IN THE MATTER OF ARBITRATION BETWEEN:

NATIONAL COUNCIL OF HUD LOCALS 222, AFGE, AFL-CIO,	)	Arbitrator Sean Rogers
Union,	)	Issue: FLSA Overtime Damages
v.	)	
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,	)	**ORAL ARGUMENT REQUESTED**
Agency.	)	

UNION'S MEMORANDUM IN OPPOSITION TO AGENCY'S
"MOTION IN LIMINE" RE: DAMAGES

INTRODUCTION

The Union, AFGE Council of Locals 222, by and through its counsel, Snider & Associates, LLC, respectfully submits this memorandum in opposition to the Agency's motion in limine regarding damages. The Agency's motion is not a proper "motion in limine" – it does not seek to strike or prevent any evidence at hearing. It is actually a Motion for Summary Judgment, which would be inappropriate at this time. The Agency is attempting to litigate the damages issue without a hearing. If taken as a motion for summary judgment with regard to proper method of overtime compensation then the motion should be denied as premature. The Union reserves the right to add expert witness testimony if it is taken as a Summary Judgment motion. In fact, the Union's **Motion for Summary Judgment on Damages** addresses many of these issues.

The Agency is attempting to cut its liability for "suffered or permitted" overtime by 2/3, cheating employees further out of overtime pay they have been deprived for decades. The Agency makes the following preposterous statement in its Conclusion:

> HUD acknowledges the obvious--Agency employees who were classified as nonexempt were paid traditional time-and-a-half overtime. This is because HUD is more generous than the FLSA and OPM's regulations require and HUD has not availed itself of the half-time method for those workers it has classified as nonexempt. It might even be true that but for the alleged misclassification, HUD's employees would have received overtime pay at the generous timeand-a-half rate.

The Agency does not make this argument in good faith. No Federal GS employee has ever been paid on a fluctuating workweek rule method – and the Agency cites no precedent for this wrong assumption. Applying the rule in this case would be outright theft from these employees, as well as contrary to law. Interestingly, OPM's own new 2006 proposed regulations implementing the FLSA do not reference anywhere the Rule the agency urges to be applied here. See http://www.opm.gov/fedregis/2006/71-052606-30317-a.htm. Compensation was not "paid" for suffered or permitted work, and therefore cannot be included in one's salary.

I. The appropriate remedy for the misclassified employees in this matter is compensation at the overtime rate of 1.5 times the regular rate of pay because the Agency did not meet the fluctuating work week rule.

The employees in this matter were all misclassified as exempt by the Agency for the relevant time period of the arbitration. The Agency contends that in misclassified exemption cases the proper remedy is to use the fluctuating work week rule. The Agency finds support in its argument through a number of misapplied cases and one Supreme Court decision that does not address the issue but rather merely defines

regular rate as it applied to the fluctuating work week rule. The Union does not dispute that the FLSA does support use of the fluctuating work week rule in certain narrow situations, but that is only where employees receive fixed salaries and work varying hours week to week such that the fixed hourly rate will change depending on the number of hours worked each week, and, as noted, only under certain narrow circumstances. But this is simply not the case for the employees in this arbitration.

A. The fluctuating work week rule does not apply to the employees in this arbitration.

The Agency fails to properly define the fluctuating work week rule in its motion. Under the FLSA, before an employer can pay employees under the "fluctuating work week" plan, the employer must meet the following five (5) requirements:

(1) employee's hours must fluctuate from week to week;

(2) employee must receive fixed weekly salary that remains the same regardless of number of hours employee works during week;

(3) the fixed amount must be sufficient to provide compensation at regular rate not less than legal minimum wage;

(4) employer and employee must have clear, mutual understanding that employer will pay employee the fixed weekly salary regardless of hours worked; and

(5) employee must receive 50% overtime premium in addition to fixed weekly salary for all hours that employee works in excess of 40 during that week.

See Fair Labor Standards Act of 1938, § 7(a)(1), 29 U.S.C.A. § 207(a)(1); 29 C.F.R. § 778.114. As demonstrated below, the Agency did not meet all prongs of the five part

test,[1] and therefore fails the test and is prohibited from utilizing the Rule to reduce its liability in this case.

