks for “outer ring” units. (Mitchell depo. I at 63).

who works in the Master Control area¹¹, testified that her job duties are indistinguishable from those performed by her “subordinates”:

Q. What is it - what do you do in the course of your day. I know you talk - can you give me an idea of what you do day-to-day at master control?

A. The same thing as everybody else does.

Q. Okay.

A. I’m no - I’m a lieutenant in the area, but I work just like - I work breaks, I work stations, I do time, I do schedules, I just do whatever, I do it all.

Q. Okay. And you said you do it - **you do the same as your sergeants and officers?**

...

A. Yes, sir.

(February 4, 2008, deposition of Charlesetta Johnson (“Johnson depo.”) at 28) (emphasis added).

The two ranks also hold the same disciplinary authority, except insofar as Sergeants may issue “discipline” to Officers and Corporals, while Lieutenants may issue discipline to those ranks as well as to Sergeants. Neither rank is permitted to issue any type of “discipline” or corrective action other than Coaching & Counseling forms (“C&C”) or oral warnings. (Hall depo. at 78). John Dulin, who is not a Plaintiff, testified that his duties as a Sergeant are similar to those assigned to Lieutenants. (October 24, 2007, deposition of John Dulin (“Dulin depo.”) at 25). Sergeant Dulin also confirmed that Lieutenants, like non-exempt Sergeants, must perform rover duties, unit checks,

¹¹ Master Control Employees supervise inmates using computers and monitors. The Master Control area remotely observes the entire facility and is “basically the security and operations center”. (1/3/07 Tr. at 42 (Kammer testimony)). If a code or signal sounds for a Custody housing unit, Master Control Employees remotely operate the unit until the housing officer is confirmed to have regained control. (Johnson depo. at 42-43).

and paperwork. (*Id.*). Sergeant John Southworth, who is not a Plaintiff (and who is now assigned to the Custody area), testified that he was authorized to assign particular Auxiliary officers to particular courtrooms. (1/3/07 Tr. at p. 234 (Jason Southworth testimony). He “instructed [subordinate officers] which courtrooms to go to and assisted them with any problems that they may have that arised [sic] other than their normal duty, parameter of duty. I spoke to the judges . . . if the judges had questions concerning the inmates. And took care of time cards” (February 15, 2008, deposition of Jason Southworth (“Southworth depo.”) at 5).

Testimony from DCC Employees who out-rank Lieutenants confirms the functional equivalence of the ranks of Sergeant and Lieutenant. Retired Major Pitts testified that the two positions are not readily distinguishable because “their chores are a lot of the same things” and they perform “a lot of the same duties.” (Pitts depo. at 210). According to the Major, the “day to day functions” of a Lieutenant and a Sergeant are the same. (*Id.*). Captain Mitchell, who has served as both a Sergeant and a Lieutenant, testified that “[w]e do the same jobs.” (Mitchell depo. I at 155). The duties and responsibilities of the two ranks are so similar that Employees who are promoted to the rank of Lieutenant sometimes choose to voluntarily demote to the rank of Sergeant in order to regain their eligibility for overtime pay or to obtain a more desirable shift. (*See* November 17, 2006, deposition of Justin Crawford (“Crawford I”) at 22; Jones depo. at 86).

3. *A Lieutenant’s job duties are neither executive nor administrative*

The former Director of the DCC testified that Lieutenants do not create policy. (Brown depo. at 22). (*See also* Cunningham depo. at 84 (Lieutenants do not create, or even help to create, any policies or rules)). Instead, policy- and decision-making, even as to very specific matters, is centralized within and limited to the DCC’s “administration”, which Assistant Director Kammer

defines as including only the Director, the Assistant Directors, and the Majors. Deviations from the administration's policies may not be undertaken or authorized by Lieutenants. The DCC's Policy and Procedures Manual states:

All Division staff must know and comply with the content of this manual. Failure to abide by the policies and procedures outlined in the manual (as well as Operational Orders or Post Orders that expand upon the manual) may result in administrative disciplinary action. **Only the Director, an Assistant Director or a Major may permit exceptions to this manual**

(Manual, p. 7 (attached hereto as Exhibit 2)) (emphasis added). The Operational Orders are highly detailed, leaving little room for the exercise of discretion by anyone other than the DCC administration. For example, with regard to supervising and detaining inmates in the Intake area, an Operational Order dictates the steps to be followed in admitting a new inmate, the balance of cash that must be kept in the cash register for processing bonds, the Intake Employees' obligation to submit videotapes of combative inmates to "the administrative offices" for review, the manner in which Intake staff may request cleaning supplies, and the mandatory use of trustees to clean the area. (Operational Order 5.1-1).¹² Intake commanders must follow a "decision tree", which was created by the Director and which follows criteria set forth in the Operational Orders, as a precondition to authorizing an unclothed search of a new inmate. (Operational Order 7.4-1). Custody commanders lack authority to conduct such searches in secure areas without the approval of "a Major or higher level of command." (Operational Order 7.2-4). The precise steps to be followed in conducting searches of all types in either the Intake or Custody areas are spelled out with great particularity. (*Id.*). In the Custody area, Operational Orders specify the circumstances under which inmates may be permitted to wear athletic shorts, the number of buttons which must be closed on an inmate's

¹² All Operational Orders referenced herein are attached as part of collective Exhibit 3.

jumpsuit, and the time during which inmates are permitted to use the telephone. (Operational Order 7.1-1). Intake and Custody commanders are instructed by those Orders precisely how often visual observations of inmates must be conducted. (Operational Order 7.2-4).

With the same level of detail, Operational Orders dictate the manner in which commanders allegedly supervise subordinate staff. For example, the determination of whether an Employee's use of sick or emergency leave is excessive rests with the Major, not a Lieutenant. (Operational Order 3.1-2a). The Operational Orders specify precisely which circumstances will result in an Employee being "marked" as "AWOL". (*Id.*). Primary and secondary overtime days are assigned by Majors, not by Lieutenants or even Captains. (Operational Order 3.1-3). Majors grant or deny requests for changes in those assigned days as well as requests for "excused absences" from those days. (*Id.*). A shift commander's decision to instruct an Employee to work overtime on an assigned mandatory overtime day is subject to a Major's review. (*Id.*).

Even as to matters not governed by Operational Orders, policy- and decision-making is centralized within the administration. For example, the directive that Custody Officers and Corporals sign "break sheets" during their break time was issued by Assistant Director Kammer. (*Id.* at 122). The Assistant Director determines the number of towels which an inmate may accumulate. (May 9, 2007, email from Assistant Director Kammer to Captain Geneva Mitchell (Exhibit 4)). At least one Lieutenant has received a C&C for failing to follow the DCC's "instructions" that "when sending an email he shall complete the subject section" of the email. (August 20, 2007, C&C to Lieutenant Deleon (Exhibit 5)). While Custody "commanders" are purportedly authorized to assign "subordinates" to particular work stations, Assistant Director Kammer has made clear that those assignments are made pursuant to the administration's "practice

and intent” of assigning Officers to particular units for five-day periods. (1/3/07 Tr. at 72). Intake assignments are made in the same way; Lieutenant Cunningham testified that Intake scheduling involves no discretion, but simply “filling in a name” so that each Employee regularly rotates through all of the duty stations. (Cunningham depo. at 71).

Lieutenants do not analyze statistics; at most, they gather information which they then pass to higher levels of authority. (*Id.* at 14). Lieutenants have no unique authority for training; instead, “floor training” of new Employees may be entrusted to non-exempt Officers or Corporals. (Crawford depo. II at 166).

The rank of Lieutenant does not inherently carry any authority over subordinate officers. Justin Crawford testified that, during his time as a Lieutenant, he was not permitted to supervise his subordinate Sergeant in any manner. (Crawford depo. I at 21). The only “supervision” that Crawford performed as a Lieutenant was to “pass[] along information” received from his Captain. Kevin Johnson, who was also previously ranked as a Lieutenant, testified that he had no authority over a Sergeant. (December 1, 2006, deposition of Kevin Johnson (“Johnson depo.”) at 46).

As a matter of undisputed fact, Lieutenants are not authorized to hire, fire, promote, or demote other DCC Employees. The current H.R. Director, Michael Allen, specifically admitted that this factor in the executive exemption analysis cannot be met for DCC Lieutenants or Captains. Explaining the process that he purportedly followed in order to confirm the exempt classification of those two ranks as part of the 2005 collective bargaining process, Allen testified:

A. Another key function that they [DCC Lieutenants] don’t particularly deal with a lot but is a key management function is the hiring and selection.

Q. Well, now, here’s what I want, just so that we’re clear. I want only the functions that you looked at to make the determinations of -

A. Well, we looked at -

Q. - exemptions.

A. We looked at all the - I didn't exclude any functionality.

Q. So you did look at -

A. **Whether they had input into the hiring and selection.**

Q. Okay.

A. And as I said, Counselor, they don't have - they don't have to meet every single one.

Q. I got it. What did you determine?

A. **They don't.**

Q. They don't?

A. **They don't have a lot of input into the hiring and selections.**

Q. **And then you say they.**

A. **Lieutenants and Captains.**

Q. Okay. I got you. And so that would cut against exemption; right?

A. That would, yes.

(Allen depo. at 36) (emphasis added).

The undisputed facts show that H.R. Director Allen was absolutely correct. The procedure utilized by the DCC for promotion and transfer requests does not grant a Lieutenant's recommendation about such matters any special weight. Assistant Director Kammer testified that the promotion process begins with an evaluation of all applications by the LFUCG's H.R. Division. Applicants are then interviewed and scored, first by a "blind panel" comprised of individuals who do not work for the LFUCG and then by an "internal panel" comprised of some assortment of DCC

Employees. (Kammer depo. at 15-19). The composition of each internal panel is controlled exclusively by the Director or Assistant Director. (Kammer depo. at 20; Pitts depo. at 55). In fact, the Director “has the option” not to utilize a panel at all; “there’s times that the director will meet with individuals at the higher levels of the organization and make a determination” without asking for a panel’s recommendation. (Kammer depo. at 190). While Lieutenants might, by happenstance, be chosen by the Director to serve on a panel, non-exempt Sergeants and even Officers are granted that same “privilege”. (*Id.* at 53).

Importantly, while ascension to the rank of Lieutenant automatically results in an Employee’s classification as “exempt”, that rank does not mean that a Lieutenant will ever serve on a promotion or hiring panel. Lieutenant Johnson, who is not a Plaintiff, testified that she has held her current rank since 2001. (Johnson depo. at 5). Over the last seven (7) years, she has not served on a promotion panel on a single occasion. (*Id.* at 80). Similarly, Lieutenant Cunningham testified that she has had no input into the promotions of subordinate Sergeants. (Cunningham depo. at 81). She has only recommended that individuals be reclassified from Officer to Corporal - a “promotion” which confers nothing more than an honorific rank, with no increase in pay or change in duties. (Cunningham depo. at 81).¹³ She understands that any recommendation she “sends up” to the DCC’s administration “doesn’t necessarily mean it’s going to happen.” (*Id.* at 27). Although she was once permitted to serve on a panel which interviewed Employees who had requested a transfer to her shift,

¹³ Presumably, Lieutenant Cunningham’s ability to recommend even this modest (and, in terms of pay and responsibilities, meaningless) “promotion” has ceased, since the DCC administrators have chosen to discontinue the honorary rank of Corporal.

her recommendation for the transfer of a particular Employee was rejected. (*Id.* at 23).¹⁴

Even when a Lieutenant is chosen, he or she receives a single vote (one out of at least three) toward the panel's mere recommendation of one or more candidates. The panel's recommendation may or may not be accepted by the Director. (Kammer depo. at 53). When a Lieutenant sits on a panel consisting of Sergeants or even Officers, his or her vote receives no greater weight than the votes cast by non-exempt Employees. (Cunningham depo. at 22, 81). The internal panel members are permitted to choose a candidate only from the group pre-selected by the H.R. Division and the "blind panel" (on which a Lieutenant obviously cannot serve), and it must select a pre-determined number of candidates. (Deleon depo. at 27 (when serving on a panel considering promotions to the rank of Sergeant, eleven candidates were interviewed "[a]nd there were no ifs, buts about it, we had to pick seven people out of those"))).

