

To Be Argued By:
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05-55650

IN THE
United States Court of Appeals
FOR THE
Ninth Circuit



ROBERT NIGG; KEITH LEWIS, as private attorney generals and
on behalf of himself and all others similarly situated;

Plaintiffs-Appellants

and

GINA HARRELL

Plaintiff

v.

UNITED STATES POSTAL SERVICE

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANTS

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants, postal inspectors employed by the United States Postal Service, asserted claims under the Fair Labor Standards Act (sometimes referred to as the "Act" or "FLSA"), 29 U.S.C. § 201, et seq. The District Court had jurisdiction over the claims pursuant to 39 U.S.C. § 409(a).

The postal inspectors appeal from three orders of the United States District Court for the Central District of California, Southern Division, the Honorable Gary L. Taylor presiding. The first Order, filed March 30, 2005 and entered as a judgment on April 11, 2005, granted the Postal Service's motion for summary judgment. (Appellants' Excerpts of Record ("R.") 74-77). The second Order, dated May 10, 2005 and filed May 11, 2005, denied plaintiffs' motion for reconsideration of the March 29, 2005 decision. (R. 80-82). The last of the three Orders appealed from is a Minute Order from the District Court dated January 31, 2005 that denied plaintiffs' motion for review of Magistrate Judge Nakazato's December 20, 2004 Minute Order relating to a discovery dispute. (R. 39, R. 26-27).

This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. On April 26, 2005, the postal inspectors filed a Notice of Appeal for the Order granting summary judgment and the Minute Order relating to discovery (R. 78-79); plaintiffs filed an Amended Notice of Appeal on June 6, 2005 to add the Order denying

reconsideration. (R. 84-85). The Notice of Appeal and Amended Notice of Appeal are timely under both Rule 4(a)(1)(A) and 4(a)(1)(B) of the Federal Rules of Appellate Procedure.

ISSUES PRESENTED FOR REVIEW

1. Is the Postal Service permitted to interpret 39 U.S.C. Section 1003(c), which requires that postal inspectors be paid on a standard comparable to other federal law enforcement officers, in a way that ignores the Fair Labor Standards Act, which entitles postal inspectors to overtime pay? (The Postal Service's authority to interpret Section 1003(c) does not permit an interpretation that violates the Fair Labor Standards Act, a federal statute enacted by Congress that specifically applies to the Postal Service.)

2. Did the District Court err when it ruled that the Postal Service can interpret Section 1003(c) to "effectively" exempt postal inspectors from the overtime provisions of the Fair Labor Standards Act? (The statutory exemptions to the Act are specifically delineated, they do not include an exemption for postal inspectors, and the Postal Service is not permitted to "effectively" create an entirely new exemption for postal inspectors.)

3. Did the District Court abuse its discretion when it affirmed a discovery ruling entered by the Magistrate Judge based on objections that the Postal Service

acknowledged are not applicable? (The District Court abused its discretion when it affirmed the Magistrate Judge's Order based on objections that the Postal Service did not make and which are not applicable.)

SUMMARY OF THE ARGUMENT

The Fair Labor Standards Act, enacted in 1938, applies to every employee in this country, whether at a public agency or private company, whether at a large company or a small business, whether in Alaska, Maine or somewhere in between. Because the Act protects all workers, an employer is excused from paying overtime compensation only if: (i) the worker falls "plainly and unmistakably" within one of the exemptions specifically enumerated in the Act, or (ii) another Congressional law repeals the Act as to a class of workers, either expressly or impliedly.

The Postal Service has never paid postal inspectors FLSA overtime, but not because postal inspectors fit within one of the exemptions or not because a federal statute has repealed the applicability of the FLSA to postal inspectors. In fact, at the trial court, the Postal Service did not even attempt to argue either of these two points. Instead, the Postal Service argued that its interpretation of Section 1003(c), requiring that postal inspectors be paid "comparably" to other federal law enforcement officers, excused it from complying with the FLSA.

The District Court granted the Postal Service's summary judgment motion holding that "[the Postal Service's] interpretation of 39 U.S.C. § 1003(c), effectively exempting postal inspectors from receiving overtime pay under the FLSA, is permissible as a matter of law." (R. 81). The District Court is wrong. The law is well established that only the Department of Labor has the power to interpret the phrases used within the FLSA exemptions and that it cannot interpret those phrases to "effectively" expand the existing exemptions because Congress itself specifically articulated them. The District Court's Orders, concluding that the Postal Service can permissibly interpret Section 1003(c) to "effectively" create an FLSA exemption, are contrary to several well-established legal principles and must be reversed.

If this Court reverses the District Court's Order granting summary judgment, the postal inspectors request that the Court address the trial court's Minute Order relating to discovery. In their Motion to Review filed with the District Court, the postal inspectors identified several instances where the Magistrate Judge's decision was incorrect as a matter of law. Instead of addressing the Magistrate Judge's errors, the District Court simply entered a Minute Order stating that the postal inspectors could return to the Magistrate Judge for any "alternative or less burdensome remedy."

STATEMENT OF THE CASE

Plaintiff Robert Nigg is employed as a postal inspector by the Postal Service; plaintiff Keith Lewis is a retired postal inspector. On April 7, 2004, Nigg and Lewis, on behalf of themselves and all other postal inspectors, filed an Amended Complaint against the Postal Service seeking unpaid overtime wages under the FLSA. (R. 90). The FLSA, by its express terms, applies to all employees of the Postal Service, including postal inspectors. 29 U.S.C. § 203(e)(2)(B).