1. Employees hours do not "regularly" fluctuate from week to week.

The HUD employees in this arbitration do not work fluctuating work weeks as required by the rule. The Agency boldly concludes that the employees at HUD work hours that vary from week to week. This is simply not true, there is no factual basis to this claim and the Agency has attached no affidavits to its Motion supporting this claim. The fluctuating work week rule does not cover irregular or infrequent fluctuations in the work week, as those experienced by the employees at HUD, but rather regular (one would even say planned) fluctuations.

The CBA between the parties specifically provides that the basic work week is 40 hours and that is how many hours employees are expected to work each week. This rule is not intended to apply to slide and glide employees that can arrive and leave anytime within a certain window during the day. Nor does it even apply to the irregular or occasional overtime work that causes the tour of duty to run over 40 hours per week. This rule applies to employees, for example, that regularly work 30 hours one week and then 50 hours the next.

In fact, the fluctuating workweek rule could not apply to the employees at issue since they would be docked pay if they worked less than 40 hours per week.

The cases cited by the Agency all deal with EMS, firefighters and/or law enforcement officers that work regular schedules based on shifts of on and off duty work. The hours in those cases actually fluctuate (in a planned manner) from week to

[1] The Union does not contest that the Agency met the third prong of the test.

week based on when the first on duty shift begins relative to the work week. Unlike those employees, the employees in HUD all work Monday – Friday and are expected to and do work 40 hours per week. Any overtime work performed is not a fluctuation in the work week; it is suffered or permitted overtime. The Agency has not cited one case directly on point from any Arbitrator or the FLRA. These FLSA OT cases have been litigated in the Federal Sector for decades and not once has any Arbitrator or the Authority applied this Rule to Federal employees – for a reason: it does not apply.

The Agency cited a number of cases which do not apply to this case. For example, *Overnight Motor* involved an employee that worked irregular hours for a fixed salary. *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572 (1942). His duties and responsibilities involved wide fluctuations in time required to perform his job. *Id.* at 1218. The facts in that case demonstrated that his average work week was 65 hours and varied between 75 and 80 at times. *Id.*

Zumerling v. Devine applied to employees that worked fluctuating work weeks. The court there specifically excluded employees in the General Schedule (GS) classification -- such as the Grievants -- when it stated that the Plaintiffs were covered, "in contrast to the typical general schedule employee who is scheduled for a 40 hour work week," such as those employees involved in this matter and that work at HUD. *Zumerling v. Devine*, 769 F.2d 745, 746 (Fed. Cir. 1985). The case specifically addresses the fact that firefighters and law enforcement officers work different schedules than most general schedule government employees. The government employees at HUD do not work "fluctuating" work weeks under the caselaw and

regulations. They work a regular 40 hour schedule plus uncompensated (suffered or permitted) overtime.

Samson v. Apollo Resources also applied to employees that were paid under a fluctuating work week primarily because they may be called upon to work a varied number of hours each week. *Samson v. Apollo Resources, Inc.*, 242 F.3d 629, 638 (5th Cir. 2001). The case holds that employees do not need to know the exact manner that the overtime payment is calculated or made. *Id.* But the case presumes that employees understand that they <u>will</u> be paid overtime. *Id. See also Bailey v. County of Georgetown*, 94 F.3d 152, 156 (4th Cir. 1996). That <u>cannot be the case</u> with the employees at HUD, because they ostensibly understood that they were <u>not</u> entitled to any overtime compensation for “suffered or permitted” work, while exempt.

It is clear that the employees in this matter understood they were compensated for working fixed 40 hour schedules and any fluctuations in the schedule were irregular and not compensated. Now that they are non-exempt, however, in order to make them whole the Arbitrator should (as have <u>all</u> Federal Sector arbitrators who addressed this issue in the past) award a <u>make whole</u> remedy, not a lesser remedy.

