

464, 473 P.2d 508, 511, *Gwynn v. Town of Eureka* (1978), 178 Mont. 191, 582 P.2d 1262, 1263. Montana Code Annotated § 39-3-216(3) provides that when the department determines that a wage claim is valid and a party appeals the determination within 15 days, “a hearing *must* be conducted according to contested case procedures under Title 2, chapter 4, part 6 . . .” (emphasis added). Under Montana Code Annotated § 2-4-612, where a contested case hearing is required, “Opportunity shall be afforded *all* parties to respond and present evidence and argument on *all issues involved*.” (Emphasis added). The issues involved are those framed by the complaint. Moreover, the Notice of Hearing and Scheduling Conference specifically apprised the parties that the issues at hearing would be whether the claimant was due wages as alleged in the complaint and a penalty as required by law.

By exercising its right to appeal under Mont. Code Ann. § 39-3-216(3), PFL has necessarily subjected itself to the requirements of contested case procedures under Title 2. Since these requirements include the right of all parties to present argument and evidence on all issues involved, all of the issues in the claimant’s complaint have to be adjudicated. To the extent that this ruling conflicts with the holding in *Evans v. Kaspersma Case No. 261-2006*, this hearing officer finds that decision to be in error with respect only to the issue described above.

Beyond the statutory basis, each party to an administrative proceeding has a due process right to a hearing before being deprived of a right. 2 Am Jur 2d Administrative Law § 298. To preclude the claimant from litigating those issues on which she did not prevail at the Wage & Hour determination level, in a circumstance where the employer appealed that determination, would result in a deprivation of the claimant’s due process right to hearing in this case. The hearing before the Hearings Bureau is the first and only opportunity for a hearing on whether wages are owed and, if so, in what amount. All the issues raised by the complaint and by operation of law are proper subjects for this hearing. PFL’s objection is overruled and its motion is denied.

PFL also raised an objection to the admissibility of the information provided in Exhibit 4. The exhibit was never offered at hearing, and the objection is moot.

Kenney objected to PFL’s post-hearing request that the hearing officer take judicial notice of certain facts regarding a degree program at RIT. The hearing officer denies Kenney’s motion to have PFL resubmit its post-hearing briefs without reference to the information, but also denies PFL’s request that he take judicial notice of the proposed facts because the evidentiary hearing closed on August 8, 2007, prior to the request for judicial notice. The request is an untimely effort to add evidence to the closed record, and the evidence is of, at best, dubious relevance.

II. FINDINGS OF FACT

1. Kenney was employed by PrintingForLess.Com, Inc. (“PFL”) as a Technical Service Representative (“TSR”) from April 5, 2004 to August 18, 2006.

2. PFL is an online retail commercial printing business and it primarily serves small business customers. PrintingForLess.Com, Inc. (“PFL”) was founded in 1996 as Express Color Printing. In 2000, it was reincorporated under the name PrintingForLess.Com (“PFL”). Customers from all across the nation place their orders either via PFL’s website or by telephone.

PFL offers its customers print media marketing materials such as brochures, calendars, letterhead, envelopes, catalogs, postcards, business cards, and posters. PFL calls itself “America’s Print Shop” and attempts to separate itself from big commercial printing companies. PFL’s main competitors are other online printing companies and smaller retail mom and pop print shops across America such as Insty Prints in Livingston, Montana, where PFL is located. PFL is not a traditional printing company.

3. TSRs work five nine and one-half hour days a week including a half-hour lunch break. TSRs rotate through three shifts: 7:00 a.m. to 4:30 p.m.; 8:00 a.m. to 5:30 p.m.; and 9:30 a.m. to 7:00 p.m.

4. TSRs are paid on a salary basis and do not earn commissions on the sales they make.

5. Kenney oftentimes would not take a lunch break. She also often worked beyond her scheduled shift. Kenney and other TSRs often worked through lunch and stayed late to get files and orders processed. PFL would occasionally bring lunch in when workload demanded so that employees could work through their lunch period. If the TSRs did not work late to get the orders processed, it could be reflected in their performance evaluation and in their salary.

6. Upon hire, Kenney participated in a 16-week training program designed to teach new hires how to perform the job functions of the TSR position. The classroom instruction is followed by additional on-the-job training.

7. The training program is not accredited by any trade organization or association.

8. Each TSR on a team is assigned to one of three functions. These functions are commonly referred to as (1) order processing and quality control (OP/QC); (2) “file processing”; and (3) “phones and e-mail.” The TSRs on each team rotate their job functions on a weekly basis. Therefore, in each three-week period a TSR is on OP/QC for one week, file processing for one week, and phones and e-mail for one week. The function to which a TSR is assigned for the week is that TSR’s primary function and the TSR may also perform one of the other functions depending on the workload.

9. PFL’s website shows TSRs to be part of the production team.

10. TSR performance is measured by sales and customer service (including retention rates, inquirers created, inquirers converted, and sample pack followup calls); production volume (expressed as the number of files processed, the dollar value of files processed, files QC’d, file processing accuracy, and QC accuracy); and adherence to the PFL mission, values, and vision.