On April 13, 2004, plaintiffs moved to have the action preliminary certified to proceed as a collective action. (R. 90). The District Court granted the motion on May 13, 2004 and plaintiffs promptly sent notice of the pendency of the lawsuit to prospective class members. (R. 92). Over the next four months, more than 1300 postal inspectors joined the case. (R. 92-98).

A. The Motion for Summary Judgment

On November 29, 2004, while fact discovery was ongoing, the Postal Service filed a motion for summary judgment, arguing that it did not have to pay FLSA overtime to its inspectors because it complied with 39 U.S.C. § 1003(c) by paying them "comparably" to other federal law enforcement officers. (R. 99). On February 14, 2005, the postal inspectors opposed the Postal Service's motion, contending that the FLSA defined "employees" entitled to overtime to include postal inspectors, and

that the only way the Postal Service could ignore the FLSA (a federal statute) was if (i) it could show that Section 1003(c) repealed the FLSA or (2) if postal inspectors fell within one of the FLSA's statutory exemptions. (R. 100). If the Postal Service could not prove one of these circumstances, then it was obligated to comply with both Section 1003(c) and the FLSA.

On February 25, 2005, the Postal Service filed its reply brief. In its brief, the Postal Service conceded that Section 1003(c) does not "expressly preempt" the FLSA. (R. 101). Instead, for the first time, the Postal Service argued that Congress "intended" to exempt postal inspectors from the FLSA's overtime provisions. To demonstrate Congress' intent, the Postal Service did not rely on the legislative history of Section 1003(c) -- which never mentions the FLSA -- or authority discussing Congress' intent. Rather, the Postal Service asked the District Court to discern Congress' "intent" based on certain phrases used in Section 1003(c). Because the Postal Service's reply brief raised new arguments, the postal inspectors requested and received permission to file a Supplemental Response. (R. 76, n. 1).

A few days before the hearing, the District Court called and informed counsel that it was taking the Postal Service's motion for summary judgment under submission and that oral argument would not be heard. (R. 73). On March 30, 2005, the District

Court issued an Order granting the Postal Service's motion and a judgment was entered on April 11, 2005. (R. 74-77, R. 101-102).

On April 19, 2005, the postal inspectors moved for reconsideration of the District Court's decision and again requested oral argument. (R. 102). The basis of the motion was a recently issued decision by the United States Court of Federal Claims, which held that the Department of Homeland Security's interpretation of its compensation scheme to preclude FLSA overtime for its employees was not entitled to deference because the Department of Homeland Security did not have any rule-making authority under the FLSA. See Bull v. United States, 63 Fed. Cl. 580, 588 (Fed. Cl. 2005). On May 10, 2005, just one day before oral argument, the District Court again telephoned counsel for the parties to inform them that it would take the matter under submission and that oral argument would not be heard. On May 11, 2005, the postal inspectors filed an ex parte application requesting oral argument. (R. 103). The District Court denied the application for oral argument and denied the motion for reconsideration. (R. 80-82). Despite denying plaintiffs' motion, the District Court fixed a glaring error in its Order granting summary judgment. (R. 82, n. 1).¹

¹ In its Order denying summary judgment, the District Court relied upon the text of Section 1003(c), the cases of Dymond v. United States Postal Serv., 670 F.2d 93, 94-96 (8th Cir. 1982) and Sprague v. United States, 677 F.2d 865, 868-69

B. The Discovery Order

The discovery order from which the postal inspectors appeal relates to their motion to compel the production of documents from the Postal Service. On November 24, 2004, the postal inspectors filed their motion, including the Joint Stipulation required by Local Rule 37-2. (R. 99). On December 15, 2004, the Magistrate Judge notified the parties that the matter was being taken under submission and oral argument would not be heard. (R. 25). On December 20, 2004, the Magistrate Judge issued a Minute Order denying in part and granting in part, the postal inspectors' motion to compel. (R. 26-27). The Magistrate Judge granted the motion only to the extent that the Postal Service had agreed to produce the requested documents. On January 6, 2005, plaintiff filed a Motion to Review the Magistrate Judge's Order. After the issue was fully briefed, the District Court telephoned the parties stating that it was taking the matter under submission and that it would not hold oral argument.

(Ct. Cl. 1982), and an opinion letter written by the Department of Labor to conclude that Congress has not clearly stated whether postal inspectors were entitled to FLSA overtime. (R. 76). After the postal inspectors argued in their motion for reconsideration that neither the Department of Labor letter nor the two court decisions constitute an expression of *Congress'* intent, the District Court deleted its reliance on those authorities and relied solely on the text of 39 U.S.C. § 1003(c). (R. 82, n. 1). Thereafter, based only on Section 1003(c) and without looking at the FLSA, the District Court concluded that Congress has not clearly spoken on whether postal inspectors are entitled to overtime pay under the FLSA. (Id.).

(R. 99). On January 31, 2005, without addressing any of the substantive issues, the District Court issued a three sentence Minute Order denying plaintiffs' motion. (R. 39).

STATEMENT OF THE FACTS

The principle issue before the Court is solely a question of law. The "facts" are the different pieces of legislation that relate to the compensation of postal inspectors. Set forth below are brief descriptions of the various statutes (the "facts") relevant to this appeal.