Unless chosen by the Director to serve on a panel, Lieutenants have no participation in promotion or transfer requests whatsoever. Certainly, they are not able to make recommendations which receive any particular weight through any evaluations of "subordinate" Employees. When Assistant Director Kammer served on a recent "internal panel" for promotion requests to the rank of Captain, he did not review the candidates' personnel files prior to making a recommendation (Kammer depo. at 43), and so could not have considered any remarks or evaluations placed there by the candidates' "supervisors". The other two administrators on that panel testified similarly. (July

¹⁴ The policy and procedure for transfers is not in any way controlled or influenced by Lieutenants or Captains. When Sergeant Kevin Johnson asked to re-interview for a transfer, he was informed that his request was "a matter that relates to the transfer process" and so "would require an Administrative review and disposition." (DCC Document No. 1440 (attached hereto as Exhibit 6)). "[A]ny action to restructure this [transfer] process would be at the discretion of the Director, his designee, or the Transfer Panel Chairperson." (*Id.*).

26, 2007, deposition of Donald Leach (“Leach depo.”) at 50 (he did nothing to prepare for the interviews other than report to work); Hester depo., at 48, 80 (she did not look at the personnel files of Kevin Johnson and Randy Jones, two candidates for the promotion, until after the promotions were granted to other individuals, and only prior to her deposition with regard to those Plaintiffs’ retaliation claims).

Lieutenants’ recommendations about firing other Employees likewise receive little weight. Lieutenant Johnson, who is not a Plaintiff, testified that her recommendations as to suspensions or written reprimands have only been followed “[s]ometimes.” (Johnson depo. at 79-80). Similarly, Plaintiff Lieutenant Jones testified that he once recommended that a subordinate officer be fired; instead, the officer was merely suspended and then transferred. (Jones depo. at 242).¹⁵ Officer Donnita Hughes testified that Assistant Director Kammer received three recommendations from her “commanders” that her employment be terminated, and she was merely suspended. (February 27, 2008, deposition of Donnita Hughes at 121). At least one of those disregarded recommendations came from Officer Hughes’s Lieutenant. (See July 29, 2003, Memorandum from Lieutenant John Taylor to Major Thomas White (Exhibit 7)).

Finally, Lieutenants are not authorized to issue any “discipline” more severe than C&Cs (which the LFUCG has represented to the Court as non-disciplinary measures (Defendant’s Response to the Plaintiff’s Motion for Preliminary Injunction, D.E. 19, p. 11)) and oral warnings (which do not remain in the recipient’s personnel file). Lieutenants are not permitted to issue written reprimands (Pitts depo. at 211), or to impose suspensions (Jones depo. at 192). Assistant Director

¹⁵ Lieutenant Jones believes that he has made similar recommendations about subordinate officers between ten and twenty times, with “less than half” of his recommendations resulting in the termination of an Employee. (*Id.*)

Kammer testified that a Lieutenant who believes that another Employee should be reprimanded must “go up through the chain of command” to Assistant Director Kammer, who will “make a determination” of whether he feels that the reprimand is “appropriate.” (Kammer depo. at 53). Major Capillo, who is not a Plaintiff, testified that any direct recommendation by a Lieutenant to the Director would likely be “kick[ed]” back down. (Capillo depo. at 65).

Even the Lieutenants’ authority to issue C&Cs and oral warnings is severely limited. At least on second shift, Lieutenants (and Captains) must obtain a Major’s approval prior to issuing even the purportedly non-disciplinary C&Cs, and certainly prior to issuing an oral warning. (Capillo depo. at 62-63). If a Lieutenant fails to obtain that required approval, the “disciplinary” action issued by him or her will be set aside. (*Id.*). Second shift Lieutenants are also required to submit any C&Cs or other “disciplinary action” to their Captain for review prior to issuance; once such an action has been issued, the must “review it again prior to the document being sent to HR, emailed out or scanned”. (December 31, 2007, email from Captain Dwight Hall, attached hereto as Exhibit 8)).

C. The Primary Job Duties of Captains

1. *The primary job duties of Captains are the detention and supervision of suspected and convicted criminals*

Like Lieutenants, Captains perform the “number-one” job of detaining and supervising suspected and convicted criminals. (Korb depo. at 49). Assistant Director Kammer admitted that Captains must respond to codes and signals and, if necessary, directly intervene in inmate altercations. (Kammer depo. at 128). Captain Hall, who is not a Plaintiff, confirmed that he is required to respond to all codes and signals and, if necessary, prevent inmates from harming one another. (Hall depo. at 81). Also like Lieutenants, Captains must perform “commander checks” in order to ensure that inmates are in “proper care and custody”. (Kammer depo. at 130). Commander

checks require Captains to interact and communicate with inmates, and to inspect their living areas. (Hall depo. at 40-41).

Some inmates are classified as “TOC plus C”, which means that they require “two officer contact with commander”. (Mitchell depo. I at 67). When such an inmate must be relocated or otherwise travel within the facility, a “commander” (including Captains and Lieutenants) must assist in that escort. Captain Mitchell explained: “I have to stop what I’m doing, whatever that may be, and go and deal with that situation, which may only take ten minutes, but it could take two or three hours.” (*Id.*).

Captains also conduct safety inspection tours of the facility. This includes checking the special needs inmate housing in order to assure “proper care and order”, conducting perimeter checks, looking for possible security violations, and, when necessary, performing the duties of subordinate officers. (Simpson depo. at 97). Captains are required to handle inmate grievances. (Pitts depo. at 38). Captain Mitchell testified that she continues to be “part of the numbers” necessary to operate the facility. (Mitchell depo. I at 12).¹⁶ She views her job duty as requiring her to “pitch in”. (*Id.*). “What that means is, if I have to be a rover, I’ll be a rover. If I have to assist with time cards, I assist with time cards. If I have to go in and deal with an unruly inmate, I do. I answer tones.” (*Id.*). She assists with commander checks “more times than not”, ensures that all inmates are “breathing” and that the doors and other areas of the facility are secure, interacts with inmates who have requested the removal of separation orders, and conducts perimeter checks. (Mitchell depo. I at 57, 71, 73, 91).

¹⁶ As noted below, Captain Mitchell’s supervisor and alleged administrator, non-Plaintiff Major Korb, agreed with her that Captains are “part of the numbers”. (Exhibit 9).

In areas other than Custody, a Captain's primary job duty remains the supervision and detention of suspected and convicted criminals. Retired Captain Billy Williams, who worked in the Auxiliary Bureau from 1983 until 2004, testified that he was required to directly supervise inmates even when on "break" at the courthouse. (August 20, 2007, deposition of Billy Williams ("Williams depo.") at 23, 96). He shackled and handcuffed inmates, brought inmates to hearings, stayed with inmates until the hearings were completed, and then delivered the inmates back to the facility. (*Id.* at 29). Like Captain Mitchell in Custody, Captain Whittlesey in the Intake area is also "part of the numbers." If the required number of Employees (as determined by the DCC administrators) to operate the Intake area is eight (8), then there may be one commander and seven officers, or two commanders and six officers. (Whittlesey depo. at 16). Her job duties include booking new inmates, performing "triage" duties, and conducting "head counts" of the inmates in the area. (*Id.* at 20, 30).

2. *Captains' job duties are neither executive nor administrative*

As a matter of undisputed fact, Captains do not formulate policy at the DCC. Captain Hall, who is not a Plaintiff, testified that protocols and directives come from the DCC administrators, not from Captains. (Hall depo. at 107).

The Captains' lack of involvement in or influence over policy matters is reflected by the pay practices challenged by the Plaintiffs in this case.¹⁷ The practice of "schedule adjusting" (refusing to permit Officers to work assigned shifts if they have worked mandatory overtime earlier in the

¹⁷ Even the DCC Assistant Director has limited policy-making authority in this area. For example, when asked whether he had authority to write a policy to compensate officers who report for mandatory shifts but are then "schedule adjusted" and sent home, Assistant Director Kammer testified that he would not issue such a policy but would "make sure that that was the directive from further above and that it was the authorized and appropriate thing to do." (1/3/07 Tr. at 201 (Kammer Testimony)).

workweek) arose not because of any policy imposed by Captains (or even Majors), but, according to Assistant Director Kammer, as an “officially implemented policy - a business practice.” (1/3/07 Tr. at 153). Because of the schedule adjusting policy, Captains exercise no discretion with regard to the number (or even identity) of people working on a particular shift. If an officer has already worked forty (40) hours within a particular workweek, a Captain is required “to try to save overtime” and must send that officer home. (Mitchell depo. I at 109). Similarly, the “rule” (which the Plaintiffs do not believe to be observed by the DCC’s administration) that Employees who report for mandatory overtime shifts should be informed no later than thirty (30) minutes past the hour whether they must work those shifts was likewise announced by the DCC’s administrators and then simply passed down to the “commanders”. (Kammer depo. at 228). When Captain Mitchell requested additional staff on her shift due to her belief that paperwork obligations had reduced the amount of time available to her for truly supervisory duties, her Major denied her request and responded that he had “requested that the Captain be taken out of the numbers in the past and this is simply not going to happen”. (September 25, 2007, email from Major Korb to Captain Mitchell, attached hereto as Exhibit 9). Questions about whether an Employee should be paid for certain periods of time are “not a Captain Gibbs or Captain Williams [issue], we are talking about an administrative issue . . . we didn’t just make up rules on our own . . .” (Williams depo. at 70).¹⁸

As noted above, even detailed and specific matters within the DCC are managed pursuant to directives and Operational Orders issued by the DCC’s administrators, not by the Captains. For example,

¹⁸ Captain Williams testified that questions or complaints about DCC policies “went up” to a level beyond the rank of Captain. (Williams depo. at 93).

- The decision of whether to order an unclothed search of an inmate in the Custody area cannot be made by a Captain (Operational Order 7.2-4);
- The decision of whether an Employee's use of sick or emergency leave is "excessive" cannot be made by a Captain (Operational Order 3.1-2a);
- Captains are not authorized to change a "subordinate" Employee's mandatory and secondary overtime days, or to approve requests for "excused absences" from those days. (Operational Order 3.1-3).
- The Assistant Director, not a Captain, determines the number of towels which may be accumulated by an inmate. (May 9, 2007, email from Assistant Director Kammer to Captain Mitchell (attached as Exhibit 4)).
- The Assistant Director, not a Captain, determines the times during which inmates should be fed. The Assistant Director characterizes that decision as "administrative", about which Officers should speak directly to him. (September 4, 2003, email from Assistant Director Kammer (attached as Exhibit 10)).
- The DCC's purported "first line of administration" dictates in specific detail the manner in which cleaning supplies may be distributed, secured, and returned. (August 9, 2007, Memorandum from Major Noland Hill (attached as Exhibit 11)).
- Captains are instructed precisely how to restrain certain types of inmates, and how many officers should be assigned to particular housing units. (August 26, 2005, and August 31, 2005, email from Major Korb to Captain Mitchell (attached as Exhibits 12 and 13, respectively); Simpson depo. at 125);
- Captains cannot recall Employees on days when they are short-staffed (Mitchell depo. I at 90).

The rank of Captain does not inherently carry any supervisory authority. Captain Williams worked in the Auxiliary Bureau as an "exempt" Employee for over twenty (20) years, but had no authority or discretion to resolve grievances or complaints by subordinate officers, to classify particular inmates as problematic for transport, or to change the regular work times for his subordinate officers. (Williams depo. at 90, 98). His rank as Captain did not even automatically entitle him to evaluate subordinate officers; instead, some evaluations in his area were performed by a non-exempt Sergeant, and Captain Williams evaluated officers only when another commander

happened to be on vacation. (*Id.* at 93). Any evaluations by a Captain can be and are re-written at the specific direction of DCC administrators (Simpson depo. at 107), and so do not involve the exercise of any meaningful discretion or independent judgment.

