BEFORE
SEAN J. ROGERS
ARBITRATOR:

In the Matter of Arbitration Between:
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 222, AFL-CIO,

***Union*,**

and

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

***Agency*.**

AGENCY'S MEMORANDUM IN RESPONSE TO THE UNION'S OPPOSITION TO THE AGENCY'S MOTION IN LIMINE

The United States Department of Housing and Urban Development ("HUD", "Department" or "Agency"), through its counsel, Epstein Becker & Green, P.C., respectfully submits this memorandum in response to the Union's opposition to the Agency's motion in limine regarding damages to avoid potential double recovery of wages and overtime by Union employees.

On a preliminary note, it is unfortunate that the Union has chosen to continue its practice of putting almost as much effort into disparaging the messenger as it puts into debating the message. Contrary to the claims on page 2 of the Union's brief, the Agency's arguments are neither "preposterous" nor lacking "good faith." Indeed, if the Union had restrained its rhetoric, it might have caught its own self-contradictory assertion in the very first paragraph of its brief in which it first asserts that a motion for summary judgment regarding damages is "inappropriate at this time," and then states that the Union's own motion for summary judgment on damages has addressed many of the same issues raised in HUD's motion.

It also is unfortunate that the Union chooses to expend resources quibbling over the name of HUD's motion. *See* Union's Opposition at 1. The issues raised in HUD's motion are the proper subject of a "motion in limine," i.e., "a request for guidance [from] the court regarding an evidentiary question." *Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995). A motion in limine has been defined as "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Gage v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 365 F.Supp.2d 919, 926 (N.D. Ill. 2005) (citing *Luce v. United States*, 469 U.S. 38, 40 n. 105 (1984)). Here, the purpose of HUD's motion is to exclude anticipated prejudicial evidence by narrowing the issues that must be addressed in the upcoming damages hearing. For example, by seeking a ruling that the only proper basis for recovery is half-time and that employees may not recover to the extent that they already received compensatory time-off valued at more than their overtime entitlement (i.e., "half-time"), the Agency seeks to preempt the Union from introducing prejudicial evidence of significantly larger amounts that employees erroneously believe they are due. In addition, HUD's motion will promote judicial economy by reducing the quantity of evidence that the Arbitrator will have to receive and consider.

In any case, whether HUD's motion is called a motion in limine or a motion for summary judgment, it should be granted. The reasons are as follows:

The Union freely admits that the "half-time" or "fluctuating workweek" method of pay is a legal one. Union's Opposition at 3 & 11. Thus, the Office of Personnel Management ("OPM") ***could*** adopt the half-time method as an *a priori* method of payment for salaried federal employees. By the same token, HUD admits that OPM has not in fact adopted the half-time or fluctuating workweek method of pay as an *a priori* method of payment, i.e., a method of pay to

be used in the first instance for nonexempt employees. None of that is in dispute. The only dispute here is whether half-time is the preferred method of ***retroactive*** compensation in so-called "failed exemption" cases, i.e., where a salaried employee was wrongly denied overtime pay because he was treated as exempt but lacked the necessary exempt "duties."

The Union appears to admit that ***most*** "failed-exemption" cases have used the half-time method to calculate back pay. *See* Union's Opposition at 13 ("not every case . . . applied the fluctuating/half-pay method of payment") (underlining in the original).[1] Even HUD does not claim that 100% of courts use the half-time method in failed exemption cases.[2] However, in contrast to the small number of contrary cases adduced by the Union, the fact remains as stated by the court in *Sutton v. Legal Services Corp.*, 11 W.H. Cas.2d 401, 404 (D.C. Sup. 2006): "Virtually every court that has considered the question" has upheld the remedial use of half-time in failed exemption cases, including the Supreme Court. To demonstrate this fact, we provide below a sampling of cases in which compensation using the half-time method was found to be the appropriate remedy for a failed exemption:

