

EXHIBIT 2

FY 2015-2016 GRAND JURY FINAL REPORT

RESPONSES TO FINDINGS (FI) AND RECOMMENDATIONS (R)

Report Number (& Date)	Report Title	Respondents (With FI and R #)
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REPORT NO. 02 May 3, 2016

Title: **Exempt Employees and Administrative Leave**

Required Respondent: **Board of Supervisors**
(for approval) (FI-01, FI-03, FI-04, FI-05, FI-06, FI-07, FI-08, FI-09, FI-10, FI-11, and FI-13 plus R-01, R-02, R-03, R-04 and R-05)

Response to Fiscal Year 2015-2016 Grand Jury Final Report

Report Title: Ventura County Exempt Employees and Administrative Leave

Report Date: May 31, 2016 Responding Agency/Dept: County Executive Office - HR

Response by: Michael Powers Title: County Executive Officer

Response by: Shawn Atin Title: Director, Human Resources

FINDINGS

- I (we) agree with the finding numbered: FI-04, FI-09
- I (we) disagree wholly or partially with the findings numbered: FI-01, FI-03, FI-05, FI-06, FI-07, FI-08, FI-10, FI-11, FI-13
(Attach a statement specifying any portions of the findings that are disputed; include an explanation of the reasons therefor.)

RECOMMENDATIONS

- Recommendations numbered R-03 have been implemented.
(Attach a summary describing the implemented actions.)
- Recommendations numbered _____ have not yet been implemented, but will be implemented in the future.
(Attach a timeframe for the implementation.)
- Recommendations numbered R-04 require further analysis.
(Attach an explanation and the scope and parameters of an analysis or study, and a timeframe for the matter to be prepared for discussion by the officer or director of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This time frame shall not exceed six months from the date of publication of the grand jury report.)
- Recommendations numbered R-01, R-02, R-05 will not be implemented because they are not warranted or are not reasonable.
(Attach an explanation.)

Date: 9/13/14

Signed: Linda Parks

Linda Parks – Chair, Board of Supervisors



Number of pages attached: 9

ATTEST: MICHAEL POWERS
Clerk of the Board of Supervisors
County of Ventura, State of California

By: Shawn Atin
Deputy Clerk of the Board

Response to 2015-2016 Ventura County Civil Grand Jury Final Report

Ventura County Exempt Employees and Administrative Leave

From the County Executive Office

The County of Ventura complies with applicable state and federal regulations, including the Fair Labor Standards Act (FLSA). Considerable analysis goes into the FLSA classification of positions upon job class establishment and periodic FLSA classification reviews are conducted to ensure compliance. County positions are categorized as FLSA exempt or nonexempt for the purposes of overtime pay eligibility based upon their job duties and other FLSA regulatory requirements.

Overtime work is sometimes necessary to meet the needs of emergency situations or seasonal/peak workload requirements. However, it is the County's policy to avoid the necessity for overtime wherever possible, as evidenced in the County's Memoranda of Agreement (MOA) and the Management, Confidential Clerical and Other Unrepresented Employees Resolution (MCCOUEER).

Grand Jury Findings

FI-01. At first glance, the definitions of “nonexempt employee” and “exempt employee” seem simple and straight forward. However, the regulations relating to the placement of positions into the correct classification are quite complex. Terminology is often open to differing interpretations. As a result, both employers and employees often do not understand the distinction between the two classifications. The County’s Personnel Rules and Regulations manual does not explain these classifications; nor does the Administrative Policy Manual.

Partially agree. The regulations which govern the employer’s ability to “exempt” positions/employees from overtime pay provisions are complex. The FLSA is a federal labor law that establishes overtime pay standards affecting employees in the private sector and in federal, state, and local governments.

The FLSA is one of many complex federal and state employment-related regulations. The Personnel Rules and Regulations (PRR) and Administrative Policy Manual, by intent, do not attempt to summarize or synthesize these complex and changing laws. The fact that these regulations periodically change, as evidenced by the recent changes to the FLSA effective December 2016, could also make explanations in the PRR and Administrative Policy Manual obsolete with each new revision of Federal Law or regulation.