11. When a new order comes in to a team, either by the PFL website or by phone, the TSR on OP/QC processes the entry of the new order. The TSR on file processing duty converts the customer’s computer file to a file that can be printed by PFL. Customer files cannot be printed by PFL in the file’s “native” format and they must be converted into a file, called a “print ready PDF” that meets specific criteria.

12. TSRs may also make spatial modifications and color modification to the customer’s files to ensure the print file meets PFL’s technical requirements.

13. Orders are tracked and managed by a database PFL calls the “dashboard.” The dashboard is used by TSRs to monitor and manage their workload.
14. The dashboard, in part, tells TSRs the status, or “latency,” of the orders in the system. TSRs continuously monitor the dashboard throughout their shift. The dashboard “drives the day” and the TSRs “live and die” by it.
15. The overwhelming portion of printing orders are paid for by credit card or check.
16. When not processing files to prepare them for printing, TSRs are either processing new orders, doing a quality control check of processed files, contacting customers about a pending order, following up with customers after an order has shipped, or contacting warm leads to generate new sales.
17. The sales function permeates all of the customer contact points. At one level, the strategy is to provide quality service to the customer so as to create a potential repeat customer. At another level, the strategy includes “upselling” customers when discussing their new order with them.
18. PFL uses customer relations management (CRM) to generate sales and repeat business. CRM essentially means sales.
19. While on the OP/QC task, a TSR spends approximately 30% of the time doing file processing or other technical work and 70% on CRM. While assigned to file processing, a TSR spends approximately 80% of the time on file processing or other technical functions and 20% on CRM. While assigned to phones and e-mail, a TSR spends 10% of the time on file processing or other technical functions and 90% of the time on CRM, especially calling warm leads provided by the marketing department and attempting to convert inquirers into customers. In sum, approximately 60% of a TSR’s duties are sales; approximately 30% of a TSR’s duties involve file processing; and approximately 10% of a TSR’s duties involve quality control and other functions.
20. TSRs generally seek guidance from team leaders and quad leaders as the dollar level of a discount increases.
21. Discounts and coupons are reviewed by the PFL accounting department and the accounting department will notify TSRs if they applied too high of a discount or coupon.
22. Pricing for PFL’s products is generated by the “InstaPricer” system on PFL’s website. If a customer wants to order something that has components not included on the InstaPricer system, then a TSR will generate a custom quote. Anything beyond simple custom quotes is sent to the Gold Team which is dedicated to generating and reviewing custom quotes.
23. TSRs do not develop budgets, marketing or advertising strategies, implement or change policies of the company, participate in strategic planning, give input on major financial decisions, or assist management in any substantial way in developing policies. Senior management is responsible for setting goals and deciding what projects to undertake.

24. TSRs may submit ideas for improving PFL through PFL's "continuous improvement process" or CIP. CIP is basically an electronic suggestion box. However, TSRs have no authority to implement their ideas.

25. TSRs occasionally make suggestions regarding a customer's marketing plans, but do not create or play a significant role in the creation of customer's marketing plans or marketing budgets.

26. During the TSR interview process, PFL informs each TSR candidate in writing that the position is exempt from overtime pay requirements.

27. TSRs are not part of PFL's marketing department, but are the primary point of contact with most of its customers. TSRs' primary work function is sales of PFL's printing products.

28. "Goodwill discounts" and other promotional discounts offered to customers by TSRs are part of the marketing budget. "Make good" discounts are a cost of goods sold.

29. TSRs are required to contact customers who have purchased products to see if they may be interested in purchasing additional printing materials.

30. On rare occasions, TSRs have suggested targeted marketing campaigns to enlist customers to purchase PFL's products.

31. TSRs have very little involvement in the human resources function at PFL. They are occasionally part of the hiring team and involved in training. They have on rare occasions suggested that someone be fired, but the ultimate decision lies with PFL management.

32. While executing their quality control duties, a TSR is required to "ding" errors identified in another TSR's file processing. Both the error rate on file processing and in performing the QC functions are metrics upon which a TSR's performance is evaluated. Poor ratings in these accuracy reports may lead to additional coaching for the TSR or even their dismissal.

33. TSRs have a minimal role in PFL's accounting functions.

34. TSRs have the discretion to grant credit terms to a customer.

35. TSRs "whack" customer's credit cards and are notified by the accounting department when payment by check has been received. Generally orders are not printed until payment has been received. TSRs have discretion to vary from this policy if necessary.

36. While TSRs must use a variety of databases as tools to perform their various job duties, they are not database administrators.

37. The dashboard is a key PFL database that contains detailed information of the status of all customer orders, as well as company-wide goals and statistics. The dashboard is a tool TSRs use to prioritize and manage their workload and to manage their customer accounts and relationships.

38. While TSRs have discretion and must use their judgment in deciding what orders to work on and when, the dashboard's varied colors (assigned to specific orders that indicate the

latency or delay in processing an order) and the “speedometer” significantly limit the TSR’s discretion and judgment in setting workload priorities.

39. TSRs have input into PFL processes and procedures but do not have the authority to change them.

40. TSRs are part of the Production and Technical Service arm of PFL. TSRs are organized into teams who have a CRM coach, a RAT (a research and technical support person), and a quad lead. CRM coaches report to the Director of Coaching and RATs report to the Director of Technical Service Production. The Director of Technical Service Production and the quad leads report to the Vice President of Tech Service who, in turn, reports to the Chief Executive Officer, Andrew Field.