- *Overnight Motor Transportation Co. v. Missel* , 316 U.S. 572 (1942) (failed Motor Carrier Act exemption);
- *Valerio v. Putnam Assoc. Inc.*, 173 F.3d 35 (1st Cir. 1999) (failed administrative exemption);
- *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135 (5th Cir. 1988) (failed executive and administrative exemptions);
- *Yadav v. Coleman Oldsmobile*, 538 F.2d 1206 (5th Cir. 1976) (failed executive and administrative exemptions);

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[1] The Union improperly calls the "half-time" method the "half-pay" method (*id.*), perhaps with the intention of prejudicing the Arbitrator. In fact, the half-time method makes the employee whole because he or she was already paid a salary for all hours worked including the overtime hours.

[2] HUD did use the phrase "almost universally" (Motion at 17), which was a correct statement, as shown here.

- *Fegley v. Higgins*, 19 F.3d 1126, 1130 (6th Cir. 1994) (failed independent contractor test);
- *Yellow Transit Freight Lines, Inc. v. Balven*, 320 F.2d 495 (8th Cir. 1963) (failed Motor Carrier Act exemption);
- *Zumerling v. Devine*, 769 F.2d 745 (Fed. Cir. 1985) (failed 7(k) partial exemption);
- *Mitchell v. Abercrombie & Fitch*, 428 F.Supp.2d 725 (S.D. Ohio 2006) (failed executive exemption);
- *Perez v. RadioShack Corporation*, 11 W.H. Cas.2d 163 (N.D. Ill. 2005) (failed executive exemption);
- *Tumulty v. Fedex Ground Package System, Inc.*, 2005 WL 1979104 (W.D. Wash. 2005) (failed unspecified exemption as well as independent contractor test);
- *Saizan v. Delta Concrete Products Co.,* 209 F.Supp.2d 639 (M.D. La. 2002) (failed unspecified exemption);
- Donovan v. Castle Springs, LLC, 2002 WL 31906183 (D. N.H. 2002) (failed executive exemption);
- *Quirk v. Baltimore County, Maryland*, 895 F. Supp. 773 (D. Md. 1995) (failed professional exemption);
- *Donovan v. Maxell Prods.*, 26 W.H. Cas. 485, 488 (M.D. Fla. 1983) (failed executive exemption);
- *Rau v. Darling's Drug Store, Inc.,* 388 F. Supp. 877 (W.D. Pa. 1975) (failed executive and administrative exemptions);
- *Sutton v. Legal Services Corp.*, 11 W.H. Cas.2d 401 (D.C. Sup. 2006) (failed exemption); and
- *Goodrow v. Lane Bryant, Inc.*, 732 N.E.2d 289 (Mass. 2000) (failed executive exemption).

As the Arbitrator can see, these cases come from a wide range of jurisdictions--federal and state, trial and appellate. And this list is not complete; indeed, the Supreme Court acknowledged in its *Overnight* decision that it was merely adopting a remedy that already had been adopted by the courts of appeal for the Fifth, Sixth and Eight Circuits. 316 U.S. at 580.

Given the 64-year existence of Supreme Court precedent on the subject, not to mention the plethora of other cases reaching the same conclusion in the context of all of the white collar exemptions, it is unclear how isolated trial courts could even have the *chutzpah* to differ. In any case, the arguments advanced by the Union which rely on the opinions of those isolated trial courts should be rejected.

On page 4 of its brief, the Union asserts that the half-time method is available only when the fluctuating workweek is planned. Not surprisingly, the Union cites no case for that proposition, since there is no such rule. In any case, such a rule would be irrelevant to this case because this case is not about whether the half-time method may be adopted *a priori*. Again, the only issue is whether half-time is the preferred method of ***retroactive*** compensation in so-called "failed exemption" cases. As just noted, the Union appears to admit that ***most*** "failed-exemption" cases have used the half-time method to calculate back pay. Indeed, the U.S. Supreme Court's 1942 decision in *Overnight, supra*, adopted half-time as the proper means of calculating remedial overtime pay for salaried employees long before there was a Department of Labor ("DOL") rule allowing half-time as an *a priori* method of payment. *Teblum v. Eckerd Corp. of Florida, Inc.*, 11 W.H. Cas.2d 382, 392 & n.15 (M.D. Fla. 2006). Thus, by trying to apply every nuance of 29 C.F.R. §778.114 to this case, the Union is in fact putting the cart before the horse. Put another way, ***HUD has a common law right to pay half-time as a remedial measure, and there is no regulation or applicable binding precedent that says otherwise.***[3]