Captains do not supervise or manage “planning, development, investigation, and analysis.” (Whittlesey depo. at 25). They do not review or analyze statistics (Simpson depo. at 34; Mitchell depo. I at 34), nor do they “formulate new directions” (Whittlesey depo. at 25; Mitchell depo. I at 34). They implement no cost-reducing measures. (Whittlesey depo. at 26; Mitchell depo. I at 36). Captain Whittlesey testified that her recommendations about efficiency issues, including staffing levels for her area, have been rejected. (Whittlesey depo. at 26). (*See also* Simpson depo. at 34, 95 (although he has recommended changes, “they don’t always act on them”, and he meets with administrators only on a “very seldom” basis)). Captain Mitchell testified that her input into operating procedures has never been solicited by the administration.

Retired Major Pitts confirmed that Captains spend very little time supervising, monitoring, or coordinating the activities of subordinate staff. (Pitts depo. at 38). He testified that he had never instructed the Captains with whom he worked to develop procedures or practices to improve the facility’s efficiency or to implement any cost-reducing measures. (*Id.* at 44). The Captains’ position is not endowed with any policy-making authority or ability that might distinguish their positions from the non-exempt positions of Officers, Corporals, and Sergeants. Instead, “anybody can make a recommendation if they think something is going to help the facility.” (*Id.* at 44).

The similarities between the non-exempt Sergeant position and the “exempt” Lieutenant position also apply to the Captain position. Sergeant John Dulin, who is not a Plaintiff, testified that his Sergeant duties are not only similar to the duties assigned to his Lieutenant, but also to the job

duties assigned to Captain Mitchell. (Dulin depo. at 25). Captain Williams described his job duties as the same as those assigned to non-exempt Sergeants. (Williams depo. at 90). Major Pitts testified that a Captain's job duties are much like those of a Lieutenant (Pitts depo. at 38), which, as discussed above, are largely identical to those assigned to non-exempt Sergeants. For example, Captains, Lieutenants, or non-exempt Sergeants may prepare duty schedules. (*Id.* at 40).¹⁹

Also like Lieutenants, Captains lack authority to hire or fire other Employees, and their recommendations about employment matters receive little or no weight. H.R. Director Michael Allen specifically conceded that Captains "don't have a lot of input into hiring and selection". (Allen depo. at 30). Captains cannot control whether particular officers continue to work for them. (Whittlesey depo. at 96). They are not permitted to terminate a "subordinate's" employment (Williams depo. at 17), or even impose a suspension (Mitchell depo. I at 29). While a Captain might recognize a subordinate officer's good job performance, there is no assurance that recognition will ever be considered or even reviewed by an administrator in connection with transfers or promotions; instead, the Captain can only hope that "other people look at it." (Williams depo. at 19). Such a hope is misplaced, however, since the "blind panel" which interviews promotion candidates receives no information about the Employees before the interviews (Kammer depo. at 46). At least as to the most recent Captains' promotions, the internal panel (which was comprised solely of DCC administrators) did not bother to review any of the candidates' personnel files prior to recommending three candidates to the Director. (Kammer depo. at 45; Leach depo. at 50; Hester depo. at 48, 80).

¹⁹ Just as the lack of any real distinction between the ranks of Lieutenant and Sergeant have led some former Lieutenants to take a voluntary demotion to the non-exempt rank of Sergeant, at least one Employee (John Taylor, who is not a Plaintiff) has voluntarily demoted from the rank of Captain to Sergeant. (February 14, 2008, deposition of John Taylor, ("Taylor depo.") at 15).

As explained above, an Employee of any rank may be selected by the Director or Assistant Director to serve on a promotion panel. The rank of Captain, however, does not assure that an Employee will ever have that opportunity. The composition of a panel is controlled exclusively by the Director, and service on a panel is not a privilege or duty which accompanies any particular rank. (Pitts depo. at 53). For example, Williams served as a Captain for over twenty (20) years, and was never granted the opportunity to vote on any Employee's promotion. (Williams depo. at 98). Likewise, Captain Simpson has not served on a single hiring or promotion panel since obtaining his current rank in October 1998. (Simpson depo. at 95). Captain Mitchell has not served on any promotion panels, and DCC administrators have not even solicited her informal input into the promotion process. (Mitchell depo. I at 41).

Except insofar as they are permitted to issue oral warnings to Lieutenants, the scope of the Captains' disciplinary authority is no greater than the authority granted to Lieutenants and to non-exempt Sergeants. Captains are prohibited from issuing reprimands; only "administrators" may do so. (Simpson depo. at 92). Captains are authorized only to issue C&Cs and oral warnings. (Whittlesey depo. at 44). The LFUCG has represented to the Court that C&Cs do not qualify as disciplinary measures at all, while oral warnings do not remain in the recipient's personnel file. (Pitts depo. at 37). As to any other disciplinary measures, Captains (like non-exempt Sergeants) can only send advisory memoranda to "administrators". (*Id.* at 40-43).

Even a Captain's ability to issue an oral warning or to recommend a written reprimand is tightly controlled by DCC administrators. A Captain's recommendation about any disciplinary matter must conform to the steps outlined in the LFUCG's disciplinary "code." (Simpson depo. at 107; Whittlesey depo. at 44). Captain Simpson once recommended that an Employee receive a

written reprimand, only to receive the administrators' response that a mere oral warning was more appropriate, leaving Captain Simpson with no discretion to take any other action. (Simpson depo. at 92). If he recommends that a particular employee be suspended for 120 hours (a recommendation which itself must be based upon the LFUCG's disciplinary rules), "it will usually be lowered to 16 hours or something like that." (*Id.* at 107). Captain Whittlesey's recommendations are also routinely lessened. (Whittlesey depo. at 44). Captain Mitchell must obtain approval from a Major before issuing even an oral warning, the only form of discipline which she may impose; otherwise, she runs the risk of those warnings being "kicked back." (Mitchell depo. I at 23). When she does issue an oral warning, she often does so only at the direction of a higher-ranked Employee or an administrator, not pursuant to her own judgment or decision-making. (*Id.* at 26). If she disagrees with those directions or refuses to carry them out, she will be deemed insubordinate. (*Id.* at 27). (*See also* Whittlesey depo. at 40 (as a Captain, when she believes that discipline greater than an oral warning is necessary, she must first write a memorandum to her superior officer, who may then send a memorandum to Assistant Director Kammer; if a written reprimand is ultimately issued, it does not come from her)). Assistant Director Kammer recently instructed Captain Mitchell to issue C&Cs not only to her staff, but also to herself, using specific "verbiage" provided by him. (Bishop depo. at 89). (A copy of the C&C issued by Captain Mitchell to herself is attached hereto as Exhibit 14)).

III. LIEUTENANTS AND CAPTAINS ARE SUBJECT TO DEDUCTIONS IN PAY

With the exception of their receipt of "comp time" in lieu of overtime pay, DCC Lieutenants and Captains are treated as hourly employees. They are required to complete time cards recording the exact number of hours they work in each workweek. (Kammer depo. at 144). The amount of pay which they receive for a particular two-week pay period may be reduced, or "docked", to reflect

missed work. According to Assistant Director Kammer, a Lieutenant who has used all of his or her leave time but who must nevertheless miss work will be placed on “no-pay status”, which means that his or her pay is reduced by a dollar amount corresponding to the number of hours of missed work. (Kammer depo. at 148).

Another DCC Assistant Director, Mary Hester (“Hester”), supervises certain DCC bureaus or divisions, which operate under a “lunch-on-the-run” policy. Employees who are subject to that policy are required to work through compensated meal periods.²⁰ For example, a Lieutenant assigned to the Classification Bureau who chooses to leave the facility for lunch rather than work through the meal period must make up the amount of missed work time; if the Lieutenant does not or cannot do so, then his or her pay will be docked. (Hester depo. at 32). The same rule applies to Captains who are assigned to “lunch-on-the-run” areas. (*Id.* at 33).

The LFUCG’s payroll coordinator for the DCC, Jamie Cooper (“Cooper”), testified that an Employee of any rank who works less than a forty-hour workweek but who has no available leave time will receive a paycheck for an amount that has been reduced by the number of hours of missed work. (October 17, 2007, deposition of Jamie Cooper (“Cooper depo.”) at 56).²¹

²⁰ The Classification Bureau works on a single shift, from 8:00 to 4:00. Because of this eight-hour shift, Classification has “a lunch-on-the-run type status”, which means that the lunch period is paid working time. (1/3/07 Tr. at 65 (Kammer testimony)). The Bureaus or divisions for Adult Probation, Inmate Services, Drug Testing and Electronic Monitoring, and Auxiliary Services also have compensable working meal periods within shifts of eight hours (or, in the case of Auxiliary Services, eight hours and five minutes). (LFUCG’s Response to Plaintiffs’ First Set of Interrogatories, Requests for Production of Documents, and Requests for Admissions, Response to Interrogatory No. 6).

²¹ That policy has been confirmed by the Plaintiffs’ testimony. Lieutenant Randy Jones (“Jones”) testified that a Lieutenant who works less than forty (40) hours in a workweek but who has no sick days, vacation leave, and other leave time, must be placed on “no-pay status” if he or she must then miss the remainder of the workweek. (Jones depo. at 216). That Lieutenant’s

The paychecks received by Lieutenants and Captains may also be reduced for disciplinary reasons. Section 21-45 of the LFUCG Code specifically permits the suspension of any classified civil service employee for inefficiency, misconduct, insubordination, or violation of laws involving moral turpitude. (*See* LFUCG Code, Section 21-45 (attached hereto as Exhibit 15)). The LFUCG Employee Handbook also provides that suspensions may be imposed for infractions of rules and standards, and that all suspensions are without pay. (LFUCG Employee Handbook, p. 42 (attached as Exhibit 16)). Major Korb, who is not a Plaintiff, explained that suspensions necessarily mean that “you’re off duty without pay for the amount of time that you’re suspended, **maybe four hours or maybe 140 hours.**” (Korb depo. at 65 (emphasis added)). He also confirmed that suspensions work in the same way for all “ranked” employees, regardless of whether they are Lieutenants or Captains. (*Id.*). Thus, a DCC employee who is suspended for eight (8) hours but who has no vacation or “comp time” available will be paid for only thirty-two (32) hours for the workweek in which the suspension occurs. This is true regardless of the Employee’s rank. (Simpson depo. at 101).

In light of the LFUCG’s policy of reducing the paychecks of supposedly exempt Employees to reflect missed work or disciplinary suspensions, the Employees who are classified as exempt unsurprisingly consider themselves to be hourly - not salaried - Employees. (Grillo depo. at 43 (as a Lieutenant, she believes that she is paid on an hourly basis)). For example, Captain Geneva Mitchell did not know the amount of her supposed yearly “salary”, but knows that she is paid \$25.67 an hour according to the time card on which she is required to record the number of hours she works in each workweek. (“Mitchell depo. I”) at 16).

paycheck will then be adjusted downward in an amount that reflects the amount of work time missed.

ARGUMENT

I. FLSA EXEMPTIONS ARE NARROWLY CONSTRUED, AND THE EMPLOYER BEARS THE BURDEN OF PROVING THAT AN EXEMPTION APPLIES

A. Summary Judgment Standard

Under Fed. R. Civ. P. 56(c), summary judgment is proper if the record reflects no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. Although the burden of establishing a lack of a genuine issue of material fact is upon the movant, the non-movant must respond to such a showing by pointing to evidence in the record upon which a reasonable jury might find in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The genuine issue must be “material”; in other words, it must involve facts that affect the outcome of the suit under the governing law. *Id.*

In an FLSA action, disputes about the nature of an employee’s duties obviously present questions of fact, but the ultimate question of whether an employee is exempt from the FLSA is a question of law. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

B. Overview of the FLSA and its Exemptions

Generally, the FLSA prohibits an employer from requiring an employee to work more than forty (40) hours per work week unless the employee is paid at least one and one-half times his or her regular rate of pay for the extra hours worked. 29 U.S.C. § 207(a)(1). Although the FLSA exempts from its coverage those workers who are employed in bona fide executive, administrative, or professional capacities, the FLSA’s remedial purpose requires its exemptions to be “narrowly” construed against the employers seeking to assert them. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). This is consistent with the important public policy underlying the FLSA:

The Fair Labor Standards Act was designed to extend the frontiers of social progress by insuring to all our able-bodied working men and women, a fair day's pay for a fair day's work. Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. **To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people.**

A.H. Phillips, Inc. v. Wallings, 324 U.S. 490, 493 (1945) (citations omitted) (emphasis added).