The FLSA and the U.S. Department of Labor provide employers with criteria and guidelines, but do not attempt to simply define an exempt employee. In order to qualify for the exemption from overtime pay, employees generally must meet certain tests regarding their job duties, be paid on a “salary basis”, and be compensated at or above the required salary level threshold set forth in the FLSA. Assuming the salary level and salary basis tests are satisfied, an employee’s specific job duties must meet the requirements of one of the exemption categories (such as executive, administrative, professional, computer, etc.) to be classified as exempt. Further, the manner in which the employer uses the employee (paying for their time versus paying for their application of a body of knowledge on a body of work) has a direct bearing on whether the employee can be exempted.

The County has approximately 9,000 employees and 1,300 job classifications which are responsible for performing a wide variety of functions. The size and complexity of the County's workforce and regulations make succinct and meaningful explanations of labor laws, including the FLSA, impractical for inclusion in documents such as the PRR and the Administrative Policy Manual. However, in recognition that this is a complex area of the law, training is currently provided to management staff and the County's Nuts and Bolts training will be enhanced to provide even more information on this subject matter in the future. Additional information and links to the U.S. Department of Labor website will be added to the County's Intranet website as a supplementary employee resource.

FI-03. Because 25% of the County's regular employees are classified as exempt, the County faces substantial inherent risks associated with incorrectly classifying employees as exempt. These risks to the County include:

- **The US Department of Labor may open an investigation and file a lawsuit if it believes a classification was incorrect.**
- **The California Labor Commissioner may take action if he/she believes a classification is incorrect.**
- **Individual employees may file a lawsuit if they believe their classification is incorrect.**
- **A class action suit may be filed for alleged misclassification.**
- **If a classification is challenged, the employer bears the burden of proving the classification is correct.**
- **The employer will be liable for back pay and possibly penalties and interest if a position is required to be reclassified.**
- **If pending federal legislation is passed, employers may be required to reclassify some exempt employees as nonexempt or increase their salaries.**
- **Reclassification – in either direction – may result in employee dissatisfaction, lower morale, and decreased productivity.**
- **Because the number of lawsuits alleging misclassification is increasing, employers face growing risk of being sued.**

Partially agree. While it is true that misclassifying employees as exempt does pose risk to any employer, there is no evidence present to indicate that there are any County employees who are currently misclassified. Approximately 23% of current regular County employees are in exempt job classifications, while the bulk (approximately 77%) of regular County employees are in nonexempt job classifications. Further, there are many County positions which pose little to no risk of being misclassified due to the nature of their work (see response to FI-05 for more detail).

FI-04. Considerable judgement must be applied when deciding to classify a position as exempt rather than nonexempt. The focus must be on actual job duties performed on a daily basis rather than job title, job description, or salary level [Little v. Belle Tire]. Careful attention should be given to comparing the cost of paying occasional overtime to a nonexempt employee with the cost of paying a fixed salary to an exempt employee regardless of hours worked.

Agree. Considerable judgement should be (and is) applied when determining if a position is exempt or nonexempt. The status is determined based upon legal requirements and not primarily financial considerations. The decision to classify a position as FLSA exempt is built on the foundation that the position is responsible for performing exempt-level job duties, as well as meeting the salary level and salary basis test criteria. When initially determining the exempt/nonexempt status of a position, the County requires a job analysis and/or completion of a Position Description Questionnaire(s), which provides detailed information on the purpose of the job, job duties (and percentage of time spent performing them), supervision exercised/received, decision making, problem solving, impact, budget authority, working conditions, etc. This information is evaluated by qualified human resources staff, who use considerable professional judgement in assigning the appropriate exempt or nonexempt status.

FI-05. Due to the large number of County positions classified as exempt, there is a potential for significant financial impact if positions have to be reclassified or salaries increased to avoid reclassification.

Partially agree. If positions have to be reclassified from exempt to nonexempt status, there may potentially be significant financial impact. However, there is no evidence to suggest that the number of County exempt positions (23%) is particularly large given the nature of the work that they perform. There are many County positions which pose little to no risk of being misclassified. Executive and “learned” professional positions easily meet the criteria for exemption from FLSA. The professional exemption also specifically allows for the exemption of employees working primarily in the professional practice of law, medicine, engineering, and accounting.

In addition, the regulations contain a special rule for “highly-compensated” workers who are paid a total annual compensation of \$100,000 (this amount increases to \$134,004 effective December 1, 2016) or more. Highly compensated employees have a lower exemption standard to meet than other employees/positions. Highly compensated employees are deemed exempt if they: meet the salary threshold; are paid on a salary basis; have primary duties that include performing office or non-manual work; and customarily and regularly perform at least one (rather than all) of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

As previously noted, FLSA regulations periodically change. In 2014, President Obama directed the U.S. Department of Labor to update and modernize the regulations governing the exemption of executive, administrative, and professional employees from the minimum wage and overtime pay protections of the FLSA.