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[3] It thus is irrelevant also that there is no direct parallel to section 778.114 in the OPM regulations. Use of half-time as a remedial measure is based on the Supreme Court's 1942 interpretation of the FLSA language itself, not on any regulation. *See Valerio, supra* 173 F.3d at 40 (half-time was appropriate remedy under Massachusetts law even though Massachusetts has no half-time regulation because it is implied by the law itself). Nonetheless, it is worth noting that the same calculation of "regular rate" that led the Supreme Court to the result it reached in *Overnight* is found also in OPM's regulation, 5 C.F.R. §551.511(a), which states:

(continued)

Also on page 4 of its brief, the Union asserts that HUD's employees are not salaried "since they would be docked pay if they worked less than 40 hours per week." First, this is an overstatement, since it is far more likely that the employee would be docked ***leave*** (sick, annual or credit hours) rather than ***pay***. Such ***leave*** docking is completely consistent with salaried status. *See, e.g.*, Wage-Hour Opinion Letter dated December 24, 1997 *and see* cases cited below. Moreover, vis-à-vis the rare occasions when ***pay*** docking may theoretically occur, the Union is forgetting the "public accountability" exception to the salary basis test which permits a "public agency" (defined in 29 U.S.C. §203(x) to include "the Government of the United States") to dock employees' salaries for absences for personal reasons. Specifically, 29 C.F.R. §541.710 (formerly 29 C.F.R. §541.5(d)) states:

> An employee of a public agency who otherwise meets the salary basis requirements of [the regulations] shall not be disqualified from exemption under [the white collar exemptions] on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because:
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> (1) Permission for its use has not been sought or has been sought and denied;
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> (2) Accrued leave has been exhausted; or
>
> (3) The employee chooses to use leave without pay.

DOL explained when this rule was initially promulgated in 1992:

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> An employee's "hourly regular rate" is computed by dividing the total remuneration paid to an employee in the workweek by the total number of hours of work in the workweek for which such compensation was paid.

> Public accountability embodies the concept that elected officials and public agencies are held to a higher level of responsibility under the public trust that demands effective and efficient use of public funds in order to serve the public interest. It includes the notion that the use of public funds should always be in the public interest and not for individual or private gain, including the view that public employees should not be paid for time they do not work that is not otherwise guaranteed to them under the pertinent civil service employment agreement (such as personal or sick leave), and the public interest does not tolerate wasteful and abusive excesses such as padded payrolls or "phantom" employees.

57 Fed. Reg. 37,676 (Aug. 19, 1992). More recently, in 2004, DOL reaffirmed this position, stating:

> The Department continues to believe this is a necessary exception to the salary basis requirement for public employees[.]

69 Fed. Reg. 22,191 (April 23, 2004). Thus, the hypothetical and vague deductions complained of by the Union do not affect the salaried status of the particular employees in question whose pay was never docked.[4]

Indeed, later in its brief, the Union corrects its mistake and admits that the employees are salaried. Union's Opposition at 8. ("The employees at HUD understood they are salaried employees…"). And "[t]he Union does not contest that the Agency met the third prong of the test" for the fluctuating work week which requires a "fixed amount" of salary sufficient to satisfy the minimum wage.) *Id.* at 4 n.1.