Therefore, the employer bears the burden of proving each element of each claimed exemption as to each employee classified as "exempt." *Martin v. Indiana Michigan Power Co.*, 381 F.3d 574, 578 (6th Cir. 2004).

Although Congress has not defined the terms "executive" and "administrative", the DOL has issued regulations defining those exemptions. Under those regulations, the LFUCG must satisfy each of three (3) independent tests in order to invoke any of the exemptions: (1) the "salary level" test, which requires that the employee be paid an amount of "salary" which meets minimum amounts specified by DOL regulations; (2) the "salary basis" test, which requires that the employee be paid a predetermined, fixed salary that is not subject to reductions because of variations in the quality or quantity of work performed; and (3) the "duties" test, which examines the employee's primary job duty. *Acs v. The Detroit Edison Co.*, 444 F.3d 763, 767 (6th Cir. 2006). As a matter of undisputed fact, the LFUCG cannot satisfy the "salary basis" test or the "duties" test, and the Plaintiffs are therefore entitled to partial summary judgment against the LFUCG's exemption defense.

II. THE "FIRST RESPONDER" REGULATION PROVIDES THAT DCC LIEUTENANTS AND CAPTAINS ARE NON-EXEMPT

Without regard to whether the Plaintiffs ranked as Lieutenants and Captains are paid on a salary basis, or whether those Plaintiffs satisfy other elements of the executive or administrative exemption, the LFUCG's exemption defense fails pursuant to the "first responder" regulation made

effective by the DOL as of August 23, 2004. That regulation, 29 C.F.R. § 541.3(b)(1), unambiguously provides that the work of detaining and supervising suspected and convicted criminals cannot qualify as exempt work under any exemption:

(b)(1) The section 13(a)(1) exemptions and the regulations in this part also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, **correctional officers**, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, **regardless of rank or pay level, who perform work such as** preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; **detaining or supervising suspected and convicted criminals, including those on probation or parole**; interviewing witnesses; interrogating and **fingerprinting suspects**; preparing investigative reports; or other similar work.

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

(3) Such employees do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer or the employer's customers as required under § 541.200.

....

Id. (emphasis added).²²

²² Unless otherwise noted, citations to the DOL's regulations throughout this Memorandum are to the current regulations, as amended effective in August 2004. Where a citation is made to a pre-amendment version, the year of the regulation is indicated in parenthesis. For the Court's convenience, copies of the regulations cited in this Memorandum for the years 2003, 2004, 2005, 2006, and 2007 are attached as collective Exhibit 17.

As a matter of undisputed fact, the Plaintiffs who are or have been ranked as Lieutenants and Captains fall within the non-exempt status conferred by the “first responder” regulation. Their primary duty is the “detaining or supervising” of “suspected and convicted criminals.” First, DCC Employees have been certified as hazardous duty workers by the County Employees Retirement System (“CERS”), which is administered by the Kentucky Retirement Systems agency (“the system”). In order for LFUCG Employees to receive hazardous duty retirement benefits, KRS 61.592(2) requires that the “**employer shall certify** to the system, in the manner prescribed by the board, the names of all employees working in a hazardous position **as defined in subsection (1) of this section** for which coverage is requested.” *Id.* (emphasis added).²³ Subsection (1) of KRS 61.592 defines “hazardous duty” as:

(a) **Any position whose principal duties involve law enforcement**, including the positions of probation and parole officer and Commonwealth detective, active fire suppression or prevention, **or other positions**, including, but not limited to, pilots of the Transportation Cabinet and paramedics and emergency medical technicians, **with duties that require frequent exposure to a high degree of danger or peril** and also require a high degree of physical conditioning; and

(b) Positions in the Department of Corrections in state correctional institutions and the Kentucky Correctional Psychiatric Center **with duties that regularly and routinely require face-to-face contact with inmates.**

KRS 61.592(2) (emphasis added). To the extent the LFUCG relied on KRS 61.592(a) for the Lieutenants’ and Captains’ hazardous duty certification, it has certified that those individuals have “principal duties” requiring “frequent exposure to a high degree of danger or peril”; obviously, that

²³ In its Response to the Plaintiffs’ document request for all documents submitted to the system in connection with the LFUCG’s certification of DCC Employees as eligible for hazardous duty benefits, the LFUCG claimed that no documents were submitted at all. The LFUCG stated, however, that “[i]t was determined that all sworn employees were eligible.” (Response to Plaintiffs’ Third Set of Requests, No. 8).

“high degree of danger or peril” is created by the inmates, whose safety and security are the Lieutenants’ and Captains’ “number-one” job. Alternatively, and to the extent the LFUCG relied on KRS 61.592(2)(b) for the Lieutenants’ and Captains’ hazardous duty certification, it has admitted that those individuals are required to “regularly and routinely” have “face-to-face contact with inmates”. In either event, the LFUCG cannot now claim that DCC Lieutenants and Captains do not have the primary duty of detaining and supervising suspected and convicted criminals.

Second, Lieutenants and Captains are “first responders” in the most literal sense of the term: Employees holding these ranks must respond immediately to signals or codes signaling inmate altercations or problems.²⁴ They must physically intervene and restrain inmates in order to return the facility to a safe and secure status. The “first responder” regulation specifically states that an employee who performs first responder activities (including the detaining and supervising of criminals) will not be rendered exempt simply because he or she also directs the work of other employees. § 541.3(b)(2). Moreover, Major Korb, who is not a Plaintiff in this action and who occupies the highest rank within the DCC, clearly and concisely identified the primary job of all of the Plaintiffs: “irregardless of where you’re assigned in the facility, your number-one job is still safety, proper care and custody, safety and security of the inmates.” (Korb depo. at 49). (See also Bishop depo. at 97 (Lieutenants, Captains, and Majors are responsible for security at the DCC)).

To support the affirmative defense of exemption, the LFUCG will presumably rely upon an August 2005 opinion letter issued by the DOL which purports to conclude that an Employee may

²⁴ Major Korb testified that DCC policy requires “any available officer” to respond to tones and signals. The term “available officer” includes any Employee who is not physically inside a housing unit, even if he or she is purportedly taking a meal break. (Korb depo. at 47). (See also November 27, 2007, deposition of Mark Kelly (“Kelly depo.”) at 27-28 (“anybody that’s available”, including Captains, must respond to a Signal 7)).

be found to be exempt even if he or she performs one of the “first responder” duties identified by § 541.3(b)(1). The letter (attached as Exhibit 18) considered police and fire employees who cannot be analogized to the DCC Lieutenants and Captains, and so it cannot support the applicability of an exemption in this case. For example, the police lieutenants addressed in the letter were responsible for the following: deploying patrol units according to the needs of the workload, planning and directing activities of “special units”, conducting training courses, developing and maintaining the police records system, disciplining subordinates, helping to train other personnel, assisting in budget preparation and budget management, and coordinating and directing expenditures and acquisitions. The police captain discussed in the letter had many of the same duties, and was also charged with recommending “strategies” for the division’s activities. The fire battalion chief whose position was examined in the letter was responsible for coordinating pre-fire planning, conducting fire cause investigations, and helping to research and prepare the budget. All of these employees were specifically recognized by the DOL as having authority to make suggestions about hiring, firing, and advancement of other employees which received particular weight.

Unlike the employees considered in the DOL’s opinion letter, the DCC Lieutenants and Captains do not develop new systems and policies. Policy is formulated by the DCC administrators, such as Assistant Director Kammer, who controls matters as detailed as the time at which inmates should be fed, whether Officers and Corporals must sign “break sheets”, when Employees must be informed that they must work overtime, and what number of Employees should be allocated to particular areas. The disciplinary authority of the Lieutenants and Captains is sharply limited; they are permitted only to issue C&Cs (which the LFUCG characterizes as non-disciplinary) and oral warnings (which do not remain in the recipient’s files). Even these actions cannot be taken without

the advance approval of a Major. DCC Lieutenants and Captains may not issue written reprimands or suspensions. And, as discussed in greater detail below, any recommendations that Lieutenants or Captains might be permitted to offer about hiring, firing, or promotions of other Employees receive virtually no weight, much less the particular weight accorded to suggestions made by the employees addressed in the DOL's opinion letter. There is no evidence that DCC Employees assist in budget preparation, research, or management, in expense coordination, in directing particular expenditures or acquisitions, or in recommending strategies.

Instead, and as a matter of undisputed fact (and unlike the employees considered in the DOL's opinion letter), the Plaintiffs who hold or have held the ranks of Lieutenant or Captain have the primary duty of detaining and supervising criminals. For example, Lieutenants and Captains regularly conduct "commander checks" which require them to enter the inmates' living areas, to field the inmates' questions and complaints, and to ascertain that inmates are being properly and constitutionally detained. They perform perimeter checks to ensure that the facility remains secure. Lieutenants and Captains must escort inmates; Lieutenants must directly supervise inmates so that other Employees may take their "breaks". "TOC plus C" inmates cannot be escorted at all unless they are accompanied by a "commander" such as a Lieutenant or Captain. Lieutenants in Intake ask standard screening questions to newly-arrived inmates, process bonds posted by inmates, perform visual observations and "wellness checks" on inmates, and conduct pat-downs or frisks of the inmates' bodies. Intake Captains must also book and "triage" new inmates, and perform "head counts." In the Auxiliary Bureau, a Captain's constant supervision of inmates may continue even while he or she is on "break". In the Intake Bureau, a Captain must book and "triage" new inmates and perform inmate "head counts."

Major Korb's admission and the LFUCG's certification of hazardous duty were both correct: the "number-one job" of all DCC Employees is the detention and supervision of criminals. Because the Lieutenants' and Captains' ranks do not protect them from the risks inherent in the supervision of inmates, those ranks should not exempt them from coverage under the FLSA. Based on these Plaintiffs' primary job duty of detaining and supervising inmates, partial summary judgment must be granted in their favor.

III. THE LFUCG HAS NO BASIS FOR CLASSIFYING ANY DCC EMPLOYEES AS EXEMPT

As a matter of undisputed fact, the LFUCG's classification of DCC Lieutenants or Captains as exempt from the FLSA is not based on any serious review of those positions more recently than 1996. Since that date, and even after opening a new facility in which the duties of all ranks have materially changed, the LFUCG has made no attempt to gather information in the form of PAQs or otherwise in order to ascertain the legality of the Lieutenants' and Captains' exempt classification. The "analysis" conducted by current H.R. Director Allen with regard to the Lieutenants' collective bargaining was based only upon position descriptions verified by Assistant Directors and a Major. The senior-most H.R. Manager cannot even identify which exemption applies to the Lieutenants or Captains. This fact alone justifies partial summary judgment against the LFUCG's exemption defense. *Harris v. District of Columbia*, 741 F.Supp. 254, 260 (D.C. Cir. 1990) (where the employer had undertaken no investigation to support the applicability of the executive exemption, "the Court would be on firm ground ruling simply that defendant has failed in its proof and be done with it").

IV. LIEUTENANTS AND CAPTAINS DO NOT PERFORM EXECUTIVE JOB DUTIES

A. Overview of the Executive Exemption

1. The 2004 amendments

Effective August 24, 2004, the DOL amended its regulations interpreting the § 13(a)(1) exemptions from the FLSA's coverage. In addition to creating the above-described "first responder" regulation, those amendments changed the agency's test for determining whether an employee qualifies as an exempt executive. Rather than employ a "long test" for lower-paid workers and a "short test" for more highly-paid workers, the DOL created a single four-part test:

(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 the 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.**

29 C.F.R. 541.100 (emphasis added).²⁵ Each of these four elements must be satisfied in order for an employee to qualify as an exempt executive. *See Davis v. Mountaire Farms, Inc.*, 453 F.3d 554, 557 (3rd Cir. 2006) (the requisite characteristics of executive employment are stated in the conjunctive rather than the disjunctive, so an employee must be shown to meet all requirements for the exemption to apply).