41. PFL has both a formal Continuous Improvement Process (“CIP”) and informal processes that allow its employees to make suggestions about PFL’s policies and procedures. The CIP system is used frequently by PFL employees.

42. Kenney frequently used PFL’s CIP process. Twenty of her recommendations passed the initial screening process and some of those recommendations were actually implemented. Most of Kenney’s suggestions had to do with modifications to the dashboard and not PFL’s overall business operations.

43. As a TSR on the Pioneer Team, Kenney directly participated in the development and implementation of PFL’s mailing service system.

44. TSRs have a significant impact on the day-to-day carrying out of PFL’s business, but are not involved in any significant way in running the business itself.

45. PFL’s written procedures require full payment prior to a customer’s job being put into production. If a TSR has extenuating circumstances, he or she may in very rare emergency situations use their judgment, provided they communicate their decision to vary from the policy and document the reasons for the variance.

46. TSRs have the discretion to decide whether or not to charge their customers for altering their files. TSRs also have discretion to deviate from PFL’s standard pricing guidelines without first seeking management approval.

47. TSRs have discretion to determine whether or not to charge a customer extra for expediting the customer’s order.

48. PFL gives TSRs discretion to use their best judgment when applying discounts and coupons and also when addressing customer claims. This discretion is allowed so long as the TSRs “don’t give away the store” and so long as they have remarkable interactions with their customers. PFL’s other policies and procedures do not expressly advise TSRs to use their discretion or to use their best judgment. PFL gives its TSRs greater discretion in making and keeping sales than in other duties they perform.

49. PFL’s senior management and marketing department determined that it would use coupons and discounts to attract and keep its customers.

50. TSRs have discretion to apply coupons and other good will discounts as inducements to close a sale or reward a good customer. These coupons are generally created by

the marketing department as part of its marketing efforts and are either used directly by the customer or offered by the TSR. TSRs can also give “make good” discounts primarily on future orders in order to placate a customer who may not be completely satisfied with the printing product it ordered. These discounts typically amount to \$80,000.00 to \$120,000.00 for every \$2 million of printing sales.

51. TSRs have the authority to issue refunds.
52. Kenney personally exercised discretion in working with her customer accounts, for example, in giving coupons, discounts, and expediting deliveries.
53. TSRs have the discretion to provide their customers with free reprints of their orders.
54. TSRs have the discretion to provide an upgrade for expedited shipment.
55. TSRs deal with customer complaints.
56. TSRs have significant discretion in dealing with post-delivery complaints.
57. TSRs may choose between a wide variety of possible options in order to resolve the post-delivery dispute, choosing the solution the TSR and the customer believe will best suit the customer’s needs.
58. TSRs have the discretion to decline to work with or even “fire” a particular customer without seeking the prior approval from PFL management.
59. TSRs are not involved in setting the overall course or policies of either PFL or its customers.
60. TSRs are sales representatives, not consultants. TSRs, as part of their sales training, are instructed to determine what a customer’s printing budget is. TSRs occasionally suggest ideas to their customers based on their experience and knowledge of PFL’s product line, but do not develop marketing plans or budgets for their customers. TSRs advise their customers about problems with their orders, technical requirements, and other issues often in an attempt to generate more sales or sales revenue.
61. Kenney excelled in providing advice on her customers’ printing products. She often asked her customers for specific information about their intended use of the PFL printing product, so she could better tailor a product to suit their needs. Kenney frequently did this to increase the size of the order or the value of the sale.
62. On a few occasions, Kenney suggested promotion and design ideas for her customers.
63. TSRs often make graphic modifications to customers’ orders to ensure the products print effectively. The graphic modifications occasionally included choosing images to compliment the customer’s overall design.
64. TSRs are required to complete a formal classroom training program that gives them just enough knowledge to get started on the job.

65. TSR training is tailored to sales, the PFL way of doing business, developing teamwork, and very basic technical training.

66. The TSRs' training is provided in a format similar to that found at colleges in that it utilizes a classroom setting, involves lectures, practical work, and tests.

67. PFL's TSR training curriculum includes a few hours of the basics of several computer software programs. Each of these programs is frequently the subject of an entire semester at the college level.

68. PFL's TSR training curriculum includes a few hours in the study of color theory which is also frequently the subject of an entire semester at the college level.

69. The classroom portion of the TSR training was approximately 16 weeks when Kenney was trained.

70. TSRs receive a substantial amount of additional on-the-job training in CRM from a coach assigned to each quad or group of four TSR teams.

71. TSRs also obtain additional technical training assistance from RATs, quad leads, or other team members.

72. PFL's training materials are dominated by subjects and materials that are specific to PFL.

73. Sometime in 2004, PFL senior management considered the question of whether the employees it paid on a salary were correctly categorized as "exempt" under the FLSA. PFL decided the question by circulating a handwritten memo asking the question "[d]oes everyone agree that all of our exempt employees fit into at least one of the highlighted categories? If so we have no issues." PFL senior managers and human resources staff, Jeff Batten, Andrew Field, Marne Reed, Danton Rice, and Heather Stanton, all indicated their agreement by signing "yes" next to their initials on the memo.