A. The Fair Labor Standards Act

In 1938, Congress enacted the FLSA to create an overarching public policy that would correct and eliminate "conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a) and (b). Under the FLSA, employees are generally entitled to overtime for hours worked in excess of 40 hours per week. 29 U.S.C. § 207. In 1974, Congress amended the FLSA to include all federal, state, and local government employees. 29 U.S.C. §§ 203(e)(2)(A) and (C); Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, S. Rep. No. 159, 99th Cong., 1ST Sess. 1985, reprinted, 1985 U.S.C.C.A.N. 651, 653 (Oct. 17, 1985). As part of the 1974

amendment, Congress expressly identified the Postal Service as being covered by the FLSA. Specifically, the FLSA was amended to apply to:

(B) any individual employed by the United States Postal Service or the Postal Rate Commission. [29 U.S.C. § 203(e)(2)(B)].

Section 203(e)(2)(B) clearly covers postal inspectors and the Postal Service has not argued otherwise.

B. The Federal Law Enforcement Pay Reform Act

In 1990, faced with an increased difficulty in retaining federal law enforcement officers, Congress passed the Federal Law Enforcement Pay Reform Act of 1990 ("FLEPA") as part of the Federal Employees Pay Comparability Act of 1990. See 5 U.S.C. § 5305. Under FLEPA, federal law enforcement officers were entitled to overtime pay (referred to as "administratively uncontrollable overtime" or "AUO") and, in certain cities, cost of living increases. See 5 U.S.C. § 5305; 5 U.S.C. § 5545. Lanier v. District of Columbia, 871 F. Supp. 20, 21-22 (D.D.C. 1994). While Congress intended to include postal inspectors in the new legislation, the Postal Service specifically requested that they be excluded. (R. 48). The Postal Service requested exclusion from FLEPA (and therefore AUO) because it believed the Postal Inspection Service had "ample authority and flexibility to make Postal Inspector

positions attractive." (Id.). Congress heeded the Postal Service's request and did not include postal inspectors. (Id.).

C. The Law Enforcement Availability Pay Act

On September 30, 1994, Congress enacted the Law Enforcement Availability Pay Act ("LEAP"), codified at 5 U.S.C. § 5545a, effectively amending FLEPA and ending AUO for numerous federal law enforcement agents (some federal agents still receive AUO pay). See Treasury, Postal Service and General Government Appropriations Act, 1995, Pub. L. No. 103-329 § 633, 108 Stat. 2382 (1994). LEAP provides that all federal law enforcement officers, in addition to their regular work schedule, are to be available to work an average of two extra hours per day. 5 U.S.C. § 5545a. If a law enforcement officer averages two hours of availability each work day for the entire year, the officer is entitled to 25 percent of his or her annual base pay as premium pay. Because postal inspectors had not been included in FLEPA, they were not included in LEAP. Nigg v. Merit Sys. Prot. Bd., 321 F.3d 1381, 1384 (Fed. Cir. 2003); Cooper v. United States Postal Service, 2001 WL 1442553 at *4 (N.D. Ill. 2001); see also 5 U.S.C. § 2105(e) (stating that "[e]xcept as otherwise provided by law, an employee of the United States Postal Service or of the Postal Rate Commission is deemed *not* an employee for purposes of this title.").

To protect federal agencies from having to pay law enforcement officers both LEAP and FLSA overtime, when Congress enacted LEAP it amended the FLSA to exempt officers who received LEAP from receiving FLSA overtime. See Pub. L. 103-329, Title VI, § 633(b)(1), 108 Stat. 2425 (Sept. 30, 1994), adding 29 U.S.C. § 213(a)(16) and 213(b)(30). However, because postal inspectors are not covered by LEAP, the amendment to the FLSA did not affect them. See Nigg, 321 F.3d at 1384; Cooper, 2001 WL 1442553 at *4.

D. Title 39 U.S.C. Section 1003(c)

On September 30, 1996, exactly two years after Congress enacted LEAP, Congress passed Section 1003(c) of Title 39. The law was passed in an effort to bring the salaries and other benefits paid to postal inspectors up to par with criminal investigators from other federal agencies. Section 1003(c) states that the:

Compensation and benefits for all Postal Inspectors shall be maintained on a standard of comparability to the compensation and benefits paid for comparable levels of work in the executive branch of the Government outside the Postal Service. [39 U.S.C. § 1003(c)].

In passing Section 1003(c), Congress did not amend the FLSA to exclude postal inspectors. Had Congresses intended to create an FLSA exemption for postal inspectors that receive pay under Section 1003(c), it could have followed the process it used when it created LEAP.

E. The Postal Service's Interpretation of Section 1003(c)

As noted above, postal inspectors are not eligible for, and thus do not receive, the premium pay afforded by LEAP. However, in response to the passage of Section 1003(c), the Postal Service adopted its own premium pay policy which it calls "availability pay." Under the availability pay system, postal inspectors can earn up to 25 percent of their annual base salary if they actually work an average of 50 hours per week (an average of two extra hours per day). While similar in some respects, the availability pay postal inspectors receive is not the same as LEAP pay. See Nigg, 321 F.3d at 1384. For example, the Postal Service's "availability pay" system does not compensate postal inspectors for scheduled overtime as required under LEAP; it does not recognize the accrual of hours worked that were actually performed; it does not properly count available hours -- i.e., when postal inspectors are required by the needs of the Postal Service to be generally and reasonably accessible beyond their normal workweek; and it is essentially mandatory overtime because a postal inspector who fails to meet the hourly requirement will be disciplined for failing to do so.

Because the Postal Service has a pay scheme that is *similar* to LEAP, the Postal Service has argued that postal inspectors are paid "comparably" to other law enforcement officers and thus not entitled to FLSA overtime. The fact is, however, that recipients of LEAP are not entitled to receive FLSA overtime because Congress

created a specific exemption for them. 29 U.S.C. §§ 213(a)(16) and (b)(30). Congress has not created such an exemption for postal inspectors and in the absence of an exemption, the Postal Service must comply with the FLSA.