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[4] HUD acknowledges that, ***for the private sector***, the Department of Labor ("DOL") considers the salary test for the half-time test to be even stricter than the salary basis test for exemption. However, OPM regulations contain no salary basis test at all, specifically because it considers such a test to be incompatible with public accountability. *See* 62 Fed. Reg. 67,238 (December 23, 1997) (citing DOL's public agency exception to the salary basis test). Thus, any such comparison is impossible and irrelevant. Indeed, under the public accountability exception to the no-docking rule, public employers that dock workers' pay do ***not*** convert them to nonexempt status. *See, e.g., Demos v. Indianapolis*, 302 F.3d 698 (7th Cir. 2002). On the same basis, such docking should not prevent public employers from availing themselves of half-time for failed exemption cases. In the worst case, actual docking might make the individual employee who was docked ineligible for half-time damages, but that cannot preclude application of the standard common law remedy to the entire class of federal workers.

The Union makes a related, and also incorrect, argument on page 6 of its brief, where it asserts that the fact that HUD required employees to use personal time or vacation in lieu of absence from work somehow impairs payment on a salary basis. This simply is wrong. The half-time method in no way bars occasional deductions from salary for willful absences or tardiness. *See Samson v. Apollo Resources, Inc.*, 242 F.3d 629, 638 (5th Cir. 2001) *and Cash v. Conn Appliances*, 4 WH Cases 2d 941, 948 (E.D. Tex. 1998) (both citing U.S. Wage and Hour Division Field Operations Handbook §32b04b (allowing "occasional disciplinary deductions for willful absence or tardiness or for the initial and terminal week of employment")); *see also* Wage-Hour Opinion Letter dated November 30, 1983. Indeed, in *Griffin v. Wake*, 142 F.3d 712, 718 (4th Cir. 1998), the court succinctly disposed of a similar claim stating:

> Wake County has voluntarily provided its EMTs with the extra benefit of paid vacation and sick leave. The EMTs now claim that the County violates federal law when it requires its employees to draw down their accrued leave or vacation balances when they exercise this benefit. Unlike deductions from base pay, such deductions from leave simply do not constitute a violation of section 778.114. To countenance the EMTs' claim to the contrary would beg the question how, if at all, any system of earned vacation time is to operate if an employer may not deduct from it when an employees take a vacation.

See also Aiken v. County of Hampton, 977 F. Supp. 390 (D. S.C. 1997) (reductions in leave and holiday pay permitted).

On page 5 of its brief, the Union asserts that the half-time method applies only when there are "wide" fluctuations in the employee's workweek. The Union's belief is mistaken and there is no case that stands for the proposition that the Union asserts. (The Union cites one case where those happened to be the facts. By the Union's logic the half-time method would apply only to males, since the employee in that case happened to be male.) There is not even a requirement that the hours fluctuate both above and below 40 hours per week. *Teblum, supra*, 11

W.H. Cas.2d at 390 & n.12 (fluctuating hours requirement satisfied even though employees were required to work a fixed minimum number of hours per week). *Teblum* cites *Condo v. Sysco Corp.,* 1 F.3d 599, 603 (7th Cir. 1993), which notes that each requirement of 778.114 was satisfied because plaintiff worked fluctuating hours, although he never worked fewer than forty hours per week). *See also Evans v. Lowe's Home Centers, Inc.* 2006 WL 1371073 (M.D. Pa. 2006).

The Union is confusing the so-called Belo Plan (§ 7(f) of the FLSA. 29 U.S.C. §207(f)) fluctuation rules with the half-time rules (§ 7(a) of the FLSA, 29 U.S.C. §207(a)). *See* Wage-Hour Opinion Letter dated October 27, 1967. *See also Vadav v. Coleman Oldsmobile, Inc.*, 538 F.2d 1206 (5th Cir. 1976) (per curiam); *Triple "AAA" Co. v. Wirtz,* 378 F. 2d 884 (10th Cir. 1967); *Griffin v. Wake County, supra*, 142 F.3d at 715 ("section 778.114 does not require an unpredictable schedule") (citing *Flood v. New Hanover County*, 125 F.3d 249, 253 (4th Cir. 1997)). Indeed, half-time is permitted for a fixed schedule of alternating workweeks. *Aiken v. County of Hampton*, 172 F.3d 43 (4th Cir. 1998) *affirming* 977 F. Supp. 390 (D. S.C. 1997). As long as the workweek ever fluctuates above 40 hours in a workweek, the half-time method is applicable. And, inherent in the Union's bringing a "suffered or permitted to work" overtime claim is an admission that employees worked an irregular number of hours that sometimes fluctuated above the 40 hour mark.