74. Field testified that Jeff Batten was "a very smart guy with experience in contracts." Field's sending of the Wall Street Journal article to Jeff Batten with the handwritten margin note "SRT HES pls assure that we are compliant" indicates that he did not know whether PFL had correctly determined whether the TSR positions were exempt under the FLSA. PFL's Human Resources Director, Marne Reed, signed the questionnaire "yes" even though she had no training specific to FLSA. She could not recall who wrote the memo, could not recall whether she did any research before initialing the memo, could not recall whether there was any meeting about the memo, or whether she sought anyone's advice before initialing the memo. The initial answer to Kenney's wage claim, prepared by Rice, demonstrated that FLSA was not an area in which he was very familiar. PFL did not provide any testimony about Heather Stanton's knowledge of or experience with the FLSA, only that she, as an accountant, could determine whether the TSRs were earning in excess of \$455.00 per week. PFL did not seek advice regarding the status of the TSR positions from any outside counsel experienced in the FLSA or labor law. PFL did not seek advice from the Montana Department of Labor or the U.S. Department of Labor. The information circulated with the questionnaire was incomplete. Field expected those signing would do their own due diligence before signing the document

“yes,” but PFL offered no evidence that anyone did anything other than looking at the documents included with the handwritten memo before signing off on it.

75. PFL did not conduct a good faith inquiry into the exempt status of the TSR position. It was unreasonable for PFL to rely on the uninformed beliefs of its management team to conclude that the TSR position was exempt from the FLSA’s overtime requirements. PFL’s only evidence of its belief that it was not in violation of the FLSA was the memo circulated sometime in 2004.

76. PFL considered the work week for a TSR to be 45 hours.

77. From August 18, 2004 to June 15, 2005, Kenney was paid \$12.02/hour and worked 42 full weeks. During the full weeks she worked, she was paid only for 40 hours of work. Kenney is owed \$3,786.30 in overtime pay for the period (42 x 5 x \$18.03/hour).

78. From June 15, 2005 to April 1, 2006, Kenney was paid \$12.86/hour and worked 31 full weeks. During the full weeks she worked, she was paid only for 40 hours of work. Kenney is owed \$2,989.95 in overtime pay for the period (31 x 5 x \$19.29/hour).

79. From April 1, 2006 to August 18, 2006, Kenney was paid \$15.87/hour and worked 16 full weeks. Kenney is owed \$1,904.00 in overtime pay for the period (16 x 5 x \$23.80/hour).

80. The total amount of the unpaid overtime wages owed to Kenney by PFL is \$8,680.25.

81. Kenney is owed liquidated damages in the amount of \$8,680.25.

III. DISCUSSION AND ANALYSIS¹

Kenney claims that PFL owes her unpaid overtime wages, liquidated damages, and attorney fees pursuant to the FLSA and the Montana Wage Payment Act. PFL asserts that the TSR position that Kenney held is exempt from the overtime provisions of either act because it qualifies for both the administrative and professional exemptions provided under the FLSA.

Both Montana law and the Fair Labor Standards Act (FLSA) prohibit employers from employing their employees in excess of 40 hours in a single work week unless the employee is compensated at a rate not less than one and one-half times the regular rate at which the employee is employed. Mont. Code Ann. § 39-3-405 and 29 U.S.C. § 207(a)(1). Both laws exempt certain employees from the requirement for overtime premium pay. Mont. Code Ann. § 39-3-406(1)(j) and 29 U.S.C. § 213(a)(1). Montana law allows employees owed wages, including wages due under the FLSA, to file a claim with the Department of Labor and Industry to recover wages due. Mont. Code Ann. § 39-3-207; *Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232.

A. Administrative Exemption

¹ Statements of fact in this discussion and analysis are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

The FLSA exempts from the requirement for the employer to pay overtime premium pay “any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]. . .).” 29 U.S.C. § 213(a)(1). Montana law has a comparable exception at Mont. Code Ann. § 39-3-406(1)(j). The key question in this case is whether Kenney was, as PFL contends, an exempt bona fide administrative employee not entitled to overtime premium pay. PFL was engaged in interstate commerce, and thus subject to the FLSA.

The U.S. Secretary of Labor has adopted regulations that are described as the “short test” and define an “employee employed in a bona fide . . . administrative . . . capacity” as any employee:

- (a) who is compensated on a “salary basis” at a rate of at least \$455 per week;
- (b) whose “primary duty consists of . . . the performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer’s customers;” and
- (c) whose duties include work “requiring the exercise of discretion and independent judgment.” [quotations from 29 C.F.R. § 541.2.]

“The regulatory criteria are absolute and the employer must prove that any particular employee meets every requirement before the employee will be deprived of the protection of the Act.” *Mitchell v. Williams*, 420 F.2d 67, 69 (8th Cir. 1969). PFL must prove that Kenney meets all requirements in this regulation before she can be held to be exempt from coverage under the FLSA. *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1069 (9th Cir. 1990); *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1125 (9th Cir. 2002).