ARGUMENT

Standard of Review

For Points I and II, the standard of review is *de novo*. In these points, the postal inspectors argue that the District Court's Orders granting summary judgment and denying reconsideration, in which the court held that the Postal Service's interpretation of Section 1003(c) was "permissible as a matter of law," were erroneous. (R. 76, R. 81-82). A District Court's grant of summary judgment and issues of law regarding the application of the FLSA are reviewed *de novo*. Brigham v. Eugene Water & Elec. Bd., 357 F.3d 931, 935 n.1 (9th Cir. 2004); United States v. City of Tacoma, 332 F.3d 574, 578 (9th Cir. 2003); Berry v. County of Sonoma, 30 F.3d 1174, 1180 (9th Cir. 1994).

For Point III, the standard of review is abuse of discretion. In Point III the postal inspectors argue that the District Court's Order affirming a discovery ruling entered by the Magistrate Judge was erroneous. Discovery rulings are reviewed for an abuse of discretion. Survivor Media, Inc. v. Survivor Productions, 406 F.3d 625, 630 (9th Cir. 2005); Garneau v. City of Seattle, 147 F.3d 802, 812 (9th Cir. 1998).

POINT I

The Postal Service Must Comply With the FLSA and Pay Postal Inspectors Overtime

A. Based on the Plain Language of the FLSA, Postal Inspectors are Entitled to FLSA Overtime

Both Section 203(e)(2)(B) of the FLSA and Section 1003(c) of Title 39 govern how the Postal Service must pay postal inspectors. However, under the District Court's Orders, the Postal Service is allowed to ignore the FLSA and comply only with Section 1003(c). The District Court arbitrarily and wrongly chose one law (Section 1003(c)) over another (the FLSA). As the Supreme Court has repeatedly stated, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Morton v. Mancari, 417 U.S. 535, 551 (1974).

The starting point for all questions involving statutory interpretation is the text of the statute itself. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999). As the District Court held, the text of Section 1003(c) is silent as to whether postal inspectors are entitled to FLSA overtime pay. (R. 76); see also 39 U.S.C. § 1003(c). In contrast to the District Court's Orders, the text of the FLSA is clear and unambiguous that postal inspectors are entitled to FLSA overtime pay because "any

individual" employed by the Postal Service is specifically and expressly protected by the FLSA. 29 U.S.C. § 203(e)(2)(B). In fact, out of all the federal law enforcement agencies, the Postal Service is the only one mentioned by name. See 29 U.S.C. § 203(e)(2). Congress' intent could not be clearer. Williams v. Taylor, 529 U.S. 362, 364 (2000) (It is a "cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word [here, "any individual"] of a statute").

The District Court's decisions must be reversed because they completely ignore the plain language of Section 203(e)(2)(B) of the FLSA. After analyzing only Section 1003(c), the District Court concluded that "Congress has not clearly spoken whether postal inspectors are entitled to overtime pay under the FLSA." (R. 76). In its Orders granting summary judgment and denying reconsideration, the District Court never once mentioned Section 203(e)(2)(B) of the FLSA, which clearly states Congress' intent that postal inspectors *are* entitled to overtime pay. (See generally R. 74-77, R. 80-82). The District Court's Orders granting summary judgment and denying reconsideration must be reversed because they ignore the plain language of the FLSA and arbitrarily require the Postal Service to comply with Section 1003(c) and not the FLSA, even though the text of both statutes make it clear that they govern the pay of postal inspectors.

**B. The Postal Service Is Not Empowered to "Effectively"
Exempt Postal Inspectors from the Fair Labor Standards Act**

As explained in Point I, the FLSA applies to postal inspectors because it protects "any individual" employed by the Postal Service. 29 U.S.C. § 203(e)(2)(B). Because Congress determined that postal inspectors are entitled to overtime pay under the FLSA, the Postal Service must comply with the FLSA and pay postal inspectors FLSA overtime, unless: (i) postal inspectors fall "plainly and unmistakably" within one of the exemptions enumerated in the FLSA² or (ii) Section 1003(c) repealed the FLSA. Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960); Alvarez v. IBP, Inc., 339 F.3d 894, 905 (9th Cir. 2003); Do v. Ocean Peace, Inc., 279 F.3d 688, 691 (9th Cir. 2002); Posadas v. National City Bank, 296 U.S. 497, 503 (1936). In its submissions to the District Court, the Postal Service: (1) never argued that any of the exemptions enumerated within the FLSA applied to postal inspectors; (2) admitted that Section 1003(c) did not "expressly" repeal the FLSA; and (3) did not argue that

² There are only two FLSA exemptions that could conceivably apply to postal inspectors: (i) the exemption for employees who receive LEAP pay under 5 U.S.C. § 5545a; and (ii) the exemption for "administrative" employees. The issue of whether postal inspectors are administratively exempt was not raised by the Postal Service, was not before the District Court, and was not the basis for the District Court's decision. (See generally R. 74-77, R. 80-82). The only other existing exemption that could arguably justify the Postal Service not paying postal inspectors FLSA overtime would be the exemption for employees that receive LEAP. However, postal inspectors do not receive LEAP and do not fall within the exemption for LEAP recipients. See Nigg, 321 F.3d at 1383.

Section 1003(c) impliedly repealed the FLSA. In sum, the Postal Service did not offer any basis for the District Court to allow the Postal Service to ignore the FLSA. Nevertheless, the District Court granted the Postal Service's motion for summary judgment.