2. <u>Employees were not paid the fixed weekly salary regardless of number of hours worked.</u>

The second prong requires employers to pay employees the fixed weekly salary <u>regardless of leave</u>, even if for personal reasons. *See* Wage-Hour Opinion Letter No. 2161 (May 28, 1999); Wage-Hour Opinion Letter No. 479 (May 18, 1966). While the code does allow certain leave policies and deductions for discipline, it does not allow the employer to deduct wages based on quality and quantity of work. The employees at

HUD were required to use leave status to substitute for missed work hours each week. While the Union does not object to the use of sick leave, annual leave, credit hours and/or compensatory time, if an employee did not have any approved leave remaining then he/she must use leave without pay (LWOP) and would be paid less than the fixed weekly salary, not regardless of, but precisely because the employee did not work 40 hours. *See* Wage-Hour Opinion Letter No. 2065 (December 24, 1997). This leave policy in itself prevents the Agency from claiming the fluctuating work week rule because there were times that employees were not paid the fixed weekly salary regardless of number of hours worked. *See also* Wage and Hour Opinion Letter No. FLSA2006-15 (May 12, 2006).

3. The employer and employee did not have a "clear, mutual understanding" that the employer will pay the employee the fixed weekly salary regardless of hours worked.

The employer classified the employees as exempt and did not even think the agency was under a duty to pay overtime wages for hours in excess of 40. Yet, the agency now contends that the whole time there was a "mutual agreement" that the employees were under the fluctuating work week rule. The CBA provides just the opposite. The basic workweek was 40 hours. Employees were ostensibly only expected to work 40 hours, unless workload otherwise required on an irregular basis.

The CBA excerpt alluded to by the Agency does not apply to exempt employees. Agency's Motion at 7, *see also* CBA para. 18.04. It clearly applies only to FLSA non-exempt employees and does not show a clear, mutual understanding as to any of the exempt employees involved in this matter. Furthermore, the Agency misapplies the clear, mutual understanding prong entirely. It is not whether the employee knows

he/she is salaried, but rather whether they know the fixed salary is for all hours worked in any given work week. The employees in this case had a clear understanding that the fixed salary only covered 40 hours each work week – they were paid nothing for the excess hours.

The statutory language found in 778.109 and 551.511 does not mean that the regular rate of a salaried employee compensates him/her for the straight time portion of the overtime. The language clearly provides the regular rate is computed based on the total number of hours for which the compensation was paid. The Agency intended the fixed salary to compensate employees for 40 hour work weeks; the Agency did not believe it even owed these exempt employees any compensation for hours worked in excess of 40 which were "suffered or permitted."

The employees at HUD understood that they are salaried employees and paid a fixed rate for 40 hours of work per week. Contrary to the Agency's belief, the locality pay tables for compensation of general schedule employees is stated in both terms of annual salary and basic hourly rates based on 40 hour work weeks and OPM does provide similar calculations for hourly rates. Furthermore, the OPM table itself provides overtime rates, which are calculated to be exactly 1.5 times the base rate, except where capped by statute.

4. The employees at HUD were not paid the required 50% overtime premium for hours that employees worked in excess of 40, which would be necessary for the Agency to qualify for the fluctuating workweek rule.

It is interesting to note that this is the one prong of the test that the Agency failed to mention. The Agency did not compensate any of the employees in this arbitration with 50% overtime premium for hours worked in excess of 40.

While the agency notes that it did not matter that the firefighters in *Zumerling* fell under Sec. 7(k) regarding when overtime hours accrued, it did matter that these employees were firefighters and not subject to the general schedule of forty hours per workweek as was the case for HUD employees. Every court that the Agency cites as applying the half-pay method of payment concluded that the employees fell under the five-prong fluctuating workweek rule. Yet, the Agency in this matter glossed over only three of the five requirements and failed to even address the issue that employees were not contemporaneously paid the 50% overtime premium owed under the fluctuating workweek rule. **Providing that payment now retroactively is not sufficient**. *See Cowan v. Treetop Enterprises*, 163 F.Supp.2d 930 (M.D. Tenn. 2001).

B. The proper method of payment for overtime work is not the half-time approach adopted by the Agency, because the fluctuating work week rule does not apply.