On page 7 of its brief, the Union misquotes or misunderstands HUD's argument. HUD never claimed that "there was a 'mutual agreement' that the employees were under the fluctuating work week rule." The law does not even require such an agreement. All that HUD said is that employees understood that they would be paid a fixed salary for all hours worked.

As the court stated in *Griffin v. Wake County, supra*, 142 F.3d at 716, regarding the plaintiffs' claim that "they were not asked to consent to the plan, but rather were told about it"—

> "[T]his argument confuses understanding with agreement, and the regulation speaks only in terms of the former. We are unable to find, and the [plaintiffs] have not identified, any case in which a court has required that employees consent to the fluctuating workweek plan to satisfy section 77.114 – employees need only understand it.

Id. Here, ***the Union admits that "[t]he employees at HUD understood that they were salaried employees. . . ." Union's Opposition at 8*** (emphasis added).[5] Indeed, since the employees were treated as exempt, they necessarily understood that they were receiving a salary for all hours worked. (The Union admits this too. *Id.* ("[T]he Agency did not believe it even owed these exempt employees any compensation worked in excess of 40 . . .").) The employees may not have understood every nuance of HUD's payroll system. However, as the Fourth Circuit has observed, the FLSA does not place the burden on the employer "to hold an employee's hand and specifically tell him or her precisely how the payroll system works." *Griffin v. Wake County, supra*, 142 F.3d at 716 (citing *Monahan v. County of Chesterfield*, 95 F.3d 1263, 1275 (4th Cir. 1996)); *see also Goodrow, supra* 73 N.E. 2d at 298 (Mass. 2000) (citing *Valerio, supra* 173 F.3d at 39-40). Moreover, in *Zoltek v. Safelite Glass Corp.*, 884 F. Supp. 283 (N.D. Ill. 1995), the court held that the employee impliedly agreed to half-time when the employee worked overtime hours for a consistent salary for 2½ years. In *Dooley v Liberty Mut. Ins. Co.*, 307 F. Supp. 2d 234, 250-52 (D. Mass. 2004), the court rejected a "novel" claim--***exactly the claim that the***

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[5] The Union notes that the "locality pay tables for compensation of general schedule employees is stated in both terms of annual salary and basic hourly rates..." Union Opposition at 8. Of course, some GS employees are entitled FLSA overtime and others are entitled to just Title 5 overtime, so some hourly rate equivalent is required. The fact that a salary has been reduced to an hourly equivalent has no impact on whether it is a salary. *Cf.*, 29 C.F.R. §541.604 (b) ("[a]n exempt employee's earning may be computed on an hourly, a daily or shift basis...").

Union is making here--that a clear mutual understanding was impossible when defendants denied plaintiffs were entitled to overtime. Finally, in *Roy v. County of Lexington*, 948 F. Supp. 529 (D. S.C. 1996), the court found the salary arrangement was clear even if the employees were not informed and did not understand how overtime was calculated. Thus, it is completely irrelevant that, as the Union asserts on page 11 of its brief, "HUD has not had its fluctuating workweek 'Plan' approved, has not circulated it to employees and has not had employees agree to it." In addition, this assertion is irrelevant because HUD has no such "Plan," just an intention to pay a salary for all hours worked. Again, the only issue in HUD's motion is whether half-time is the preferred method of ***retroactive*** compensation in so-called "failed exemption" cases.