In granting the Postal Service's motion, the District Court itself ignored the exemptions specifically enumerated in the FLSA and held that the Postal Service's decision to interpret Section 1003(c) in a way that violated the FLSA was "an appropriate agency interpretation." (R. 75). However, in denying the motion for reconsideration, the District Court admitted that its decision was not founded on any of the recognized FLSA exemptions, but rather based on its belief that the Postal Service was able to "effectively" create a new exemption to the FLSA. (R. 81). As a matter of law, the District Court's decision is incorrect and must be reversed. First, only the Department of Labor ("DOL"), not the Postal Service, has the authority to interpret and define the terms of the FLSA. See 29 U.S.C. § 213; 29 U.S.C. § 204(f).³ Second, the DOL's authority to interpret and define the terms used within the FLSA is limited to those few exemptions in which Congress explicitly authorized it to do so.

³ For federal employees other than those employed by the Postal Service, the Postal Rate Commission, the Library of Congress, and the Tennessee Valley Authority, the Office of Personnel Management is responsible for interpreting the terms used in the FLSA exemptions. 29 U.S.C. § 204(f)

Because Congress specifically listed FLSA exemptions, even the DOL cannot "effectively" create new exemptions or enlarge the existing exemptions. See Addison v. Holly Hill Fruit Prods, 322 U.S. 607, 617 (1944); Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 35 (1987); Powell v. United States Cartridge Co., 339 U.S. 497, 509-512 (1950); Hodgson v. Klages Coal & Ice Co., 435 F.2d 377, 382 (6th Cir. 1970), cert denied, 402 U.S. 973 (1971). Finally, even if the Postal Service could interpret the FLSA (which only the DOL can do) and even if it could create a new FLSA exemption for postal inspectors out of whole cloth (which only Congress can do), the exemption for postal inspectors would be impermissible because it conflicts with a valid, Congressional law.

1. Only the DOL Possesses the Authority to Interpret the FLSA and Even the DOL's Authority is Limited to Certain Provisions

Under the FLSA, the DOL is given *limited* authority to interpret the FLSA exemptions. See e.g., 29 U.S.C. § 213(a)(1), (7), and (15). The FLSA does not give the Postal Service *any* authority to create new FLSA exemptions, "effectively" or otherwise. See generally 29 U.S.C. § 213. In any event, because Congress took the time to enumerate approximately twenty-one exemptions from the FLSA overtime requirements, even the authority of the DOL to interpret FLSA exemptions is limited to only those exemptions where Congress has explicitly authorized the DOL to act.

Addison, 322 U.S. at 617; Citicorp Indus. Credit, Inc., 483 U.S. at 35; Powell, 339 U.S. at 509-512; Donovan v. Nekton, Inc., 703 F.2d 1148, 1151 (9th Cir. 1983). As the United States Supreme Court explained, when Congress enacted the FLSA, it did not give the Department of Labor broad discretion or authority, but rather:

[i]t dealt with exemptions in detail and with particularity, enumerating not less than eleven exempted classes based on different industries, on different occupations within the same industry, (the classification in some instances to be defined by the Administrator, in some made by Congress itself, in others subject to definition by other legislation), on size and on areas. In short the [DOL] was not left at large. A new national policy was here formulated with exceptions, catalogued with particularity and not left within the broad dispensing power of the [DOL]. *Exemptions made in such detail preclude their enlargement by implication.* Addison, 322 U.S. at 617 (emphasis added)].

Since the decision in Addison, courts have repeatedly held that the DOL does not have the authority to interpret the FLSA to create new exemptions. Citicorp Indus. Credit, Inc., 483 U.S. at 35 (because FLSA exemptions are provided for "in detail and with particularity," enlargement by implication is precluded); Powell, 339 U.S. at 509-512 (holding DOL interpretation enlarging FLSA exemption invalid because Congress' detailed list of exemptions precluded their enlargement by implication); Hodgson, 435 F.2d at 382 (FLSA "[e]xemptions must be limited to those [employees] falling expressly within the statute."); see also Donovan, 703 F.2d at 1151 ("To extend an exemption to other than those plainly and unmistakably within its terms and spirit

is to abuse the interpretative process and to frustrate the announced will of the people."); citing A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945).

The District Court's Orders granting summary judgement and denying reconsideration undermine the guiding principles of Addison and its progeny. First, under the District Court decisions, the Postal Service is allowed to create a new exemption to the FLSA. If the power existed to create new exemptions, Congress vested the power only in the DOL, not the Postal Service. More importantly, even the DOL cannot create new exemptions; the DOL can only interpret or define the FLSA exemptions that Congress specifically delegated to the DOL. See e.g., 29 U.S.C. § 213(a)(1)⁴; 29 U.S.C. § 213(b)(14)⁵.

The District Court also concluded, erroneously, that it was permissible for the Postal Service, based on Section 1003(c), to "effectively exempt[] postal inspectors from receiving overtime pay under the FLSA." (R. 81). A thorough review of the

⁴ Section 213(a)(1) provides that the overtime pay provisions do not apply to "any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the [DOL]) . . ."

⁵ Section 213(b)(14) provides that the overtime pay provisions do no apply to "any employee employed within the area of production (as defined by the [DOL]) by an establishment commonly recognized as a country elevator . . ."