1. Unlike the Employees in the Case Law Cited by the Agency, the Employees in this Arbitration Do Not Work a Fluctuating Work Week Due to Off-Duty Days

The Agency overly relies on cases, like *Flood* and *Blackmon*, that are inapplicable and distinguishable. In *Flood*, the court addressed a case that involved EMS workers that worked regularly recurring cycles of on-duty and off-duty hours. While working a fixed schedule, the employee's hours actually fluctuated on a planned basis in that case because the total hours worked each week depended on the number of scheduled on-duty work days that fall within a given week. *See also Griffin v. Wake County*, 142 F.3d 712 (1998) (finding employee subject to fluctuating work week because workweeks did fluctuate and employer provided employee with memorandum outlining payment method and samples). Furthermore, the employees in that case were provided a memorandum of understanding with regard to the fluctuating method of payment.

Unlike the employees in *Flood,* the exempt employees at HUD did not have a clear, mutual understanding with regard to fluctuating workweeks. In fact, the workweeks did not fluctuate simply because some employees worked longer hours. The fixed schedules at HUD were not based on on-duty and off-duty days and did not cause any employees to work more than 5 days each week.

2. <u>The Fluctuations in the HUD Employees' Schedules Are Not Consistent Enough to Justify Use of the Fluctuating Work Week Pay Method</u>

The Wage and Hour Division of DOL has provided that an employer can use the fluctuating pay method to compensate employees that work alternating and fluctuating workweeks pursuant to a fixed schedule. In that case, the employee alternated working 43 and then 51 hours every other workweek. Wage and Hour Letter (May 16, 1966). That is not the case in this matter. The fluctuations in the general schedule of HUD employees are irregular and not pursuant to a fixed schedule. Further, HUD has not had its fluctuating workweek "Plan" approved, has not circulated it to employees and has not had employees agree to it.

Further, the Agency's reliance on the first circuit case of *Valerio v. Putnam Associates*., 175 F.3d 35 (1st Cir. 1999), is misplaced. The employee in that case was hired to work from "8:30 until whenever," knew the employer was not paying overtime for hours in excess of 40 and regularly worked more than 40 hours per week.

Courts do not endorse the fluctuating workweek rule simply to reduce damages or potential liability of the employer. The courts that apply the rule actually find that the employer <u>met</u> the 5 prong test. The Union does not contest the <u>existence</u> of the fluctuating workweek rule. The Union merely disputes the <u>application</u> of the fluctuating workweek rule to the employees in <u>this</u> matter because they did not work regular, planned fluctuating work weeks and there was no clear, mutual understanding with regard to the salary compensating them for all hours worked.

The Agency does nothing more than make a bold and general statement supported by cherry-picked case law that does not apply to the case at bar. The Union

does not contest that the fluctuating work week rule is accepted and practiced in cases where applicable. Yet, none of the Agency's case law supports the contention that "half-time is universally recognized as the proper method of payment for salaried non-exempt employees."

In *Bailey*, the court only held that the district court's instruction with regard to whether employees must have a clear, mutual understanding of the way overtime is calculated was lawful. *Bailey v. County of Georgetown*, 94 F.3d 152 (4th Cir. 1996). The court did not address the facts of the case de novo. Furthermore, the facts are not applicable to the employees in this matter:

> Each deputy sheriff is paid a specified annual salary; no additional compensation is paid unless the deputy works more than 171 hours during a given twenty-eight-day cycle. For each hour in excess of 171 hours worked by a deputy during such a cycle, the deputy receives overtime pay. The overtime rate to be paid to the deputy is determined by dividing his or her base salary for that twenty-eight-day period by the total number of hours worked, yielding an adjusted hourly rate of pay. An overtime premium of one-half of that adjusted hourly amount is then paid for each hour worked in excess of 171 hours.
> *Id.* at 153-154.

The employees in *Bailey* were law enforcement officers (sheriffs deputies) and worked fluctuating work weeks because the payment plan was based on cycles of twenty-eight days. *See also Knight v. Morris*, 693 F. Supp. 439, 445-446 (W.D.V.A. 1988) (law enforcement officers fell under fluctuating work week rule because they "testified that they understood that their salary represented their total straight-time salary, regardless of the hours they were required to work in a given period").