²⁵ For purposes of this Motion only, the Plaintiffs who are classified as exempt concede that they are paid at least \$455 per week.

In addition to removing the distinction between the “short test” and “long test”, the DOL’s 2004 amendments require “the employer to prove an **additional element** (that the employee has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or other change of status of other employees are given particular weight) to take advantage of the executive exemption.” *Aguirre v. SBC Communications, Inc.*, 2007 WL 2900577, *17 (S.D. Tex. 2007) (unpublished) (emphasis added).²⁶ To determine whether this additional element is satisfied, the Court may consider the following factors: “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.” § 541.105. Although an employee’s suggestions might qualify as having “particular weight” even if they are subject to a higher level of review,

[g]enerally, 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 co-worker.

Id.

Several other key terms comprising the executive exemption are defined by amended regulations. Section 541.100 limits the exemption to an employee who has the primary duty of

²⁶ The LFUCG’s flawed basis for its exempt classification of Lieutenants and Captains arises from its apparent decision to ignore this amendment to the executive exemption as well as the “first responder” amendment. The current H.R. Director, Michael Allen, believes that the factor concerning authority to hire or fire, or having “input” into such matters, is not a prerequisite to the applicability of executive exemption. He specifically admitted that DCC Lieutenants and Captains do not satisfy that requirement, but expressed his opinion that “they don’t have to meet every single one” of the exemption’s “functions.” (Allen at 30). While this might have been true prior to 2004, such a view is plainly insupportable as to the time period after August 24, 2004. *Davis*, 453 F.3d 554; *Aguirre*, 2007 WL 2900577.

“management of the enterprise.” The key term “management” includes the following activities:

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 purposes 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.

§ 541.102.

An exemption will not apply simply because an employee happens to perform some duties that might qualify as “management”; instead, § 541.100(2) makes clear that management of the enterprise must be the employee’s “primary duty”:

. . . **The term “primary duty” means the principal, main, major or most important duty that the employee performs.** Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, **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.**

§ 541.700(a) (emphasis added).²⁷ Although the amount of time spent performing exempt work can be “a useful guide” in identifying an employee’s “primary duty”, quantity of time may not serve as the sole factor in an exemption analysis. § 541.700(b).

Section 541.106(c) recognizes that, while an employee whose primary duty truly qualifies

²⁷ This definition of “primary duty” also applies to the administrative exemption.

as management will not become nonexempt simply because he or she also performs some nonexempt work, the converse is also true. Thus, a “working supervisor whose primary duty is performing nonexempt” or production work does not become exempt simply because he or she “occasionally has some responsibility for directing the work of other nonexempt production line employees” *Id.* Further, “[a]n employee whose primary duty is ordinary production work or routine, recurrent, or repetitive tasks cannot qualify for exemption as an executive”. § 541.106(a).

The use of manuals, guidelines, or other established procedures by an employee will not preclude exemption where those resources contain or relate to “highly technical, scientific, legal, financial, or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills”. § 541.704. However,

The section 13(a)(1) exemptions are not available . . . for employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances.

§ 541.704.²⁸

2. *The pre-2004 amendments*

Prior to the DOL’s 2004 amendments to its regulations defining the § 13(a)(1) exemptions, the regulations employed a “long test,” applicable to employees who were paid less than \$250 per week, and an alternative “short test”, applicable to employees who were paid more than \$250 per week. For the limited purposes of this Motion, the Plaintiffs do not contest that the LFUCG is entitled to apply to “short test” for the time period beginning September 6, 2003 (the beginning of the relevant limitations period) through August 23, 2004 (the effective date of the amended

²⁸ This rule also applies to any administrative exemption that might be claimed by the LFUCG.

regulations).²⁹

The pre-2004 “short test” defined an executive employee as one who (1) was compensated on a salary basis at a rate of not less than \$250 per week, and (2) “whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of the work of two or more employees therein”. 29 C.F.R. § 541.1(f) (2003).

Like the amended regulations, the pre-2004 regulations also expanded upon many of the key terms appearing in the DOL’s definition of an exempt employee. The pre-2004 definition of the key term “management” was very similar to the definition which appears in the amended regulations.³⁰ The pre-2004 regulations also emphasized that identification of an employee’s “primary duty” should be based on a number of factors, including the amount of time spent on particular tasks, but also

the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by supervisor

§ 541.103 (2003).

The pre-2004 regulations did not specifically require an executive employee to have the

²⁹ Obviously, as to Plaintiffs who did not hold the rank of at least Lieutenant prior to August 24, 2004, the LFUCG must be governed entirely by the post-2004 regulations. While sub-classes might be utilized to deal with the variations between the pre-2004 and post-2004 regulations, the Plaintiffs believe that the LFUCG’s exemption defense fails under either version of those regulations.

³⁰ The pre-2004 definition of “management” did not, however, include the activities of “planning and controlling the budget; and monitoring or implementing legal compliance measures”, which are specifically identified as management activities in the “new”, post-2004 definition of “management.”

authority to hire and fire other employees. *Cf.* § 541.100(4) (2007) and § 541.1(f) (2003). However, that authority and ability was nevertheless relevant to the exemption analysis. *Sack v. Miami Helicopter Service, Inc.*, 986 F.Supp. 1456, 1467 n. 8 (S.D. Fla. 1997). Moreover, the pre-2004 regulations prohibited an employer from characterizing “working foremen” or “working supervisors” as exempt where those employees performed a substantial amount of work of the same nature as that employed by non-exempt subordinates:

(b) One type of working foreman or working supervisor most commonly found in industry works alongside his subordinates. Such employees . . . perform the same kind of work as that performed by their subordinates, and also carry on supervisory functions. Clearly, the work of the same nature as that performed by the employees’ subordinates must be counted as nonexempt work and if the amount of such work performed is substantial the exemption does not apply. (“Substantial,” as used in this section, means more than 20 percent. See discussion of the 20-percent limitation on nonexempt work in 541.112)

(c) Another type of working foreman or working supervisor who cannot be classed as a bona fide executive is one who spends a substantial amount of time in work which, although not performed by his own subordinates, consists of other routine, recurrent, repetitive tasks which are a regular part of his duties

§ 541.115 (2003).

B. Lieutenants Do Not Qualify as Executive Employees

As a matter of undisputed fact, Plaintiffs who are or have been ranked as DCC Lieutenants cannot properly be characterized as “executives” who are exempt from the FLSA’s protections.

1. *Lieutenants do not have authority to hire or fire other Employees, nor do their suggestions or recommendations about hiring, firing, or promotions receive any particular weight*

First, and as a matter of undisputed fact, DCC Lieutenants have no authority to hire or fire other Employees, nor do their suggestions or recommendations about such matters receive any particular weight from the DCC administration. The current H.R. Director, Michael Allen, who

purportedly reviewed the exempt classification of DCC Lieutenants as part of the collective bargaining process, specifically admitted that neither the Lieutenants nor Captains satisfy this prerequisite for the executive exemption. (Allen depo. at 30). Allen's admission is dispositive as to the inapplicability of the executive exemption to any Plaintiffs who have held the Lieutenant (and Captain) rank at any time after August 23, 2004, the effective date of amended § 541.100. Although this authority was not a prerequisite to the pre-2004 "short test" for executive employees, it was nevertheless relevant to the executive exemption analysis even before the enactment of amended 29 C.F.R. § 541.100. *Sack*, 986 F.Supp. at 1467 n. 8.

Without authority to hire or fire, or to offer suggestions about hiring, firing, or changes in other employees' status which receive "particular weight", an employee cannot be classified as an exempt executive, without regard to whether his or her primary job duties might otherwise qualify as "managerial." In *Davis*, 453 F.3d 554, the owner of chicken farms classified its "Crew Leader" employees as exempt executives. The Crew Leaders were responsible for directing the work of a crew comprised of chicken "catchers" and forklift operators. The Crew Leaders coordinated the crew's work with chicken growers, checked equipment for damage, divided coops into sections, directed the placement of certain equipment, ensured that the proper number of chickens were placed in each transport cage and that the cages were properly loaded into trucks, and generally monitored the entire chicken-catching process. Despite those duties, however, the employer's written job description for the Crew Leaders did not reflect that the plaintiffs had any authority to hire or fire the employees whom they supervised. Applying the post-2004 regulations, the Court found that the employer had not met its burden of proving that the executive exemption applied to the Crew Leaders. *Id.*

Here, there is no disputed issue of material fact as to the Lieutenants' total lack of authority to hire or fire other employees. Further, no material issue of fact supports any argument by the LFUCG that the Lieutenants' suggestions or recommendations about such matters receive any "particular weight." H.R. Director Allen admits that this requirement is simply not met as to Lieutenants (or even as to Captains). Additionally, the undisputed facts show that DCC promotions are granted only by the Director. The Director may or may not employ a panel to provide him with a recommendation. If panels are used, then recommendations to the Director are based upon (1) rankings by the LFUCG's H.R. Division (which does not include the DCC Lieutenants), (2) interviews by a "blind" external panel (which obviously does not include Lieutenants and which learns nothing about the candidates outside of the interviews), and (3) interviews and rankings by an "internal" panel (which may include non-exempt Sergeants or Officers as well as "exempt" Employees). The rank of Lieutenant does not mean that an Employee will ever be selected by the Director or Assistant Director to sit on a promotion panel, or that, if selected, the panel will concern the promotions of Employees whom the Lieutenant regularly or customarily supervises, as required by § 541.105. Some Lieutenants, like Lieutenant Cunningham, have never been chosen for a promotion panel. Even when a Lieutenant does sit on such a panel, he or she receives a single vote which carries no greater weight than the votes cast by non-exempt Sergeants, Corporals, or Officers who might also sit on the panel. The panel is permitted to consider only those candidates presented by the administration's promotion or transfer process, and must choose a pre-determined number of candidates to "recommend" to the Director. When Lieutenant Cunningham was permitted to sit on a panel addressing transfer requests concerning the area which she "supervises," her recommendations were rejected. A Lieutenant's input into an Employee's termination is equally

hollow; even after receiving three (3) consistent recommendations for termination of one Officer, Assistant Director Kammer chose to impose a suspension. Based on these undisputed facts, § 541.100(4) cannot be satisfied by the DCC as to the Lieutenants.

2. *The Lieutenants' primary duty is not the "management" of the DCC or any subdivision thereof*

Third, and under both the amended and pre-2004 regulations, Lieutenants are not engaged in duties (much less "primary" duties) that can be characterized as "management" of the DCC or any subdivision thereof. The definitions provided by the regulations for the terms "management" and "primary duty", as well as applicable caselaw, foreclose any characterization of the Lieutenants as exempt executives.

In *Harris*, 741 F.Supp. 254, the plaintiff employees were "Supervisory Housing Inspectors" for a municipal government. The plaintiffs spent only about 25% of their working time "in the field". The remainder of their time was spent preparing or reviewing reports about housing inspections. They tracked cases and maintained records. They could not hire or fire other employees, nor could they impose any discipline upon lower-level employees more severe than "verbal counseling." They could make recommendations about discipline, but not all of those recommendations were accepted by their superiors. The court found the Supervisory Housing Inspectors to be non-exempt. Because these employees spent at least a quarter of their time performing the same work as that assigned to the non-exempt housing inspectors whom they "supervised", "[t]his alone removes them from the executive category, even if the rest of their duties are of an executive character." *Id.* at 260. The remainder of their work, moreover, was not "management" work:

The evidence further indicates that plaintiffs' role does not entail directing or

managing the execution of housing code policy. Not a single piece of evidence suggests that any of the Supervisory Housing Inspectors have ever devised plans or strategies, determined priorities, put together initiatives, or done anything associated with management of a project. The testimony suggests that Supervisory Housing Inspectors react only, whether to direction from the Branch Chief or Program Manager, or to complaints from the public. Nothing in plaintiffs' duties has any "proactive" quality to it, in the sense that word has come to be used to mean anticipating a problem and taking steps to correct it. In short, Supervisory Housing Inspectors do not manage at all, much less more than 50% of the time.