FLSA exemptions enumerated in Section 213 of the FLSA demonstrates, however, that Congress did not enact an exemption applicable to employees that receive pay under Section 1003(c). See generally 29 U.S.C. § 213. If Congress did not provide an FLSA exemption for postal inspectors or individuals that receive pay under Section 1003(c), no agency, not even the DOL, and certainly not the Postal Service, can create a new FLSA exemption for postal inspectors or enlarge the existing exemption for LEAP recipients to cover postal inspectors.⁶ For these reasons, the District Court's Orders granting summary judgment and denying reconsideration must be reversed.

2. Even If the Postal Service Could Create a New Exemption, an Exemption for Postal Inspectors Would Be Impermissible

Even assuming that the Postal Service could interpret the FLSA to create a new exemption for postal inspectors, a new exemption for postal inspectors would be impermissible because it invalidates and contradicts the FLSA, a Congressionally enacted law. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467

⁶ Although there is nothing in the District Court's opinion to suggest that it interpreted the LEAP exemption provided in Section §213(a)(16) or (b)(30) to cover postal inspectors, such a holding would be an error of law. Congress determined the employees that fall within the LEAP exemption provided in Sections 213(a)(16) and (b)(30), and neither the DOL, the District Court, nor the Postal Service are given authority to interpret those exemptions. 29 U.S.C. § 213(a)(16) and (b)(30); Addison, 322 U.S. at 617. Since postal inspectors do not receive LEAP, the LEAP exemption cannot be effectively enlarged to cover postal inspectors. Nigg, 321 F.3d at 1383.

U.S. 837, 842-843 (1984); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976); Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981); Hayfield N. R.R. Co. v. Chicago & North Western Transp. Co., 467 U.S. 622, 634 (1984). In Hochfelder, the Supreme Court said:

The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. Id., 425 U.S. at 213-14 (internal citations omitted).

Hochfelder reaffirms the well established principle that the rule-making power of an administrative agency is limited to complying with the law as written. The agency cannot interpret a law in a way that violates another federal law. See Hochfelder, 425 U.S. at 213-14; Federal Election Comm'n, 454 U.S. at 32; Hayfield, 467 U.S. at 634 (1984); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 936 (2d Cir. 1986).

The District Court's decision allows the Postal Service to interpret Section 1003(c) in a way that invalidates the FLSA, a federal statute. Under the Supremacy Clause, the laws passed by Congress are the supreme laws of the land and no federal agency, including the Postal Service, is free to rewrite those laws. U.S. Const., Art. VI; Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745-746 (1973)

(holding that the Maritime Commission's power to approve shipping agreements does not allow it to approve conduct that violates the antitrust laws).

POINT II

The District Court Ignored Plaintiff's Motion to Review

The Federal Rules of Civil Procedure create a broad right of discovery and should be liberally construed. Shoen v. Shoen, 5 F.3d 1289, 1292 (9th Cir. 1993). The parties "may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1); Survivor Media, Inc., 406 F.3d at 635. "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1); Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1470 (9th Cir. 1992).

A court abuses its discretion if it relies on a clearly erroneous finding of fact or an erroneous legal standard. Miller v. Cal. Pac. Med. Ctr., 19 F.3d 449, 455 (9th Cir. 1994); Casey v. Albertson's, Inc., 362 F.3d 1254, 1257 (9th Cir. 2004). On December 20, 2005, the Magistrate Judge entered a Minute Order denying in part and granting in part, the postal inspectors' motion to compel. The Magistrate Judge abused his discretion because he denied the motion based on objections the Postal Service had not asserted. When the postal inspectors sought review of the Magistrate Judge's

decision, the District Court failed to exercise any discretion. Instead of addressing any of the issues raised in the parties' papers, the District Court issued a terse three sentence Minute Order stating:

The Court has received Plaintiffs' Motion for Review of Magistrate Judge Nakazato's December 20, 2005 Minute Order. Plaintiffs' Motion is DENIED, but Plaintiffs may return to Magistrate Judge Nakazato to seek any alternative or less burdensome remedy.

The hearing set for February 7, 2005 is vacated and taken off-calender. [(R. 39).]

A. National Communications, Division Directives and Division Circulars

In their first request for documents, the postal inspectors requested "All documents describing or discussing the job description of a postal inspector including, but not limited to, all versions of the Postal Service Employee and Labor Relations Manual." (R. 8). The Postal Service objected to the request on the grounds that it was "vague and ambiguous, overly broad, and unduly burdensome." (*Id.*). Thereafter, the postal inspectors narrowed their request to, *inter alia*, National Communications, Division Directives and Division Circulars. (R. 9). The Postal Service objected to this more narrow request on the basis that it was "overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence." (*Id.*). The Postal Service did not claim the request was vague or ambiguous. (*Id.*). Nonetheless, the Magistrate Judge sustained the Postal Service's objection holding that the postal

inspectors had not met their burden of showing the documents were relevant and that they were "*vague and ambiguous*, overly broad, and unduly burdensome." (R. 26) (emphasis added).

The Magistrate Judge's ruling, and the District Court's failure to correct the ruling, are an abuse of discretion because they rest on clearly erroneous facts and incorrect standards of law. First, as a matter of law, a request for documents by name and title cannot be considered vague or ambiguous (i.e., National Communications, Division Directives, and Division Circulars). Even the Postal Service did not suggest that the request for National Communications, Division Directives, and Division Circulars was vague or ambiguous. (R. 9).