Furthermore, the employees were contemporaneously paid overtime compensation for the excess hours at the 50% premium rate. On the other hand, the

employees at HUD worked general schedule 8 hour tours of duty, five days a week and the Agency did not ***contemporaneously*** pay the 50% overtime premium for excess hours.

3. The Fluctuating/ Half Pay Method of Payment is Not Proper For *Misclassified* Employees

Contrary to the Agency's bold assertion, not every case that considered improper classification of a non-exempt employee applied the fluctuating/half-pay method of payment. To the contrary, a DC Federal Court[2] has held exactly the opposite. *See, e.g., Rainey v. American Forest and Paper Association*, 26 F.Supp.2d. 82 (D.D.C. 1998); *See also Cowan*, *supra*. In *Rainey*, the court concluded that there cannot be a clear, mutual understanding if the employer believed the employee was exempt and not entitled to overtime compensation. This term cannot apply, therefore, retroactively – logically or practically. The fluctuating work week rule is only applicable to currently non-exempt employees that are entitled to overtime compensation.

The *Rainey* court reasoned that if the parties had agreed that the employees' compensation was subject to the fluctuating workweek rule then the employees would be classified as non-exempt. The court therefore dismissed the defendant's motion for summary judgment on damages. *Cowan* elaborated on *Rainey*'s ruling that classifying an employee as exempt precludes the clear mutual understanding necessary for the fluctuating work week payment method to apply. According to the *Cowan* decision, if an employee is misclassified as exempt, there cannot be a clear mutual understanding between the employer and the employee that overtime premiums would be paid, nor can there be contemporaneous payments of 50% overtime.

[2] The Union notes that all hearings in this case are all taking place in the District of Columbia.

> To be sure, in *Blackmon v. Brookshire Grocery Co.,* 835 F.2d 1135 (5th Cir.1988), the Fifth Circuit applied Section 778.114(a) retroactively, but this Court agrees with *Rainey* that the Defendants' prior assertion of exempt status for these employees and the lack of contemporaneous payment of the 50% overtime to unit managers bar the Defendants' reliance upon Section 778.114(a).
>
> The structural framework of the Act and the DOL regulations undercuts defendant's claim that it had a "clear mutual understanding" with plaintiff. Defendant has maintained consistently that ... plaintiff was employed in an administrative capacity that rendered her exempt from section 207(a) of the Act. If plaintiff were in fact exempt, she clearly would not have been entitled to any overtime compensation, no matter how computed, as the provisions for overtime compensation apply only to employees not exempt from section 207(a). Yet defendant insists that all along it had a clear mutual understanding with plaintiff, one defined by the regulations as encompassing an understanding that overtime premiums would be paid. See 29 C.F.R. section 778.114(a) ("a clear mutual understanding ... that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek..") Defendant cannot credibly argue both sides of the same coin.
>
> If defendant believed that plaintiff was exempt from section 207(a), such that she was entitled to no overtime compensation, then it was not possible for it to have had a clear mutual understanding with plaintiff that she was subject to calculation method applicable only to non-exempt employees who are entitled to overtime compensation.

Cowan, 163 F.Supp.2d at 941-942, *citing*, *Rainey*, 26 F.Supp.2d. at 101-102. *See also Dingwall v. Friedman Fisher Associates,* 3 F.Supp.2d 215 (N.D.N.Y.1998) (employer failed to meet fluctuating work week rule because no evidence that misclassified employee understood salary was intended to compensate him for every hour worked; employee manuals distributed at various times during plaintiff's employment all state that “staff personnel are normally expected to work a 40 hour week….”). *See also Troutt v. Stavola Brothers, Inc.,* 905 F.Supp. 295, 300 (M.D.N.C.1995), *aff'd,*107 F.3d 1104 (4th Cir.1997) (Section 778.114 inapplicable because “Defendant has failed to establish that there was any ‘clear mutual understanding’ regarding fluctuating hours.”).