In addressing questions under the FLSA, this hearing officer is “mindful of the directive that [the statute] is to be liberally construed to apply to the furthest reaches consistent with Congressional direction.” *Biggs v. Wilson*, 1 F.3d 1537, 1539 (9th Cir. 1993). To that end, “FLSA exemptions are to be ‘narrowly construed against . . . employers’ and are to be withheld except as to persons ‘plainly and unmistakably within their terms and spirit.’” *Auer v. Robbins*, 519 U.S. 452, 462, 137 L.Ed. 2d 79, 91, 117 S. Ct. 905, 912 (1997) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 4 L. Ed. 2d 393, 80 S. Ct. 453 (1960)); see also *Donovan v. Nekton, Inc.*, 703 F.2d 1148, 1151 (9th Cir. 1983); *Klem v. County of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000).

1. Salary

Kenney earned more than \$25,000.00 per year during the period of her claim and therefore the first part of the short test is satisfied.

2. Primary Duty

The key issue in determining whether the TSR position is administratively exempt is whether Kenney’s primary duty while employed at PFL involved the performance of non-manual work “directly related to management policies or general business operations” of PFL. 29 C.F.R. § 541.2 (emphasis added).

a. Non-manual

While neither party raised the issue of whether Kenney's work was non-manual labor, it appears from her testimony and from that of other witnesses who worked in the TSR position or were familiar with its duties, that it consisted primarily of non-manual work either on the phone with customers or on the computer communicating with customers, editing their files, or performing quality control work.

b. Directly related to management policies or general business operation

PFL must still show that Kenney's work related to management or general business operations. See 29 C.F.R. § 541.202(a) (work need not be "manual" or "repetitive" to be classified as routine, non-administrative work). This requirement is met if the employee engages in "running the business itself or determining its overall course or policies," not just in the day-to-day carrying out of the business's affairs. *Bratt*, 912 F.2d at 1070.

i. Administration/Production Dichotomy

In determining whether work relates to management or general business operations, the courts apply the "administration/production dichotomy" suggested by the Secretary of Labor's interpretive regulations. Those regulations state: [t]he phrase "directly related to management policies or general business operations of his employer or his employer's customers" describes 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. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of the employer or the employer's customers. 29 C.F.R. § 541.205(a) (emphasis added). *Bothell*, 299 F.3d 1120, 1125-1126.

In *Bothell*, the court held that:

29 C.F.R. § 541.205(a) must be read in conjunction with § 541.205(b) which specifies: The administrative operations of the business include the work performed by so-called white-collar employees engaged in "servicing" a business as, for example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control. 299 F.3d at 1126.

It went on to state that the "administration/production distinction thus distinguishes between work related to the goods and services which constitute the business's marketplace offerings and work which contributes to running the business itself." *Bratt*, 912 F.2d at 1070. *Bothell*, 299 F.3d at 1127.

PFL does most of its business through the internet and most of its marketplace offerings were of a type frequently sold through retail print shops. The hearing officer finds that in essence, PFL is an "etailer" – a retail printing establishment that does the majority of its business through the internet and that has no storefront. Retail sales involves the sale of printing products that are used directly by the customer and not resold to another entity. PFL's products are used directly by its customers. The TSRs, its sales force, do not travel to service its customers and are not paid commissions on sales. They are engaged in retail, not outside commission, sales. Over the course of a TSR's three-week rotation, approximately 60% of a TSR's duties is sales.

TSRs spend 30% of their time performing the file processing or digital pre-press function. This is a type of work that falls on the non-exempt production side of the analysis. Accordingly, at least 90% of the TSR position falls on the non-administrative side of administration/production dichotomy.

The 10% of the TSRs' time spent on quality control functions is normally an exempt activity, however, given the lack of independent judgment or discretion involved in applying a checklist to a processed file to make sure it meets PFL's printing standards, this duty cannot be truly seen as an exempt function.

Analysis under the administrative/production dichotomy is used "as a tool towards answering the ultimate question, whether work is directly related to management policies or general business operations [it is] not as an end in itself." *Bothell*, 299 F. 3d at 1129. The federal regulations provide further analytical tools:

(b) Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

(c) An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt. 29 CFR §§ 541.201(b) and (c).

PFL argues that TSRs perform work directly related to management or general business operations because TSRs are involved in accounting, quality control, marketing, personnel management, human resources, computer network, and database management functions. PFL's argument fails because sales is the primary duty of the TSR position and any work involving accounting, marketing, personnel management, and human resources is minimal and ancillary, at best, to their primary duty.

TSRs are simply not involved in the management of PFL's computer networks, and while they are users of PFL's databases, to construe that to mean they are database administrators is not credible. While TSRs do perform quality control functions, it is not directly related to their primary duty of selling PFL's marketplace offerings. Moreover, the quality control procedure requires little, if any, discretion or independent judgment. TSRs simply compare a processed file to a checklist to determine whether certain predefined criteria have been met.