On May 18, 2016, the U.S. Department of Labor issued new regulations changing the weekly salary and annual compensation threshold levels required for white collar exemptions to FLSA overtime requirements. These new adjustments will increase the salary level threshold from \$455 per week (\$23,660 per year) to \$913 per week (\$47,476 per year), effective December 1, 2016.

Employers have a range of options for responding to the updated standard salary level, including changing the FLSA classification of a position or increasing the salary to match the minimum threshold (providing the position still satisfies the job duties and salary basis tests). Preliminary analysis of the impact of these changes indicates that approximately 1% of County employees will be affected.

FI-06. Due to the large number of County positions classified as exempt and therefore eligible for administrative leave, there is a potential for significant abuse of the Administrative Leave Policy. Exempt employees benefit from being paid their full salary for a week in which any work is performed. If the granting of administrative leave is not carefully controlled, classifying positions as exempt may be a financial disadvantage for the County.

Partially agree. A review of County records provides no indication that the County's Administrative Leave policy, as defined in the Administrative Policy Manual, is being abused. County payroll records for calendar year 2015 indicate that administrative leave represented approximately 0.2% of all time paid to FLSA exempt employees. Further, it is highly unlikely that the County will be financially advantaged by reclassifying exempt positions to nonexempt, thus making them eligible for overtime pay equivalent to 150% of their regular rate of pay.

There may be some confusion in the use of the term "administrative leave". Based on the nature of their work, business needs, and supervisory approval, exempt employees and their superiors have more latitude than nonexempt employees in arranging their time at work. This is separate and distinct from the granting of administrative leave, as permitted by the County's various collectively-bargained Memoranda of Agreement and the Administrative Policy Manual. The purpose of administrative leave is to provide time off (in full, one day increments) with pay for employees who are not eligible to be compensated for overtime. It is granted at the discretion of the Department/Agency Head and is intended to provide recognition of an outstanding or noteworthy work event or events, such as extended projects or work efforts entailing a substantial amount of uncompensated hours of work.

FI-07. The County has not determined the financial impact of having 25% of its employees in positions classified as exempt.

Partially agree. While fiscal reality is always noted, the County has classified employee positions based on legal requirements rather than primarily on financial concerns. The County could treat exempt employees as nonexempt by assigning them a set forty (40) hour schedule and compensating them with overtime pay for any time worked over that schedule. Such an election would likely have a substantial financial impact on the County budget. We calculate that if every current FLSA exempt employee worked only two (2)

hours of overtime per week, the total annual impact on the County budget would be approximately \$19 million.

FI-08. The application of the Administrative Leave provisions of the County's Administrative Policy Manual is *inconsistent* across employee units. While the Administrative Policy Manual merely states that administrative leave shall be granted for *no more than three consecutive days*, some MOA's (SEIU and VEA) express increments for taking administrative leave in terms of *maximum hours per workday*. Still others express the increment in terms of a *minimum* (MCCOUEER, CNA, APCD), or make no mention of time increments (CJAAVC). While the meaning may seem the same, the SEIU and VEA wording would allow the practice of granting administrative leave in increments as small as one hour while the wording in the MCCOUEER's would prohibit the practice.

Partially agree. There are modest language differences in the County Memoranda of Agreement (MOA's). This is to be expected as the County of Ventura enters into MOA's with several distinct recognized employee organizations. The MOA's regulate wages, hours, and working conditions of employees exclusively represented by such employee organizations.

FI-09. The MCCOUEER reflects the County's position that exempt employees should not be required or even allowed to record actual hours worked beyond the regular workday. However, exempt employees *may*, for a variety of reasons, be required to track their actual hours worked (as long as their pay is not reduced for working less than a full workday).

Agree. The MCCOUEER states that exempt employees shall not accrue or record hours worked beyond the regular work day or bi-weekly work period. However, Exempt employees may also for a variety of reasons, including funding source and payment recoupment, be required to track their actual hours worked.

FI-10. A periodic review (audit) of the classification of positions as exempt or nonexempt would reduce the risks associated with the misclassification. The review should focus on actual job duties performed on a daily basis.