Second, the postal inspectors explained that the National Communications, Division Directives and Division Circulars were relevant because they demonstrate *de facto* changes, modifications, or amendments to the job description, duties or work requirements of a postal inspector. Plaintiffs even submitted copies of a relevant National Communication and Division Circular to the District Court. (R. 28-33). The National Communication explained how the Postal Service is reevaluating the tasks and jobs that postal inspectors perform. (R. 28). Based on this request, the postal inspectors asked for the results of the survey which the Postal Service produced (tacitly admitting the survey's relevance). Given that the job duties and

responsibilities of postal inspectors will demonstrate whether postal inspectors are "administratively exempt", the National Communications are relevant and "reasonably calculated to lead to discoverable information" and have already lead to discoverable information. Based on these facts alone, the Magistrate Judge's ruling and the District Court's blind adherence to the Magistrate Judge's ruling are clearly erroneous.

Before the District Court, the postal inspectors also produced a Division Circular which lists the "Standard Operating Procedures" for postal inspectors during threat warnings. (R. 29-33). The operating procedures require that (1) postal inspectors are to bring their weapons, ammunition, and handcuffs home every night and (2) postal inspectors must be available by pager or phone "at all times." (R. 30). These responsibilities are not listed in the Standard Position Description for postal inspectors which the Postal Service intends to present at trial as the sole and undisputed list of job requirements for postal inspectors. In contrast to the Standard Position Description, the Division Circular demonstrates that the duties and responsibilities of a postal inspector change depending on the needs of the Postal Service and are not confined to the narrow list of responsibilities listed on the Standard Position Description. Although the postal inspectors were not able to produce an example of a Division Directives, they also will show that postal inspectors

are given additional job duties and responsibilities that are *not* detailed in the Standard Position Description.

The Magistrate Judge also held that production of these documents would be overly burdensome. While the Postal Service argued that it issued approximately 4,800 National Communications, the postal inspectors submitted that they are: (i) stored in a single location on the Postal Service network so that they can be accessed by postal inspectors every day from any Postal Service office; and (ii) can be transferred onto a compact disc in a matter of minutes.⁷ With the exception of the Postal Service's conclusory, self-serving statements, the Magistrate Judge and District Court did not have any evidence before them with respect to whether the production of the National Communications, Division Circulars and Division Directives would be unduly burdensome. In light of the storage of these documents in a single location in cyberspace, the postal inspectors' willingness to accept the documents on cd, and the ease in which they can be copied onto a cd, the volume of National Communications does not make the postal inspectors' request unduly burdensome.

⁷ The Postal Service never offered any explanation as to why the production of Division Directives and Division Circulars would be unduly burdensome. The Division Directives and Division Circulars are also stored in a computer folder in a central location so that all postal inspectors in the division can access them from their computers.

B. The Team Leader Guides

The postal inspectors moved to compel the Postal Service to produce:

- The schedule of training modules or classes;
- All training handouts provided to postal inspectors during training classes;
- All Management Guides, including the Southern California Team Leader Guide and guides for any other position or division. (R. 13).

The Postal Service responded by (1) criticizing the postal inspectors for failing to identify specific training documents, (2) stating that it was continuing its investigation to determine whether a "schedule of training modules or classes" existed, and (3) listing three manuals that it had produced. (R. 13-14). The Postal Service did *not* offer any reasons why it should not be required to produce the Management Guides. (Id.).

The Magistrate Judge denied the request on the ground that the postal inspectors had failed to explain the relevance of the requested documents and that the requests were "vague and ambiguous, overly broad and unduly burdensome." (R. 27). The Magistrate Judge made this determination despite the fact that the Postal Service did not object on those grounds or present any objections. (R. 13-14).

In moving for review before the District Court, the postal inspectors explained the relevance of the various documents and, more importantly, instructed the Postal

Service where it could locate the schedule of training materials. In fact, the Southern California Team Leader Guide, a Management Guide, stated that:

In-service training courses are available through CDD [Career Development Division] for personnel assigned to all functional areas. A detailed listing of the Inspection Service course catalog can be obtained from CDD or from Bala Cynwyd ISOSG. Additionally, CDD periodically publishes an In-Service Training Calendar on the Inspection Service home page, under National News, and then under the Training Bulletin Board. [(R. 36)].

After the postal inspectors instructed the Postal Service where to find the schedule of training classes based on the Southern Team Leader Guide, the Postal Service offered to produce it. While the Postal Service produced the schedule of training classes voluntarily, the District Court's Minute Order denying review did not require it to do so. (R. 39).

Ironically, even though the postal inspectors used the Southern California Team Leader Guide to locate the training schedules, the Magistrate Judge ruled, and the District Court upheld the decision, that the Management Guides were "not relevant." (R. 27). The postal inspectors also quoted from the Southern California Team Leader Guide to demonstrate the likelihood that other such guides would contain relevant information. For example, the Southern California Team Leader Guide states that "a team leader is responsible for taking appropriate corrective action for poor performance and/or violation of Postal policies, procedures, laws, rules and/or

regulations" and provides that "[w]hen contemplating disciplinary action, a team leader must consult with the Manager, Human-Resources, to verify that the technical requirements of the action are met after conferring with higher management." See (R. 35). This is exactly the type of evidence that the postal inspectors will introduce at trial to demonstrate that while the Standard Job Description appears to vest the postal inspectors with independent discretion and judgment, in reality, they do not actually possess such authority. If postal inspectors do not exercise independent discretion and judgment, they cannot be considered administrative employees. See 29 C.F.R. § 541.207(c)(2).

The Magistrate Judge's and the District Court's decisions are clearly erroneous because the Postal Service never argued that the Team Leader Guides were not relevant, presumably because this argument would be difficult to make given the postal inspectors had shown that: (i) the Guides are reasonably likely to lead to the discovery of admissible evidence (e.g., the existence and location of the training schedules) and (ii) the Guides are relevant (e.g., requiring the Team Leader to check with Human Resources before taking any disciplinary action).