PFL also rather obliquely argues that TSRs are consultants who would qualify for the administrative exemption because their work with customers is directly related to the general business operations of PFL customers. While TSRs are required as part of their training to

develop an intimate relationship with PFL's customers, the purpose of that intimacy is to knock down barriers to sales of PFL products and not to supply the kind of information a tax consultant or financial consultant would provide to their customers.

ii. Substantial Importance

Assuming Kenney's work was administrative, and it is not, to meet the second part of 29 C.F.R. § 541.205(a) this work must be of "substantial importance" to the "management or operation" of PFL. PFL must show that the TSRs are engaged in "running the business itself or determining its overall course or policies as opposed to merely carrying out its day-today business." *Bratt*, 912 F.2d at 1070.

TSRs are not involved in running PFL. While their work in selling PFL's products and preparing files for printing is critical to the sale of PFL's marketplace offerings, they are not involved in running PFL itself. PFL has many layers of management that perform the running of PFL's business, including its senior management team comprised primarily of department heads and the CEO, and the technical service management team that has responsibility for making resource decisions, managing the TSR teams, and undertaking any necessary disciplinary actions. Even if the TSR position's duties fell on the administration side of the administration/production dichotomy, the TSR's work is not of substantial importance *to the management of PFL*. It is again critical to sales and profits, but has no meaningful role in the management of PFL operations. A TSR does not determine PFL's overall course or policies.

3. Discretion and Independent Judgment

The requirement that the employee "customarily and regularly exercise discretion and independent judgment" is satisfied if the employee has the ability to compare, evaluate, and choose from possible courses of conduct. The requirement "implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance." 29 C.F.R. § 541.207(a).

The regulations specifically warn against confusing "the exercise of discretion and independent judgment" with "the use of skill in applying techniques, procedures, or specific standards." 29 C.F.R. §§ 541.207(b)(1) and (c).

TSRs are allowed to exercise considerable judgment and discretion in order to ensure that its customers have "remarkable interactions." They have, as Field testified, "discretion in sales." They also have some, but significantly less, discretion when they are processing a customer's computer file to make sure it will print well. More often when working in the file processing and quality control areas TSRs use skill in applying techniques, procedures, and specific standards that they acquired in their training and which are contained in PFL's training materials and process documents. Applying knowledge in determining whether specific standards are met is not exercising discretion and independent judgment. 29 C.F.R. 541.207(c)(1); *Mohorn v. TVA*, 2007 U.S. Dist. LEXIS 52014 (D. Tenn. 2007).

While TSRs have some discretion in processing orders, that discretion is guided by the teams' decisions made at the beginning of the work day after reviewing the dashboard. The

dashboard plays a major role in deciding what a TSR should do in order to timely process customers' orders.

However, the TSRs' freedom to exercise discretion in the sales function of their job is neither tied to an otherwise exempt position or directly related to PFL's management policies or general business operation.

The TSR position does not qualify for the administrative exemption because it does not meet all of the required elements. The primary duty of the TSR is sales. In itself this precludes the TSR position from being an administrative position and therefore exempt. The TSRs' sales duties clearly are not directly related to management policies or general business operations of PFL or its customers – the TSRs do not run PFL or determine its overall course or policies. Although the individual TSR may exercise discretion and independent judgment, especially when it comes to sales, this by itself is insufficient to make the TSR position administratively exempt from the FLSA's overtime requirements. The evidence provided by PFL did not “plainly and unmistakably” prove that the TSR position was within the terms and spirits of the administrative exemption.

B. Professional Exemption

PFL also asserts that the TSR is exempt for the FLSA's overtime requirements based on its status as a learned profession.

For the TSR position to qualify for the professional exemption under the FLSA, PFL must prove that: (a) the employee must be compensated on a salary or fee basis at a rate of not less than \$455 per week; (b) the employee's primary duty must be the performance of work requiring advanced knowledge; (c) the advanced knowledge must be in a field of science or learning; and (d) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. 29 C.F.R. § 541.300; 29 C.F.R. § 541.301(a); *Ragnone v. Belo Corp.*, 131 F. Supp. 2d 1189, 1192-1193 (D. Or. 2001).

1. Salary

Kenney earned more than \$25,000.00 per year during the period of her claim thereby satisfying the first requirement.

2. Primary duty must be the performance of work requiring advanced knowledge.

The phrase “work requiring advanced knowledge” requires work that is “predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical, or physical work.” 29 C.F.R. § 301. An employee that “performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances.” *Id.* This manner of “[a]dvanced knowledge cannot be attained at the high school level.” *Id.*

The TSRs’ work is predominantly intellectual in character as it revolves around the intellectual process of selling products to PFL’s clients, maintaining good relationships with those clients so that they might either bring additional business and profits to the company or refer other businesses to PFL for their printing needs. TSRs also exercise discretion and independent judgment when working to sell a customer a product or work to fix a customer’s problem with an order. TSRs also apply skill during file processing that determines the quality of the final product. TSRs use their advanced knowledge gained through PFL’s training program in both their sales and production activities.

3. The advanced knowledge must be in a field of science or learning.

The FLSA and the rules promulgated thereunder provide guidance in the factors applicable to the third prong of the professional exemption test:

Field of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

29 C.F.R. §541.301(c) (Emphasis added.)

In *Ragnone v. Belo Corp.*, the Federal court in Oregon held that pilots were nonexempt employees because:

Although charged with an extraordinary degree of responsibility, the training of airline pilots in this country typically does not revolve around specialized college-type academic instruction, but more closely resembles the classic apprenticeship model -- a structured, systematic program of on-the-job supervised training coupled with a program of related instruction.