Partially agree. As stated earlier, many of the County's positions pose little to no risk of FLSA misclassification. Considerable analysis goes into the original FLSA classification of positions upon job class establishment, and periodic FLSA classification reviews are conducted as needed. In addition, reviews and job analyses are regularly performed as part of recruitment and classification maintenance processes, providing further opportunities to capture information important to ensuring appropriate FLSA classification.

Scheduled reviews (audits) of "targeted" FLSA exempt classifications (i.e., those potentially more susceptible to misclassification) are an effective tool in continuing to maintain appropriate FLSA classification and further mitigate any associated risks.

FI-11. The County's Administrative Leave policy for exempt is not clearly stated. It does not have a provision related to "exceptional performance" but rather simply "satisfactory or better performance". Furthermore, it does not define satisfactory performance, thereby leaving the term open to a wide range of interpretations. Requiring documentation of hours worked by exempt employees may be useful in substantiating exceptional performance.

Disagree. The County's Administrative Leave policy specifically states that administrative leave "shall be granted only to those employees who maintain satisfactory or better performance, such as that reflected in performance reviews, employee development records and other types of performance evaluations". While the County's Administrative Leave policy does not explicitly define satisfactory or better performance, the County's performance evaluation process (the basis for determining satisfactory or better performance) does provide performance standards and guidelines.

The County's Administrative Leave policy is not intended to be prescriptive and purposefully allows for management discretion in determining "satisfactory or better performance" based upon individual circumstances. Employees who have achieved "satisfactory performance" on their performance evaluations meet and often exceed management expectations, and the "satisfactory or better performance" stipulation includes "exceptional performance".

Finally, administrative leave is not intended to correlate to, or exclusively reward, extra hours of work. It is intended to be a flexible management tool, which is granted at the discretion of Agency/Department Heads to recognize and reward significant and valuable efforts of employees who are not eligible to receive overtime compensation.

FI-13. Requiring exempt employees to utilize available Personal Time Off, rather than Administrative Leave, for absences of less than a full work shift would reduce nonexempt employees' perception that exempt employees receive an unfair advantage.

Partially agree. County administrative policy (Chapter VIII B-6) has been established pursuant to the principles of public accountability to compensate employees only for hours actually worked. It is the County's policy to require employees absent from work for less than a full day to use accrued leave or leave without pay. However, the policy is not required to be rigidly applied. Exempt employees' hours worked may be viewed over the entire pay period, not just on a day-by-day basis. It should be noted that the administrative policy is overridden by the applicable provisions of collective bargaining agreements for represented employees, and as noted earlier, administrative leave is not to be used to cover time off that is less than a day in duration.

Grand Jury Recommendations

R-01. The Grand Jury recommends that the Board of Supervisors update the Personnel Rules and Regulations to incorporate a definition/explanation of “exempt employee” and “nonexempt employee”.

Will not be implemented. It warrants noting that there is no evidence to suggest that there is any impropriety with respect to the County’s FLSA classification of its employees or positions.

The FLSA is one of many complex federal and state employment-related regulations and the U.S. Department of Labor determines the criteria for exempting employees/positions from the FLSA. The Personnel Rules and Regulations (PRR’s) consist of rules adopted by the Board of Supervisors pursuant to the County’s Civil Service Ordinance and are intended to provide rules for the organization and implementation of the civil service system. Therefore, the PRR’s are not a suitable place to define terms such as “exempt” and “nonexempt,” which are established by the U.S. Department of Labor. In addition, the PRR’s and Administrative Policy Manual do not attempt to summarize or synthesize these regulations as they are inherently complex and subject to interpretation and change. Furthermore, summary analysis and criteria incorporated into County documents, such as the PRR, may lead to conflicting legal interpretations when compared to the state of the current law, in the event of a dispute.

However, please note that in recognition that this is a complex area of the law, training is currently provided to management staff and the County’s Nuts and Bolts training will be enhanced to provide even more information on this subject matter. Additional information and links to the U.S. Department of Labor website will be also added to the County’s Intranet website as another resource for County employees.

R-02. The Grand Jury recommends that the Board of Supervisors review and revise Chapter VIII (B) – 3 of the County’s Administrative Policy Manual to better define the level of performance required for the granting of the administrative leave and to clarify the minimum and maximum time increments for taking administrative leave. The Policy should require the use of PTO for absences of less than a full work shift. The Policy should also direct the tracking of actual hours worked by exempt employees. Furthermore, as the various MOA’s expire, the replacement MOA’s should be consistent in the applications of the Policy.