Id. at 261.

Last, Supervisory Housing Inspectors do not appear to exercise any degree of discretionary power. Their schedules, and the plan for their subordinates' schedules, are set by the Branch Chief and Program Manager. Plaintiffs' duty seems to be to relay those to the Housing Inspectors, acting as a conduit. All of the testimony shows that Supervisory Housing Inspectors are sharply constrained in their power to act on their own or to do much of anything without higher approval.

Id. At best, the Plaintiffs qualified as "working foremen", and "[a]s such, their duties do not meet the test of employment in a bona fide executive capacity." *Id.*

A similar result was reached in *Schuller v. City of Livermore*, 1987 WL 46348 (N.D. Cal. 1987) (not reported), where the Court considered the status of city-employed Fire Captains. The Court found that the position "is not by any stretch of the evidence or facts in the executive-management category":

The Captain in this case can be more likened to a shop foreman; the Captain's duties and parameter of operation (his discretion), are clearly and fully set forth by the Fire Chief, Assistant Fire Chief, Battalion Chiefs, and the rules, regulations and policies of the Fire Department. The captain has merely to follow their directives. To say that his duties and authority at the fire station, fire scene, or medical emergency, constitutes him an executive with its requisite discretion, too narrowly defines those in the management level exempt from the Act.

Id. at *1. The Captains had no authority to issue any discipline to subordinates beyond a reprimand without first obtaining approval from the Battalion Chief. Their evaluations of subordinates were also subject to review. "Even matters as petty as granting permission to wash private vehicles (Fire

Department Rule 23.19), or installing a basketball hoop (for personal exercise purposes)” were governed by the employer’s rules, regulations, and policies, which “gave little in the way of discretionary deviation.” *Id.* at *3. The court also noted the “line of demarcation of authority” existing between the positions of Captain and Battalion Chief. *Id.* See also *Department of Labor v. City of Sapula, Oklahoma*, 30 F.3d 1285 (10th Cir. 1994) (fire department captains were not exempt executives where they had no authority to establish their own work schedules, and they participated in “routine manual station duties”).

In *Donovan v. Great Lakes Recreation Co.*, 1983 WL 2057 (E.D. Mich. 1983) (not reported), managers of several bowling centers owned by a single employer were held not to qualify as exempt executives largely because of micromanagement by the employer’s “central office.” The employer sent detailed instructions to managers which told them exactly how to manage each bowling center. The “memos” addressed matters such as how to set the thermostats and lights, how to re-use coffee grounds, how to supervise the employees who counted money from the juke boxes, and how to schedule vacations. The employer also directed managers how to instruct subordinates about specific issues. For example, one memo instructed the managers to tell counter employees that rental shoes should be “rung” into the cash register in a particular manner. Another directed the managers to tell mechanics to clean and service the centers’ machines in a specific way. “All of these memos, along with the [employer’s manual and testimony], illustrate that most of the discretion and supervision involved in operating the bowling centers was exercised and performed by persons at the Great Lakes central office, not by the center managers and assistant managers.” *Id.* “They show generally that the Great Lakes office did not entrust a number of important matters to the discretion of the center managers.” *Id.*

Very few of the job duties identified by § 541.102 or § 541.102 (2003) could ever be claimed by the LFUCG to be performed by Lieutenants. They do not interview or select employees. Training is performed by a separate Bureau, and then by “floor training officers” who may or may not be “exempt.” Lieutenants do not set or adjust rates of pay or hours of work. They do not assign mandatory overtime days, and they may not excuse Employees from required availability on those days. Their evaluations of subordinates follow a pre-determined form, are subject to revision by the DCC administrators, and are not used by the DCC for promotions or other changes in status.

Appropriate techniques and the type of equipment to be used are determined by DCC policy-makers, not by Lieutenants. To the extent Lieutenants “apportion” work among Employees (a task that may also be performed by non-exempt Sergeants), they do so by routinely rotating both subordinate and superior Employees through various duty stations. They do not plan or control the budget. Like the Supervisory Housing Inspectors in *Harris*, the DCC Lieutenants do not devise strategies or plans, nor do they determine the DCC’s priorities, nor do they possess any real disciplinary authority. Lieutenants may only issue non-disciplinary (as characterized by the LFUCG) C&Cs and oral warnings. They may not issue written reprimands or impose suspensions. The scope of a Lieutenant’s disciplinary authority is the same as that held by non-exempt Sergeants, so the LFUCG cannot characterize the ability to issue oral warnings as sufficient to render the Lieutenants exempt. *See, e.g., Davis*, 453 F.3d 554 (although non-exempt Crew Leaders could issue disciplinary warning “write-up” forms to chicken catchers, disciplinary decisions were ultimately controlled by the employer’s administrative offices). The “line of demarcation of authority” recognized in *Schuller* cannot be drawn between Sergeants and Lieutenants, since Sergeants have as much authority over Officers and Corporals as the Lieutenants might be said to hold over the Sergeants. Instead, the real

“line” is drawn between the ranked Employees and the DCC “administrators”, or, according to Major Capillo, between Majors and “the boots on the floor”.

Also like the *Harris* plaintiffs, the primary duties of DCC Lieutenants are identical to those assigned to their non-exempt subordinates. Either rank may conduct briefings, staff inspections, and perimeter checks. Either rank may serve as shift commanders, paperwork commanders, or floor training officers. Either rank may review time cards, be selected for a promotion panel, or ensure officers’ proper uniform care and appearance. Either rank may issue work station assignments. A “working supervisor whose primary duty is performing nonexempt” work will not become exempt merely because he or she “occasionally has some responsibility for directing the work of other nonexempt production line employees.” § 541.106. *See also* § 541.111 (2003) (nonexempt work consists of work of the same nature as that performed by the non-exempt subordinates of the “executive”); § 541.115(b) and (c) (2003) (where “working supervisors” perform the same type of work as that performed by their subordinates, the work counts as nonexempt, and if the amount of such work is substantial, then the exemption cannot apply, nor does the exemption apply to working supervisors who perform routine, recurrent, repetitive tasks). Much of the Lieutenants’ workday is consumed by tasks which might also be performed by their subordinates. As a matter of undisputed fact, the two ranks are so similar that a former DCC Director (who served during a portion of the time covered by this lawsuit) attempted to have the Lieutenant position reclassified as non-exempt.

To the extent any of the activities performed by Lieutenants might be analogized to the duties identified by § 541.102 and § 541.102 (2003) as constituting “management” work, the Lieutenants are granted so little discretion and judgment in the performance of those activities that the executive exemption cannot apply. For example, staff duty assignments are made on rotating basis (1/3/07 Tr.

at 72 (testimony of Kammer)), and involve nothing more than “filling in a name.” (Cunningham depo. at 71). Discretionary management decisions are made at the administrative level. As in *Schuller*, where the employer controlled even “petty” matters and left “little in the way of discretionary deviation” to its Fire Captains, and in *Donovan*, where the employer instructed its “managers” exactly how to “manage” their subordinates and the bowling centers, the DCC administrators control virtually every aspect of how the jail is managed. Decisions such as the manner in which “breaks” should be recorded and when inmates are to be fed are made at the administrative level. Operational Orders issued by the Director dictate the number of buttons that must be closed on an inmate’s jumpsuit, when an inmate may wear shorts, how to request and obtain cleaning supplies, when and how to perform searches, and how often visual observations may be conducted. Lieutenants may not deviate from those Orders without prior approval.

Although Lieutenants (like non-exempt Sergeants) serve as “commanders”, that designation does not denote any real managerial authority. The Sixth Circuit has cautioned that the fact that an employee might be nominally “in charge” of a particular shift does not automatically invoke the executive exemption. *Ale v. Tennessee Valley Authority*, 269 F.3d 680 (6th Cir. 2001). “Supervising, while an important aspect of management, is not the equivalent of management.” *See also International Ass’n of Fire Fighters, Alexandria Local 2141 v. City of Alexandria, Va.*, 720 F.Supp. 1230, 1233 (E.D. Va. 1989) (even where plaintiffs are unquestionably “in charge of the unit they supervise”, management could not be said to constitute their primary duty “when examined from the perspective of their role within the entire fire or police department and when factoring in the lesser degree of discretion and autonomy they exercise”); *Jackson v. City of San Antonio*, 2006 WL 2568545 (W.D. Tex. 2006) (unpublished) (employer failed to satisfy burden of establishing that

executive exemption applied to police Sergeants and Lieutenants; although those employees were responsible for monitoring and evaluating subordinates and for recognizing and “reward[ing] appropriately” meritorious work, and could initiate disciplinary investigations, the city’s evidence only showed that the employees had “*some* managerial duties” and not that “the duties were the *primary* occupation” of the employees) (emphasis in original). Because supervisory authority does not necessarily accompany the rank of Lieutenant, it cannot provide a viable basis for the LFUCG’s blanket classification of all Lieutenants as exempt. Some Lieutenants are granted no supervisory authority whatsoever. Even where a Lieutenant might have a supervisory role, that supervision cannot constitute his or her “primary duty” because, as explained above, the Lieutenant is granted virtually no discretion as to even very minor matters, and is subject to constant and close supervision. § 541.700(a) (in identifying an employee’s “primary duty”, the Court should consider the employee’s relative freedom from direct supervision); § 541.704 (the executive exemption is inapplicable to an employee who simply applies procedures within closely prescribed limits). The DCC is operated pursuant to administratively-established policies, procedures, and orders, and not pursuant to any discretionary decision-making of Lieutenants who, as a matter of undisputed fact, are indistinguishable from non-exempt Sergeants.

Another factor to be considered in determining whether the Lieutenants’ “primary duty” is the performance of exempt work is the relationship between the Lieutenants’ pay or salary and the pay received by nonexempt DCC Employees. 29 C.F.R. § 541.700. LFUCG Ordinance Section 21-25 (attached as Exhibit 19) sets for the “Salary Schedules” for various grades of LFUCG Employees. LFUCG Ordinance Section 21-5, titled “Classified civil service positions” (attached as Exhibit 20), states that DCC Lieutenants fall within Pay Grade 114E. According to section 21-25, therefore,

Lieutenants are paid between \$16.28 per hour and \$26.05 per hour, and between \$33,870.72 and \$54,181.92 annually. Non-exempt Sergeants (who fall within Pay Grade 112) are paid between \$14.23 and \$22.51 per hour, and between \$29,592.16 and \$46,829.12 annually. Even the lower-ranked non-exempt Officers (assigned Pay Grade 110) are paid between \$12.48 per hour and \$19.54 per hour, and may receive as much as \$40,651.52 annually. It is thus entirely possible for a Sergeant or even an Officer to receive higher pay than a supposedly “exempt” Lieutenant. A Lieutenant’s pay grade is so closely related to the pay received by nonexempt Employees that the Lieutenant’s primary duty cannot be characterized as the performance of exempt work. *Cf. Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496 (6th Cir. 2007) (exempt manager earned \$21,947 in her final seven month period of employment, and was eligible to participate in a bonus program, while the “next highest grossing employee” earned only \$13,943 during that same period and was not eligible for a bonus); *Light v. MAPCO Petroleum, Inc.*, 2005 WL 1868766 (M.D. Tenn. 2005) (unpublished) (store manager who was paid nearly twice as much as other employees and who was the only store employee eligible for bonuses, was properly classified as exempt).