131 F. Supp. 2d 1189, 1193-1194 (D. Or. 2001)

Similarly, the training of TSRs involves a relatively short program of instruction followed by a program of on-the-job instruction from CRM coaches, RATs, quad leads, and other TSRs. Accordingly, the advanced knowledge acquired through this training is not in a field of science or learning.

4. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

The FLSA and the rules promulgated thereunder provide guidance in the factors applicable to the fourth prong of the professional exemption test:

The learned professional exemption is restricted to professions where *specialized academic training is a standard prerequisite for entrance into the profession*. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word “customarily” means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry. *However, the learned professional exemption is not available for the occupations that customarily may be performed with only general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes*. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

29 C.F.R. §541.301(d) (Emphasis added.)

The regulations define eight specific professions that qualify for the professional exemption and all eight generally share the requirement of four years of study at an accredited academic institution. 29 C.F.R. §541.301. Notably identified as a profession that does not qualify for the exemption is the paralegal who does not meet the requirements “because an advanced specialized academic degree is not a standard prerequisite for entry into the field” and because “most specialized paralegal programs are two-year associate degree programs from a community college” 29 C.F.R. §541.301(e)(1-9)

The TSR position does not meet this requirement. While the TSR training program has been compared to an associates degree, the TSR training, like the paralegal degree, does not qualify because, in part, it does not require four years of study. PFL seeks highly educated people as future employees, but it does not require some specialized degree “as entry into the field of employment” that PFL represents. Moreover, its unaccredited training program of 16 weeks at the time Kenney went through it cannot seriously compare to the academic requirements associated with those professions the regulations have determined meet the professional exemption. No matter how PFL spins its training program, 16 weeks is not a prolonged course of study. Even if the extended training² supplied by RATS and CRM coaches were to be

² It typically takes between six and 12 months from the TSR’s hire date for the TSR to become proficient at the position and an additional 18 to 30 months of on-the-job training to master the skills necessary to perform their job.

included, this would weigh against finding that the TSR position is an exempt professional position because this additional training “more closely resembles the classic apprenticeship model -- a structured, systematic program of on-the-job supervised training coupled with a program of related instruction” that the court in *Ragnone* found was not appropriate for the learned profession exemption.

The TSR position does not qualify for the learned professional exemption because while the TSR performs work requiring advanced knowledge, that knowledge is not in a field of science or learning and is not acquired by a prolonged course of specialized intellectual instruction.

C. Penalties

Kenney is entitled to liquidated damages for PFL’s failure to pay overtime premium under the FLSA. Under Montana law, the liquidated damages provision of the FLSA, not the statutory penalty provisions of the state Minimum Wage and Overtime Act, apply to cases subject to FLSA. Mont. Code Ann. § 39-3-408. The FLSA has a liquidated damages provision, 29 U.S.C. § 216, which states:

Any employer who violates the provisions of Section 206 or Section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid . . . wages . . . and in an additional equal amount as liquidated damages.

For a number of years, the Portal to Portal Act has altered the liquidated damages provision of the FLSA, pursuant to 29 U.S.C. § 260:

In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 of such Act.

The hearing officer may refuse to award liquidated damages if the employer demonstrates it acted reasonably and in good faith. To demonstrate “good faith” under this exception, an employer must show “the act or omission giving rise to [the violation] was in good faith and that [it] had reasonable ground for believing that [its] act or omission was not a violation of the [FLSA].” *Brock v. Shirk* (9th Cir. 1987), 833 F.2d 1326, 1330. This test has both subjective and objective components. *Id.* Good faith requires an honest intention and no knowledge of circumstances which might have put the employer on notice of FLSA problems. *Id.* See also *Key West, Inc. v. Winkler*, 2004 MT 186, ¶¶ 29-32, 322 Mont. 184, 191, 95 P.3d 666, 671.

The hearing officer has no reason to doubt Field’s honest intention in circulating the memo in an attempt to determine whether the TSR position was FLSA compliant. However, it was not reasonable for PFL to believe it was in compliance without doing substantially more than circulating a handwritten memo asking each person to check whether they agreed that

PFL was in compliance. PFL offered no evidence that it did substantially more. Circulating the memo with its attached information, in and of itself, was insufficient to establish a reasonable ground upon which PFL could conclude it was in compliance with the FLSA regarding the TSR position. Had PFL acted reasonably and conducted a more thorough review and analysis of its compliance with the FLSA, it would have discovered that the TSR positions were not exempt.