Therefore, based on clear local precedent, misclassifying employees as exempt precludes an employer from asserting that there was a mutual understanding or that they contemporaneously paid the additional 50% premium required for qualification for the Rule. Accordingly, the fluctuating half pay method of payment cannot be used in the case of the employees in this arbitration who were considered by the Agency to be exempt.

The Agency would be urging the Arbitrator to find a clear, mutual understanding based on an implied-in-fact agreement. *See Mayhew v. Wells*, 125 F.3d 216 (4th Cir. 1997). But there are no additional facts to support the position that the employees understood the salary was intended to compensate for any of the hours above 40.

The Agency's calculations based on half-time overtime premium were correct, if the fluctuating work week rule applied. *See* Agency's Motion at 10-11. However, with regard to the employees at HUD, the normal overtime rate is applicable. In the case of the hypothetical GS-10, Step 1 employee with base salary of $42,040 that works 40, 44, 48 and 50 hours, his/her regular hourly rate of pay and overtime compensation in each week would be as follows:

Hours Worked	***Regular Rate***	***OT Hours***	***Overtime Pay***	***Total Pay***
40	$810 ÷ 40 = $20.25	0	n/a	$810.00
44	$810 ÷ 40 = $20.25	4	4 x 1.5 x $20.25 = $121.50	$931.50
48	$810 ÷ 40 = $20.25	8	8 x 1.5 x $20.25 = $243.00	$1053.00
50	$810 ÷ 40 = $20.25	10	10 x 1.5 x $20.25 = $303.75	$1113.75

The basic rate of $810 equals the regular rate for all weeks because the employee is only being compensated for 40 hours of work. If that employee is later found to be non-exempt and entitled to overtime pay, the calculation for overtime must use the 1.5 premium rate because the straight time portion of the overtime compensation has not been paid.

II. **The Agency is not entitled to deny legitimate overtime payments to HUD employees that were misclassified based on the erroneous claim that this time falls under other allowances.**

The Union is not asking for double compensation, but rather only asks that the HUD employees receive a "make whole remedy," which would include all overtime payments denied to them due to the Agency's misclassification. Because the Agency misclassified employees, they were denied the **choice** between compensatory overtime and overtime. Therefore these employees have a right to the overtime that they would have been paid.

Under Title 5, employees are not entitled to a choice between compensatory time and overtime, while FLSA covered employees are entitled to overtime pay and, **at their express election**, to compensatory time. AFGE 3614 and EEOC, **60 FLRA 601** (2005).

Therefore, an Agency found to have misclassified an employee as FLSA exempt must, to make the employee whole, pay the employee, for each hour of compensatory time earned during the relevant time period, their overtime rate offset by the amount of their straight time / hourly rate (ie, the amount of compensation they received as comp

time). ***U.S. Department of the Navy, Naval Sea Systems Command and IFPTE,*** 57 FLRA 543 (September 28, 2001)(**"NSSC"**).

The Authority explained in **NSSC:**

> The regulation governing compensatory time off for employees covered by the FLSA (5 C.F.R. ' 551.531(a)) is significantly different in that employees may elect compensatory time. In promulgating 5 C.F.R. ' 551.531(a), the Office of Personnel Management (OPM) explained that "[t]he rules governing compensatory time off requested by an employee are not the same under both parts 550 and 551." 56 Fed. Reg. 26,340 (May 3, 1991). Distinguishing the rule under 5 U.S.C. ' 5543(a)(2), OPM stated that "there is no legal authority for an agency to require that a nonexempt employee take compensatory time off in lieu of overtime pay under the FLSA." Instead, under 5 C.F.R. ' 551.531(a), compensatory time off for employees covered by the FLSA is "[a]t the request of an employee."
>
> There is no evidence in this case that the Agency provided employees with a choice of whether to elect compensatory time off, in lieu of overtime pay, as required under 5 C.F.R. § 551.531(a). We reject the Agency's claim that "the Union in this case admitted that compensatory time off was properly requested" as unsubstantiated. Exceptions at 5. First, the portions of the transcript of the arbitration hearing on which the Agency relies do not address the specific point of whether any of the grievants in this case requested compensatory time off. Second, at the time the Agency provided compensatory time to the grievants, the Agency was treating the grievants as though they were covered by title 5, not title 29. As stated above, for employees covered by title 5 (specifically, under 5 U.S.C. § 5543(a)(2)), the decision to require GS-12 employees to take compensatory time off rests solely with an agency. In this case, the record reflects that the Agency did not give the grievants the choice between overtime pay and compensatory time off to which they were entitled had they been considered covered under title 29, but essentially required the grievants to take compensatory time off.
>
> Even assuming that some of the grievants requested compensatory time off, however, nothing in the record before us shows that such requests were based on the employees, understanding that under title 29 they had a choice between overtime pay and compensatory time off. The absence of such a showing in the record is not surprising, inasmuch as the Agency was operating solely under title 5 in compensating the employees for the overtime worked, and title 5 does not afford the employees such a choice.
>
> Since the grievants were not given the choice of electing compensatory time off or overtime pay, as required under the FLSA, and because the FLSA provides a