Will not be implemented. The County’s Administrative Leave policy is designed to allow for management discretion in determining performance based upon individual efforts and results as reflected in performance-related documents. The policy itself clearly states that such leave is to be granted on only an “occasional” basis, that it is not an accrued right, that it is to be taken only after first being approved, that it is to be granted in only full day increments, and that unless there are truly unusual circumstances, it is not to exceed three consecutive days.

Further, a County administrative policy (Chapter VIII B-6) has already been established pursuant to the principles of public accountability to compensate employees only for hours actually worked. It is the County’s policy to require employees absent from work for less

than a full day to use accrued leave, or leave without pay. This policy will be clarified to ensure that the reconciling of hours worked with partial day absences by exempt employees may be accomplished over the course of a full pay-period. It should also be noted that this administrative policy is overridden by the applicable provisions of collective bargaining agreements for represented employees.

Finally, while it is a reasonable goal from the County's perspective to align all MOA language, it is not necessarily realistic to expect the various labor organizations to conform to a uniform wording in their MOA's regarding the use of administrative leave. However, since the MOAs state that administrative leave shall be granted in accordance with County policies and guidelines, we will amend the Chapter VIII-(B)-3 of the Administrative Policy Manual to further clarify the minimum time increments for taking administrative leave (i.e., administrative leave is not to be used for absences of less than a full work day).

R-03. The Grand Jury recommends that the Board of Supervisors require the review of the Position Description Questionnaire to ensure that it focuses on actual job duties performed on a daily basis rather than on a generalized job description.

Has been implemented. When determining the classification of a position (including the exempt v. nonexempt status thereof), the County requires a job analysis and/or completion of a Position Description Questionnaire(s). County human resources staff recently conducted a review of the Position Description Questionnaire and made revisions to the document in April 2016.

Both the previous and the new version of this form focus not only on obtaining information about the actual job duties performed, but also on many other job factors crucial to determining FLSA classification. These factors include supervisory responsibility; discretion and independent judgment; independent decision making; knowledge, skills, and abilities required to do the job; problem solving; etc.

R-04. The Grand Jury recommends that the Board of Supervisors require a regularly scheduled audit of workforce classifications and job descriptions to ensure employees are correctly classified under current rules.

Requires further analysis. Considerable analysis already goes into the FLSA classification of positions upon job class establishment, and periodic classification reviews are subsequently conducted. In addition, the County has planned an evaluation of the positions affected by the recent U.S. Department of Labor regulations in the upcoming months to determine the best way to respond to the upcoming changes.

The County will conduct a formalized and scheduled review of "targeted" FLSA exempt classifications (i.e., a select group of those which may be more susceptible to misclassification) to reinforce the County's commitment to maintaining FLSA compliance in the classification of its positions.

R-05. The Grand Jury recommends that the Board of Supervisors require a study of the financial impact of having a large number of exempt employees. The study should compare the cost of potential overtime if exempt employees were reclassified as nonexempt with the cost of granting administrative leave to exempt employees. Additionally, the study should consider the cost of potential increases in salaries for exempt employees when the proposed new federal regulations take effect.

Will not be implemented. A full scale study is not required to analyze and determine the consequences of reclassifying exempt employees to nonexempt status. While it is legally permissible for the County to reclassify FLSA exempt employees to nonexempt status and pay them overtime at the rate of 150% of their regular pay rate, a high level analysis readily indicates that this would not likely result in a net savings to the County.

The possible savings realized by the County as a result of tracking and utilizing FLSA exempt employee leave hours (for some represented employees) would very likely be more than offset by the additional costs incurred in overtime compensation. FLSA exempt employees, by the nature of their work, are periodically and regularly required to work beyond their scheduled hours. A high level analysis conducted as a result of this recommendation indicates that if every current FLSA exempt employee were eligible for overtime compensation, paid at 150% of the base pay rate, and worked only two (2) hours of overtime per week, the total impact on the County budget would be approximately \$19 million. There is no evidence that the "cost" of the County's discrete use of administrative leave in any way approaches that figure.

Finally, soon after the release of the new FLSA regulations effective December 1, 2016, the County began evaluating the positions affected by the new federal regulations to determine the most appropriate way to respond to the upcoming changes. The impact of the new regulations is anticipated to be relatively minor.