The Magistrate Judge also ruled, and the District Court also held, that the postal inspectors' requests for Management Guides were "vague and ambiguous." (R. 27). Again, the postal inspectors requested a type of document by name and provided an

example of the type of document they were requesting -- the Southern California Team Leader Guide. Finally, the decisions by the Magistrate Judge and District Court are erroneous because the Postal Service never argued that the production of Management Guides would be unduly burdensome.

C. Quality Assurance Reviews:

The postal inspectors requested copies of all Quality Assurance Reviews ("QAR"). A QAR is a report prepared by a team of managerial postal inspectors that reviews the files of postal inspectors to ensure that postal inspectors are preparing and documenting their cases in accordance with established Postal Service protocol. During this review, a management team will show up unannounced at a postal inspector's office and ask the inspector to pull his or her files for certain cases. The team will then review the postal inspector's files to ensure, among other things, that he or she has completed all of the required forms, that the forms were filled out correctly, that the file is in order, that the inspector completed his tasks in a timely manner, and that the investigation is being conducted consistent with Postal Service policy. If the inspector has not followed Postal Service protocol, this will be documented in the Quality Assurance Review. If too many aspects of the file are not accurate, are incomplete, or have not been timely filed, the inspector may be sent for additional training.

The postal inspectors submit that QARs will demonstrate the lack of independent discretion and judgment that postal inspectors exercise, again going to the issue of whether the postal inspectors are "administrative employees." (R. 17). QARs demonstrate that postal inspectors must follow specific and precise Postal Service procedure when they document their criminal investigations. The failure to follow these rules or, in other words, the exercise of discretion and independent judgment will result in disciplinary action. The Postal Service argued that the QARs are internal reviews that "do not contain information regarding the oversight of postal inspector investigations" and therefore, they are not reasonably calculated to lead to the discovery of admissible information. (R. 17). In sum, the Postal Service contends that because managers, executives, and professionals in all lines of business are required to complete forms and comply with company policy, the QARs are not relevant. The Magistrate Judge sustained the Postal Service's objection without explanation. (R. 27). The District Court affirmed without explanation. (R. 39).

The Postal Service's arguments that all managers and executives must fill out standard forms does not demonstrate that QARs are not relevant. If anything, the argument goes only to the amount of relevance. Postal inspectors do not know what is contained in a QAR and the Postal Service never submitted one to the Magistrate Judge or District Court for review. Obviously, the more detailed the QAR, the more

oversight the Postal Service exercises and the less discretion the postal inspectors can exercise in preparing their cases. The postal inspectors acknowledge the inverse is also true: the less detailed and demanding the QAR, the less relevant the document because the less likely it is to demonstrate whether postal inspectors can exercise independent judgment. However, without ever reviewing a copy of the QAR, neither the District Court nor the Magistrate Judge were in a position to make any determination about its relevancy.

D. Level 2 Files

The postal inspectors requested all "Level 2" files for postal inspectors. A Level 2 file is a personnel file for a postal inspector. Depending on the postal inspector's home office, a variety of information will be kept in a Level 2 file. Most importantly, official and unofficial letters of warning or council (i.e., reprimand) will be kept in a Level 2 file. This means that Level 2 files are relevant and likely to lead to admissible evidence because they list the conduct for which postal inspectors are disciplined. These letters will show whether a postal inspector will be reprimanded if he or she does not follow protocol and goes to the issue of whether postal inspectors exercise the independent discretion and judgment necessary to be considered an "administrative employee."

Furthermore, if an employee is classified as "administrative" and paid on a salary basis, his or her compensation cannot be reduced because of "variations in the 'quality or quantity' of the work performed." Auer v. Robbins, 519 U.S. 452, 456 (1997); 29 C.F.R. § 541.118(a) (1996). If a postal inspector's pay has been reduced, a letter of council or similar document will be in the Level 2 file.

The Postal Service objected to the production of the Level 2 files on the grounds that such production would be unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. (R. 18). The Postal Service claimed that the postal inspectors could obtain information about how postal inspectors are disciplined without invading the privacy of postal inspectors. (R. 18-19). However, the Postal Service did not offer a single shred of evidence or explanation as to why the production of Level 2 files would be unduly burdensome. See Green v. Baca, 219 F.R.D. 485, 492-493 (C.D. Cal. 2003) (defendant opposed a document request and submitted a detailed affidavit demonstrating why the discovery was unduly burdensome; court still ruled the documents should be produced because it could not take the defendant's "time estimates at face value."). If a defendant is free to defeat a request for documents simply by stating that production would be unduly burdensome, no defendant would ever be required to produce documents.

The Magistrate Judge sustained the Postal Service's objection without explanation. (R. 27). The District Court affirmed without explanation. (R. 39).

CONCLUSION

The Fair Labor Standards Act is a federal statute that applies to every worker in this country unless specifically exempted. The District Court erroneously ruled that Postal Service had the right to "effectively" exempt postal inspectors from the protection of the Act. The Postal Service does not have such authority. The postal inspectors therefore request that this Court reverse the District Court's March 30, 2005 and May 11, 2005 Orders.

ORAL ARGUMENT

Plaintiffs-Appellants request oral argument.

STATEMENT OF RELATED CASES

Plaintiffs-Appellants are not aware of any other related cases pending in this, or any, Court.

Date: August 11, 2005

Respectfully submitted,

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