C. Captains Do Not Qualify as Executive Employees

The Captains do not qualify as exempt executives for the same reasons that the Lieutenants do not so qualify. First, they do not satisfy the fourth prong of the executive employee definition set out in § 541.100. As H.R. Director Allen admits, Captains have no authority to hire or fire other employees, and no ability to offer “a lot of input” into those decisions. Decisions about promotions or other changes in an employee’s status are made by the Director, not by Captains. The rank of Captain does not ensure that an Employee will ever be selected by the Director to serve on the promotion panels which recommend candidates for promotion to the Director. For example, retired

Captain Williams served in that rank for over twenty (20) years, and was never selected for such a panel. Captain Simpson has not been selected for a hiring or promotion panel since achieving his current rank. Captain Mitchell has not only been excluded from panels, but has not even been informally asked for her recommendations. DCC administrators who sit on promotion panels do not bother to review the candidates' personnel files before making recommendations to the Director.

The Captains' primary job duties are also non-managerial. The authority to conduct evaluations does not necessarily accompany a Captain's rank; Captain Williams evaluated subordinates only when other Employees were on vacation. When a Captain is permitted to complete an evaluation of a subordinate officer, DCC administrators can order the evaluation to be re-written. The scope of the Captains' disciplinary authority is the same as the authority granted to non-exempt Sergeants; they may issue "non-disciplinary" C&Cs and oral warnings, but cannot impose written reprimands or suspensions. The Captains' discretion in exercising even that limited authority is very narrow. Major Capillo requires Captains to obtain his approval prior to issuing even a C&C. The Captains' recommendations about disciplinary matters must conform to the LFUCG's "codes", and may be modified or overridden by DCC administrators. The Assistant Director's control over all disciplinary matters is so pervasive that at least one Captain has been instructed by him to issue C&Cs to her staff and to herself, without regard to her own judgment and using the exact "verbiage" dictated by the Assistant Director. (Bishop depo. at 89).

Captains do not supervise or manage planning or development within the DCC. They are not responsible for implementing cost-saving measures, and they have no budgetary input or control. According to Captain Mitchell, her involvement in legal compliance is simply to follow "[w]hatever administration says." Captains do not set their subordinates' rates of pay or hours of work; indeed,

they cannot even recall employees when they are short-staffed. To the extent the Captains perform any duties that might be analogized to the duties recognized by § 541.102 (2007) and § 541.102 (2003) as “management”, those duties do not primarily constitute the Captains’ positions because the Captains’ exercise of discretion is severely limited, and the Captains are themselves subject to close supervision. As in *Schuller* and *Donovan*, management of the DCC, even on a very detailed level, is centralized among the administrators. Captains are instructed by administrators or Majors how to restrain particular inmates, how many officers to assign to particular units, what time inmates should be fed, whether and how to conduct particular searches of or impose restraints on inmates, the number of towels that may be kept by an inmate, and how to obtain and secure cleaning supplies. Moreover, the LFUCG cannot claim that the Captains’ roles in preparing duty assignments transform them into exempt executives, since Sergeants are equally as authorized - and equally as likely - to perform those tasks. (Dulin depo. at 25; Williams depo. at 90; Pitts depo. at 38).

As with Lieutenants, Captains are assigned to a pay grade which, in comparison with the pay grades of the nonexempt ranks, further demonstrates that the Captains’ primary duty is not the performance of nonexempt work. 29 C.F.R. § 541.700. Captains are assigned Pay Grade 115, and therefore earn between \$17.46 and \$28.08 as hourly pay, or between \$36,320.96 and \$58,410.56 as annual pay. Since nonexempt Sergeants (Pay Grade 112) may receive as much as \$10,000 more in annual pay than the minimum annual pay awarded to the supposedly exempt Captains (or as much as \$5 per hour more in hourly pay), the relationship of the Captains’ pay rate to the pay rate of nonexempt Employees further defeats the LFUCG’s classification of Captains as exempt. (See Exhibits 19 and 20).

V. LIEUTENANTS AND CAPTAINS DO NOT PERFORM ADMINISTRATIVE DUTIES

H.R. Director Allen testified that the LFUCG has confirmed only the applicability of the executive exemption to DCC Lieutenants and Captains, while the administrative exemption could only “be possibly construed” to apply. (Allen depo. at 14, 21). In response to the Plaintiffs’ request that it identify which exemption applied to particular Plaintiffs, however, the LFUCG stated that DCC Lieutenants and Captains “are exempt under either the executive exemption or the administrative exemption”. (LFUCG Response to Plaintiffs’ Third Set of Interrogatories, No. 3). The Plaintiffs must therefore address the inapplicability of the administrative exemption.

A. Overview of the Administrative Exemption

1. The 2004 amendments

Like the regulations interpreting the executive exemption, the DOL’s 2004 amendments removed the distinction which previously existed between the “short test” and “long test” for the administrative exemption. Now, the regulations define an administrative employee as one who is:

- (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week . . .
- (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.**

§ 541.200(a) (emphasis added).

Also like the executive regulations, the administrative regulations define the key terms to be used in determining whether the exemption applies. In order to qualify as administratively exempt, an employee’s primary duties must be “directly related to management and general business

operations”. That phrase refers to “work directly related to assisting with the running or servicing of a business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.” § 541.201. Work “directly related to management and general business operations” includes

. . .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

§ 541.201.

Another prerequisite to the administrative employee exemption is that the employee’s “primary duty include[] the exercise of discretion and independent judgment with respect to matters of significance.” § 541.200(a)(2). That exercise must “involve the comparison and the evaluation of possible courses of conduct, and acting or making a decision after various possibilities have been considered.” § 541.202(a). To determine whether an employee exercises discretion and independent judgment with regard to matters of significance, the Court may consider the following factors:

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.

§ 541.202(b). Application of “well-established techniques, procedures, or specific standards” will not support an administrative exemption. § 541.202(e) (referencing § 541.704)). Further, the “exercise of discretion and independent judgment” will not include clerical or secretarial work, “recording or tabulating data”, or “performing other mechanical, repetitive, recurrent or routine work”. *Id.* The reality that an employee’s job performance may have significant consequences to an employer plays no part in the administrative analysis. § 541.202(f).

The regulations specifically identify employees who perform inspection work as falling outside of the exemption:

Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

§ 541.203.

The regulations also offer the following examples of jobs considered by the DOL as generally administrative and therefore exempt: insurance claims adjusters who negotiate settlements and determine coverage liability, human resources managers who “formulate, interpret or implement employment policies”; management consultants “who study the operations of business and propose changes in organization”; employees who lead others to complete major projects for an employer such as purchasing or selling a business, negotiating a real estate transaction or collective bargaining agreement, or designing productivity improvements; and “purchasing agents with authority to bind the company on significant purchases”. § 541.203.

2. Pre-2004 regulations

Prior to August 2004, the administrative exemption, like the executive exemption, could

apply under either a “long test” or a “short test.” For the limited purposes of this Motion, the Plaintiffs concede that the LFUCG may take advantage of the more employer-lenient “short test” for the time period beginning September 6, 2003, until August 24, 2004 (the effective date of the amended regulations). The pre-2004 short test limited the exemption to an employee whose primary duty consisted of “the performance of office or nonmanual 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” § 541.2(2) (2003).³¹

The pre-2004 regulations also defined the key term “directly related to management policies or general business operations” in a manner similar to post-2004 regulations. Prior to August 2004, this phrase described “those types of activities relating to the administrative operations of a business as distinguished from ‘production’ or, in a retail or service establishment, ‘sales work.’” § 541.205(a) (2003). More specifically, the “administrative operations of the business” include work such as advising management, planning, negotiating, representing the employer, purchasing, and business research and control. § 541.207(b) (2003).

The pre-2004 regulations make clear that the key phrase “discretion and independent judgment” does not describe an employee who simply applies knowledge or skill in following an employer’s rules or guidelines:

³¹ This differs only slightly from the post-2004 administrative short test. The post-2004 regulations require that the employee’s job duties “include” the exercise of discretion and independent judgment, while the pre-2004 regulations provide that an administrative employee’s performance of office or nonmanual work must include work “requiring” the exercise of discretion and independent judgment. *See, e.g., Mohorn v. Tennessee Valley Authority*, 2007 WL 2077549, *6 (E.D. Tenn. 2007) (noting change).

Perhaps the most frequent cause of misapplication of the term “discretion and independent judgment” is the failure to distinguish it from the use of skill in various respects. An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are met, or whether an object falls into one or another of a number of definite grades, classes, or categories, with or without the use of testing or measuring devices, is not exercising discretion and independent judgment within the meaning of § 541.2. This is true even if there is some leeway in reaching a conclusion

§ 541.207(c)(1) (2003).

Thus, inspection work that is “fairly routinized” cannot be held to include the exercise of discretion and independent judgment. *Sack*, 986 F.Supp. at 1470.

Although cautioning that “[t]itles can be had cheaply and are of no determinative value”, the old regulations offer examples of the types of employees who generally qualify for the administrative exemption. Such employees include “administrative assistants”, “wage rate analysts”, personnel directors, and advisory specialists. § 541.201(a)(1)-(3) (2003).

B. Lieutenants and Captains Are Not Administrators

As a matter of undisputed fact, DCC Lieutenants and Captains do not qualify as exempt administrators. This is an admitted fact; according to Assistant Director Kammer, Employees occupying those ranks are not part of the DCC’s administration. (1/3/07 Tr., p. 37, 50 (Kammer testimony)). Instead, and according to Major Capillo, these Employees constitute “the boots on the floor.”

Even disregarding that admission, the work performed by the Plaintiffs occupying the ranks of Lieutenant or Captain is not “directly related to the management policies or general business operations” of the DCC. Their tasks are not analogous to the type of work characterized as administrative by § 541.201(2007) or § 541.207(2003). These Plaintiffs are not engaged in the

running or servicing of the jail. They do not create policies or rules. Instead, the DCC is operated by the “administration” (which, according to the Assistant Director, excludes Lieutenants and Captains).

Lieutenants and Captains do not work in “functional areas” such as finance, accounting, budgeting, auditing, quality control, procurement, research, personnel management, human resources, employee benefits, or labor relations. § 541.201(2007). (*See, e.g.*, Whittlesey depo. at 25, 26 (as a Captain, she has no involvement in planning, development, investigation, and analysis, and no involvement in cost-reducing measures); Mitchell depo. I at 34, 36 (as a Captain, she does not “formulate new directions” and has no involvement in cost-reducing measures); Pitts depo. at 38, 44 (Captains spend very little time supervising, monitoring, or coordinating the activities of subordinate staff, and, as a Major, he never directed the Captains to develop procedures or practices to assist in efficiency or to implement cost-saving measures)). Work that is directly related to the management or general business operations of the DCC is performed by DCC administrators. For example, Assistant Director Kammer is the decision-maker on matters as detailed as how an officer should document a break, the time of day by which an Employee must (allegedly) be informed that he or she is not required to work an overtime shift, the number of towels that an inmate may accrue, and the time by which inmates must be fed. Other management decisions, such as the number of Employees required to operate a particular area or shift, are made by administrators, not by any ranked Employees.

To the extent Lieutenants and Captains may be argued by the LFUCG to perform any of the work identified as “administrative” by § 541.201, the context in which they perform that work - as part of the production of the DCC rather than its administration - defeats their “exempt”

classification. The “administration/production dichotomy” recognizes the distinction between “production” employees (who “generate (i.e., produce), the very product or service that the employer’s business offers to the public”) and truly administrative employees (who engage in work that is only “ancillary” to an employer’s principal production activity). *Renfro v. Indiana Michigan Power Co.*, 370 F.3d 512, 517-18 (6th Cir. 2004). For example, the principal production activity of a power plant is to generate electricity. Employees whose primary duties involve the creation of plans for maintaining the plan’s equipment and systems are engaged in work that is ancillary to that principal production activity. As “planners”, those employees have duties that “[w]hile not precisely ‘administrative’ . . . form the type of ‘servicing’ (‘advising the management, planning,’ etc.) that the FLSA deems administrative work directly related to the [plant’s] general business operations.” *Id.* at 517-18.

