



WHD-OL-2004-0001

June 2, 2004

Re: FAA Contract No. DTFA-02-01-D-1253; Wage-Hour Case No. 1229563

NAME\*

Thank you for your letter of September 3, 2003, which responds to our letter of June 23, 2003, regarding the findings of a labor standards investigation conducted under the McNamara-O'Hara Service Contract Act (SCA) relative to the subject FAA contract for the furnishing of air traffic control instructional services. We appreciate your acknowledgement that the SCA applies to the non-exempt support staff employed on the subject contract as they are service employees for SCA purposes and constitute more than a minor factor in the performance of the subject contract. We also note your request for reconsideration with respect to the preliminary findings of the investigation that SCA may also apply to the predominate class of workers on the contract, the "regular air traffic control instructors" as they do not appear to be exempt under the Fair Labor Standards Act (FLSA) Regulations Part 541 as "teachers" employed in an "educational system or establishment, such as a secondary school or college..."

As discussed in our previous letter, whether SCA applies to the "regular air traffic control instructors" performing on the contract in question is contingent upon whether they are "service employees" as defined in Section 8(b) of the SCA. Section 8(b) defines a "service employee" as any person engaged in contract performance other than any person employed in a bona fide executive, administrative, or professional capacity as those terms are defined under the FLSA (§13(a)(1)). It is FAA's contention that the "regular air traffic control instructors" meet the professional exemption as a "teacher" pursuant to the bona fide "Professional" employee provisions of the FLSA Regulations Part 541, and you have provided information to support that position.

The contract at issue is between the FAA and the **NAME\*** to provide instruction at various sites around the country (referred to as "air traffic control facilities") to individuals training to become FAA air traffic controllers. This instruction is specialized to particular airports or FAA Control Centers and provided to air traffic controllers after their basic instruction at the FAA Academy in Oklahoma. The instruction is provided in classrooms and laboratories dedicated to the training of air traffic controllers that are FAA-funded and conducted pursuant to an FAA-furnished curriculum. The total training lasts for three to five years, depending upon the individual's specialty, before he or she becomes a "Certified Professional Controller." This total training includes time at the FAA Academy and at the air traffic control facilities in classroom work and air traffic control simulation.

The employees, whom the FAA considers teachers under Part 541, are primarily retired air traffic controllers who have received additional training as instructors from the FAA Academy before working for the contractor. The FAA states that the FAA Academy is accredited by the North Central Association of Colleges and Secondary Schools and that the course curriculum of the FAA Academy and the specialized curriculum taught by the contractor's employees at the air traffic control facilities is accredited by the American Council of Education. The FAA further states that air traffic control students receive college credits for completing the air traffic curriculum at the FAA Academy, but do not receive college credit for the training conducted by the contractor's employees subsequent to training at the Academy.

In order for a teacher to qualify for exemption under Part 541, the employee's primary duties must consist of –

“Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher **in the school system or educational establishment or institution** by which he is employed, or . . .” (emphasis added)

The primary question is whether the employees in question are employed as teachers in a “school system or educational establishment or institution” when they are working for the contractor at the various remote sites.

The FAA asserts that the employees in question should be exempt as teachers because “aircraft flight instructors” (pilot instructors) employed at flight schools have been determined by the Wage and Hour Division to qualify as exempt teachers since 1970. The FAA references the Wage and Hour Division's Field Operations Handbook (FOH), which at section 22d19 states that flight instructors may qualify as teachers, if they are pilots certified by the FAA pursuant to Regulations 14 CFR Part 61 and teach at a flight school certified by the FAA pursuant to Regulations 14 CFR Part 141. In such a case, the flight school would constitute an “educational establishment” even though college credit is not necessarily provided. The FAA argues that because the FAA Academy is recognized as an educational establishment, the air traffic control facilities should also be recognized as educational establishments as the instruction is the same with the only apparent difference being the geographical separation.

The discussion of “school system or educational establishment” provided in Part 541 suggests the terms are generally viewed in the traditional sense as elementary schools, high schools, colleges, and universities. However, the foregoing discussion reveals that on occasion the Wage and Hour Division has adopted a slightly broader interpretation in the case of flight schools. In addition, the court in Gonzales v. New England Tractor Trailer Training School, 932 F. Supp. 697 (D. Md. 1996), held that a driving school accredited by a nationally recognized accrediting organization and licensed by the state as a private career training school was a school for purposes of the FLSA “teacher” exemption. Given our position concerning flight schools, the fact that the air traffic controller training at issue is conducted at classrooms and laboratories which are dedicated to training air traffic controllers and are funded by the FAA, and this training is a continuation of the training at the FAA Academy, which constitutes an educational establishment, we conclude that the FAA's air traffic control instructional facilities may be considered a “school system or educational establishment” as provided in Part 541.

On the basis of the foregoing discussion, it is our opinion that “air traffic control instructors” employed on the contract in question could satisfy the “teachers” exemption under FLSA as professional employees pursuant to Part 541, if they meet certain criteria. (See FLSA Regulations, § 541.301(g) (2), which lists the occupation “aircraft flight instructor” among “teaching personnel.”) To be “teachers” and consequently exempt from coverage under the SCA pursuant to Section 8(b) of the Act, air traffic control instructors must be FAA “Certified Professional Controllers” in accordance with Regulations 14 CFR Part 65, must successfully complete the FAA “Facility Instructor Training Course” furnished by the FAA Academy, and their primary duty must be to deliver instruction by using FAA-certified curriculum in classes and laboratories funded by FAA.

While the SCA may not cover those employees employed on the contract in question as air traffic control instructors that qualify as teachers under Part 541 as exempt professional employees, the SCA does cover the non-exempt service employees who are employed on this contract to a significant extent. As previously noted, the FAA agrees with this conclusion and to request wage determinations by location and labor category to be applied to this contract. Accordingly, we again request that all necessary steps be taken as expeditiously as possible to retroactively include in this contract and all future such contracts the labor standards provisions and all applicable SCA wage determinations so that affected employees may receive the benefits to which they are entitled under law. Please inform us of your actions in this matter as soon as possible. If you should require further assistance, please contact Ms. Michelle Bechtoldt of my staff at (202) 693-0510.

You may consider this letter to be a final ruling on this matter. Any interested party may appeal this ruling to the Department’s Administrative Review Board pursuant to the Regulations, 29 CFR Part 8, copy enclosed. Any such appeal should be filed within sixty (60) days of the date of this letter and forwarded to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Room S-4309, Washington, D.C. 20210.

Sincerely,

Tammy D. McCutchen  
Administrator

Enclosure

\*Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b) (7).