> statutory basis for granting employees overtime pay at the rate of time and one-half, the award, which provides the grievants with the difference between straight time and time and one-half, is not contrary to law. Note 14
>
> > 14. We are aware that, under 5 C.F.R. § 551.501(a)(7), an employee who takes compensatory time off is not eligible to receive overtime pay. However, this exclusion from the overtime pay provisions of the FLSA applies when the employee's compensatory time off is granted under the compensatory time off provision of the FLSA, namely, 5 C.F.R. § 551.531. If the Agency had correctly classified the grievants as covered under the FLSA for the periods of the overtime worked, and if the employees had properly been given a choice and had requested and taken compensatory time off, there would be no basis, under law, to grant any additional compensation. Here, however, the grievants were not given the choice to which they were legally entitled under title 29, since their compensatory time off was erroneously granted under the overtime provisions of title 5. Consequently, 5 C.F.R. § 551.501(a)(7) does not operate to bar the additional differential to the grievants ordered by the Arbitrator.
>
> We further note that, in an analogous situation, the Comptroller General found that an employee who was entitled to overtime pay under the FLSA, but was erroneously granted compensatory time off under title 5 instead, was entitled to an additional amount of overtime compensation under the FLSA. *See Matter of Marion D. Murray,* 59 Comp. Gen. 246 (1980) (*Murray*). There, as here, the amount of overtime compensation was to be offset by the value of the compensatory time off….the appropriate remedy consists of the payment of overtime pay, calculated under title 29, reduced by the value of the compensatory time off.

Therefore, under the FLSA and based on clear and unambiguous FLRA precedent, an employee must receive overtime for any hours worked beyond their tour of duty, unless they are given the choice and expressly **choose** to have that time counted as compensatory time. Because the misclassified employees were denied the choice of whether their uncompensated overtime would be considered overtime or as compensatory time/credit hours, and they were treated as FLSA Exempt employees during the time period that they earned the compensatory time, they are entitled to the half time that they would have accrued had they been given the overtime option.

Therefore, an employee who worked one hour beyond their tour of duty and was compensated with a credit hour (and denied the choice to have this counted as overtime), should receive an additional payment of half their salary for that hour since they would have received the time and a half rate had they been given the choice of counting it as overtime that they were entitled to.

Therefore, all HUD employees that were misclassified are entitled to compensatory time damages, as explained above.

Rounded Hours

The Union agrees that some claims are so de minimis that they cannot result in a reasonable claim but the Agency has cited no law requiring that aggregation of such time cannot be allowed. Further, since the Agency failed to keep accurate time records, the Union should not be punished for the Agency's sins, and therefore any time claimed by employees should be fully credited as a just and reasonable inference.

Religious Compensatory Time and Credit Hours

The Union agrees that RCT is a full hour-for-hour offset for premium pay overtime, as are proven credit hours. We see no need for briefing these matters, wasting the Government's time and money or the Arbitrator's time or efforts, since we do not disagree. The Agency should leave out such things from its Brief.

CONCLUSION

For the foregoing reasons, the Arbitrator should grant judgment in favor of the Union.

Respectfully Submitted,

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