The administration/production dichotomy may also apply in the context of public law enforcement. For example, in *Shockley v. City of Newport News*, 997 F.2d 18 (4th Cir. 1993), a group of variously ranked police officers claimed that they had been improperly classified as exempt administrators. The employee holding the position of Ethics and Standards Lieutenant was held to be exempt. She devoted her time to the investigation of complaints. She analyzed relevant facts, interpreted policy, and made recommendations to the Chief of Police which were followed about 90% of the time. Her primary job duties, “accumulating and analyzing data and making recommendations that shaped the police department’s policy with regard to internal discipline”, were directly related to management policies. In contrast, the position of Media Relations Sergeant could not be classified as exempt administrators. Employees occupying that position spent most of their time on the “crime line”, answering the telephone, taking crime “tips” from callers, and passing the

tips to the proper department. They asked pre-approved questions and gave pre-approved answers. That work constituted “production work, not work related to the administrative operations of the police department.” *Id.* at 29 (citing *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1070 (9th Cir. 1990) (administrative activities must be directly related to “the running of a business and not merely the day-to-day carrying out of its affairs”).

The administration/production dichotomy was also applied in *Harris*, the above-discussed case regarding the non-exempt status of supervisory housing inspectors. There, housing inspections obviously constituted the “production” of the Housing Inspection Branch. *Id.* Therefore, time spent by the supervisory employees inspecting residences constituted working time spent in the “production” of the employer. The significant amount of time spent by those individuals in that production work disqualified them from being administrative employees. *Cf. West v. Anne Arundel County, Maryland*, 137 F.3d 752 (4th Cir. 1998) (EMS “training lieutenants” were exempt administrators, where their primary tasks included the development and coordination of all EMS training programs, as well as the administration of tests and the evaluation of new equipment).

Lieutenants and Captains perform production work, not the type of planning or policy-making work that is ancillary to the jail’s essential function of ensuring the proper care and custody of inmates. Lieutenants and Captains do not analyze data, nor do they make recommendations that will shape DCC policy like the exempt Ethics and Standards Lieutenant in *Shockley*. Instead, like the Media Relations Sergeant in *Shockley*, they are engaged in actually operating the DCC - “production work, not work related to the administrative operations” of the DCC. *Shockley*, 997 F.2d at 29. For example, Custody Lieutenants perform commander checks to ensure the safety and security of the facility. Lieutenants and Captains in Intake process newly-arrived inmates by frisking

them, “booking” them, asking them standardized questions, and performing head counts. “Commanders”, including Lieutenants and Captains, must respond to codes or signals, and, when necessary, physically restrain inmates. Lieutenants and Captains conduct perimeter checks and escort inmates. A Captain in Auxiliary Services has custody over an inmate during court appearances and while the inmate is in the courthouse “holdover” cell. All of these duties fall precisely within the DCC’s essential mission, or production, as described by Assistant Director Kammer. These safety and security tasks are not ancillary (and therefore administrative) work duties, but essential “production” work. Even when viewed most favorably to the LFUCG, the commander checks and perimeter tours performed by Lieutenants and Captains qualify only as inspection tasks, which have been specifically recognized as non-exempt work by § 541.203.

The supervisory authority exercised by Lieutenants and Captains over subordinate ranks is not enough to support their exempt classification. In *Ale v. Tennessee Valley Authority*, 269 F.3d 680 (6th Cir. 2001), the court considered the FLSA status of several employees of a nuclear power plant. The plant’s security lieutenants, for example, “supervised” between fifteen to thirty lower-ranked officers. The lieutenants were responsible for ensuring that subordinate officers complied with required rules and procedures. They evaluated the officers’ conduct by applying specific guidelines. The lieutenants also assisted in evaluating the overall job performance of lower-ranking officers. However, “nearly everything” that the lieutenants did was controlled by an internal or governmental regulation, so they did not have “authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.” *Id.* Instead, they were far more similar to inspectors, who used their skills and knowledge to follow set procedures or to determine whether specific standards had been met. Therefore, the court found the

lieutenants to be nonexempt.

Here, as in *Ale*, the Plaintiffs classified as “exempt” by their employer play no role in shaping the employer’s rules, orders, or directives. “[N]early everything” that the Lieutenants and Captains do is subject to the control of DCC rules or administrative directives, which regulate matters as detailed as how particular inmates should be restrained and as broad as how Employees waiting for an overtime assignment should be compensated.

The DCC Lieutenants and Captains fail the administrative exemption test for another, independent reason: the “primary duty” of these Employees does not include “the exercise of discretion and independent judgment with respect to matters of significance.” § 541.200(a). Lieutenants or Captains are specifically prohibited from deviating from (or approving deviations from) the Operational Orders. These Employees do not have authority to formulate or interpret management policies or operating practices. Policies come exclusively from the Director or Assistant Director, and Lieutenants and Captains cannot commit the LFUCG or even the DCC to matters that have any significant impact, financial or otherwise.³² They do not provide “consultation or expert advice to management.” Tasks such as reviewing subordinates’ paperwork, conducting commander checks, or making staff assignments are the type of “repetitive, recurrent or routine work” recognized as non-administrative in § 541.202(e).

³² Indeed, when the Plaintiffs sought a preliminary injunction to correct misstatements about this action which were being promulgated by a Captain, the LFUCG represented to the Court that the Captain’s statements should not be construed as having been “made or sanctioned by LFUCG.” (LFUCG’s Response in Opposition to Motion for Preliminary Injunction, D.E. 117, p. 12). This was true despite the fact that the Captain carried the additional title of “Public Information Officer.”

VI. LIEUTENANTS AND CAPTAINS ARE NOT PAID ON A SALARY BASIS

Even if the LFUCG can establish that the primary job duties of the Plaintiffs who hold or have held the ranks of Lieutenant and Captain do not involve the detaining and supervising of suspected and convicted criminals, and that their duties otherwise qualify as administratively or executively exempt, these Plaintiffs are not exempt because they are not paid on a “salary basis.” The “salary basis” portion of either the executive or administrative exemption requires the LFUCG to demonstrate that “the employees in question are paid on a salary basis rather than an hourly rate.” *Aaron v. City of Wichita*, 54 F.3d 652, 657 (10th Cir.), cert. denied, 516 U.S. 965 (1995). Payment on a “salary basis” requires that the allegedly exempt employee receive, for each pay period, 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.” § 541.602. Subject to limited exceptions, “an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked.” *Id.* “If an employer docks the employee’s pay for an absence of a few hours on a particular day, the implication is that the employee really is expected to work the same number of hours every day, implying in turn that he really is an hourly rather than a salaried worker and that his salaried status is an evasion of the [FLSA].” *Spradling v. City of Tulsa, Okla.*, 95 F.3d 1492, 1501 (10th Cir. 1996). One type of deduction in pay which will defeat an employee’s exempt classification is a deduction made for absences caused by attendance as a witness. § 541.602(b)(3). Another such deduction is one imposed as discipline for an Employee’s infraction of a rule other than a safety rule of major significance. § 541.118(a)(5).

In *Spradling*, a city employer followed an unwritten policy under which supposedly exempt employees were subject to pay reductions for absences of less than one day. Although the policy permitted an employee's leave time to be reduced to "cover" those absences, an employee who did not have a sufficient accumulation of such time was subject to deductions in his or her pay. The Court held that the city's policy violated the FLSA's salary basis test.³³

Here, the LFUCG admits that deductions are made from the paychecks of supposedly exempt Lieutenants and Captains due to absences as well as suspensions. According to Assistant Director Kammer, a Lieutenant who must miss work and who has exhausted his or her available leave time will receive a paycheck that has been docked by a dollar amount corresponding to the number of hours of work that he or she has missed. The paycheck of a supposedly exempt Employee can be docked merely for having lunch outside of the facility if he or she is assigned to a "lunch-on-the-run" area. Jamie Cooper, the LFUCG payroll coordinator assigned to the DCC, testified that an Employee who has no leave time but who works less than a forty-hour workweek will be paid only for the

³³ The Plaintiffs acknowledge that the DOL's regulations now permit a public employer to make deductions in an exempt employee's pay for partial day absences, but only if the employer proves that the pay practice was established pursuant to principles of public accountability. § 541.710. The employer bears the burden of establishing that its pay system is based on such principles. *Spradling*, 85 F.3d at 1499 (10th Cir. 1996). The mere fact that public employees' salaries are funded by tax dollars is "wholly insufficient to allow [the Court] to conclude that the City's pay system is based upon a public accountability law as envisioned by the DOL." *Id.* Even if the LFUCG is able to offer some evidence suggesting that its pay system is based upon principles of public accountability, it still cannot properly classify the Lieutenants and Captains as exempt. Under its express terms, § 541.710 will salvage a claimed exemption only if the employer otherwise satisfies the requirements of the salary basis test; "that is, ignoring deductions that a public sector employer may make for absences of less than one day due to personal reasons, illness, or injury, **the employer must otherwise satisfy the test, and therefore cannot make any other deductions from an employee's salary based upon quantity or quality of work.**" *Spradling*, 85 F.3d at 1500 (emphasis added). Where a public employer also has a policy of making deductions to its employees' pay for disciplinary infractions, it cannot "otherwise meet" the salary test requirements and therefore cannot rely upon § 541.710.

number of hours which he or she has worked, and that this is true regardless of the Employee's rank. The LFUCG's Ordinances reflect hourly pay rates for all of its Employees, including the supposedly exempt DCC Employees. (Exhibit 19).

No evidence suggests that an employee's exempt status is considered in any manner prior to the LFUCG's imposition of deductions in an employee's pay to reflect variations in the amount of time worked or for disciplinary suspensions. On the contrary, the undisputed fact is that exempt and non-exempt Employees are treated identically for purposes of pay deductions and for unpaid suspensions.

This policy has applied to the Plaintiffs during this very case. According to the LFUCG's counsel, even "exempt" Employees deposed by the LFUCG were required to choose whether to "take time off without pay" or use leave time (assuming it was available) to the extent their depositions were held during their regular working hours. (August 2, 2007, Transcript of Hearing Proceedings at 9-10). This fact alone results in the LFUCG's violation of the salary basis test and the loss of any claimed exemption. § 541.602(b)(3). The LFUCG cannot represent that its Lieutenants and Captains are salaried Employees while simultaneously threatening to reduce their paychecks to reflect work missed due to their participation in this action.

CONCLUSION

The LFUCG's failure to review the legality of its classification of DCC Lieutenants and Captains is apparent from the undisputed fact that no formal analysis of that classification has been attempted since 1996. The cursory consideration of these Employees' exempt status performed by H.R. Director Allen as part of the 2005 collective bargaining process was not based upon the current version of the DOL's regulations governing the executive exemption. As a result of its disregard of

the 2004 amendments, the LFUCG has apparently ignored the DOL's enactment of § 541.3(b)(1), which provides that any employee who detains and supervises suspected and convicted criminals shall be non-exempt from the FLSA, as well as § 541.100, which makes the authority to hire or fire or the ability to make recommendations which receive particular weight as to such matters a prerequisite to the executive exemption. As a matter of undisputed material fact, the Plaintiffs who are and who have been classified as "exempt" by the LFUCG are engaged in the detaining and supervising of suspected and convicted criminals. Therefore, these Employees cannot be classified as exempt executives or administrators. Further, the H.R. Director has specifically admitted that these Plaintiffs do not satisfy all of the prerequisites of the current test for exempt executives.

Even ignoring the DOL's "first responder" regulation and the post-2004 version of § 541.100, the LFUCG's classification of any of the Plaintiffs as "exempt" is illegal. The Plaintiffs who hold or have held the ranks of Lieutenant and Captain cannot qualify as exempt executives because they do not have the "primary duty" of "management". The administrative exemption is equally unavailable to the LFUCG, since the Plaintiffs who have been classified as "exempt" do not perform work that is "directly related to the management or general business operations" of the DCC. Instead, these Plaintiffs are engaged in the "production" work of the DCC, which is the providing of a safe and secure location for inmates.

For the reasons set forth above, the Plaintiffs respectfully request that the Court enter a partial summary judgment against the LFUCG's affirmative defense that any of the Plaintiffs are exempt from the FLSA's coverage.

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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 the 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.

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