D. Limitation Period

Kenney argues that because PFL's violation of the FLSA was willful she is entitled to unpaid overtime wages for the entire time she was employed at PFL. The FLSA limitation provision states:

Any action commenced on or after the date of the enactment of this Act [enacted May 14, 1947] to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act--
(a) if the cause of action accrues on or after the date of the enactment of this Act [enacted May 14, 1947]--may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, *except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;*

29 U.S.C. § 255 (emphasis added).

In interpreting the willfulness requirement necessary to impose a three-year statute of limitations, the Supreme Court held, in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (U.S. 1988):

We recognize that there is some language in *Trans World Airlines v. Thurston*, 469 U.S. 111, 83 L. Ed. 2d 523, 105 S. Ct. 613 (1985), not necessary to our holding, that would seem to permit a finding of unreasonableness to suffice as proof of knowing or reckless disregard, and thus that would render petitioner's standard an appropriate statement of the law. See *id.*, at 126. Our decision today should clarify this point: If an employer acts reasonably in determining its legal obligation, its action cannot be deemed willful under either petitioner's test or under the standard we set forth. If an employer acts unreasonably, but not recklessly, in determining its legal obligation, then, although its action would be considered willful under petitioner's test, it should not be so considered under *Thurston* or the identical standard we approve today.

PFL failed to show that it acted in good faith and that it had reasonable grounds for believing it was in compliance with the FLSA. Those failures do not meet the *Richland Shoe* test, because although PFL's actions were unreasonable, they were not reckless. PFL's negligence in conducting a meaningful review of the TSR position as it relates to the wage and hour laws was not a reckless disregard of the requirements of the FLSA. Moreover, PFL's reliance on senior management ignorant of FLSA requirements was negligent but not intentional, and therefore not willful.

The appropriate limitation period is therefore two years.

E. Attorney's fees

Kenney seeks attorney's fees for pursuing this claim. Attorney's fees are not available in this administrative proceeding. Mont. Code Ann. § 39-3-214; *Chagnon v. Hardy Construction Co.* (1984), 208 Mont. 420, 680 P.2d 932 and *Thornton v. Commissioner* (1980), 190 Mont. 442, 621 P.2d 1062 (attorney's fees are not recoverable at the administrative stage of a wage and hour claim but are available once the case is appealed to the district court).

F. Expert witness testimony

An expert testifies to opinions, either in the form of hypothetical assumptions (related to the facts of the case through other evidence) or actual opinions about the particular case. Such opinion testimony is proper when scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, and the expert is qualified by knowledge, skill, experience, training, or education. Rule 702, M.R.E. The expert may even testify in the form of an opinion as to an ultimate fact if the testimony is otherwise admissible. Rule 704, M.R.E. However, the expert may not testify about the ultimate determination for the fact-finder on a question of law or in circumstances where no specialized knowledge is necessary to make the ultimate determination from the evidence, and the expert is serving as an advocate for an outcome rather than as an aid to the understanding of the fact-finder. *Kizer v. Semitool, Inc.*, 251 Mont. 199, 205-07, 824 P.2d 229 (1991); *Helborg v. Modern Machinery*, 244 Mont. 24, 31-32, 795 P.2d 954, 958 (1990); *Mahan v. Farmers Union Central Exchange, Inc.*, 235 Mont. 410, 421; 768 P.2d 850, 857-59 (1989); *Crockett v. City of Billings*, 234 Mont. 87; 761 P.2d 813, 820 (1988); *Hart-Anderson v. Hauck*, 230 Mont. 63, 748 P.2d 937 (1988) quoting *Marx Co. v. Diners' Club*, 550 F.2d 505 (2nd Cir. 1977), cert. den. 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977).

The expert testimony offered by PFL did not assist the hearing officer in understanding the other evidence offered at hearing. The expert's testimony was not as persuasive or relevant as that of the other witnesses who because they were current or former employees of PFL had direct knowledge of PFL's operations and the duties of the TSRs.

IV. CONCLUSIONS OF LAW

1. The Hearings Bureau for the State of Montana's Department of Labor and Industry has jurisdiction over this case.
2. At all times relevant to these proceedings, PFL was and is engaged in interstate commerce, and therefore, the Fair Labor Standards Act ("FLSA"), not state law, applies to and governs the determination of the issues in this matter.
3. PFL violated 29 U.S.C.A. § 207(a)(1) when it failed to pay Kenney overtime wages when she worked in excess of 40 hours in a work week.
4. The TSR position is not plainly and unmistakably within the terms and spirit of the administrative or the learned profession exemptions of the FLSA. Therefore, TSRs are not employed in a "bona fide executive, administrative, or professional capacity."
5. The statute of limitations for Kenney's cause of action against PFL is two years because PFL negligently, rather than willfully, violated the FLSA.
6. As a result of PFL's violation of the FLSA, PFL owes Kenney unpaid overtime wages in the amount of \$8,680.25.
7. PFL did not establish that it acted in good faith and that it had reasonable grounds for believing that its conduct did not violate the FLSA and, therefore, PFL owes Kenney liquidated damages in the amount \$8,680.25.

V. ORDER

PrintingForLess.Com, Inc. IS HEREBY ORDERED to tender a cashier's check or money order in the amount of \$17,360.50, representing \$8,680.25 in unpaid wages and \$8,680.25 in liquidated damages, payable to the claimant, Julia Caruana, and delivered to the Wage and Hour Unit, Employment Relations Division, P.O. Box 6518, Helena, Montana 59604-6518 no later than May 19, 2008. PrintingForLess.Com, Inc. may deduct applicable withholding from the wage portion but not the penalty portion.

DATED this 18th day of April, 2008.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also Mont. Code Ann. § 2-4-702.