Beginning on page 13 of its brief, the Union argues that because the hearings in this case are taking place in Washington, D.C., the Arbitrator should follow the opinion of the D.C. federal trial court in *Rainey v. American Forest and Paper Ass'n, Inc.*, 26 F.Supp.2d 82 (D.D.C. 1998). *Rainey* held that the plain language of 29 C.F.R. §778.114 requires that an employee paid under the fluctuating workweek method be paid overtime, while an employee wrongly classified as exempt has not been paid overtime; thus, according to Judge Oberdorfer, half-time cannot be used as a remedial measure of damages.

First, it should not even need to be said that it is only fortuitous that the hearings in this arbitration are taking place in the District of Columbia. They could just as well have been anywhere in the United States where HUD employees are found. Thus, there is no particular reason to give more weight to *Rainey* than to any other judicial decision.

Second, there actually are good reasons to give ***less*** weight to *Rainey* than to other judicial decisions. Not only did the *Rainey* court simply miss the point, the *Rainey* decision has been soundly rejected in both the District of Columbia courts and courts of other jurisdictions.

The *Rainey* court missed the point because no one is suggesting that 29 C.F.R. §778.114 was ***promulgated*** to provide a remedial measure in failed-exemption cases. As noted above, attempting to apply every nuance of section 778.114 to a remedial situation puts the cart before the horse since the Supreme Court's decision adopting half-time as the correct remedial measure in failed-exemption cases was issued long before there was a section 778.114.[6] The reason that the U.S. Supreme Court and the overwhelming majority of appellate and trial courts, as well as the U.S. Department of Labor, have adopted the half-time method for use in failed-exemption cases is because it is required by the language of the FLSA. It also is required by the language of OPM's regulation, 5 C.F.R. §551.511(a) (quoted in footnote 3 above). It also happens to be the fairest way to make a misclassified salaried employee whole, especially considering the fact that the employer and employee both believed that the employee's salary already compensated him in full.

It is not surprising therefore that *Rainey* has been almost universally rejected. For example, just a few months ago, in *Sutton v. Legal Services Corp., supra*, ***a failed-exemption case*** involving a federal government corporation,[7] the court said:

> With respect to calculation of back pay for overtime earned, ***the court concludes as a matter of law that the "fluctuating work week method" is the correct formula. Virtually every court that has considered the question has so held, including the Supreme Court*** in *Overnight Motor Transportation Co.* [*supra*] (interpreting the Fair Labor Standards Act). To the extent that Judge Oberdorfer's decision in *Rainey v. American Forest and Paper Assoc.*, 26 F.Supp.2d 82 (D.D.C. 1998) is not distinguishable, the court declines to follow it.

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[6] *See* footnote 3.

[7] *See* 42 U.S.C. §2996 *et seq.*

11 W.H.Cas.2d at 404 (emphasis added). Similarly, in *Tumulty, supra*, the court summarized Rainey and said: "This Court does not find this reasoning persuasive and declines to follow it." *Id.* at *5. The court explained:

> The First and Fifth Circuits have both held that ***employers who inappropriately misclassified an employee as exempt from the FLSA may rely on §778.114 to determine overtime due*** because the employees understood that they would be paid a fixed weekly salary regardless of the hours worked. *Valerio v. Putnam Assoc. Inc.*, 173 F.3d 35, 39-40 (1st Cir.1999); *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1138 (5th Cir.1988). "The parties must only have reached a 'clear mutual understanding' that while the employee's hours may vary, his or her base salary will not." *Valerio*, 173 F.3d at 40. ***Neither court required that the employee know that he would receive overtime compensation or have actually received it contemporaneously.*** In fact, in *Valerio*, the employee understood that her employer did not intend to pay her overtime. These cases imply that the employee need not have understood that he would receive overtime compensation and need not have been paid such compensation contemporaneously.

Id. at *4 (emphasis added). Accordingly, the *Tumulty* court granted summary judgment to the employer (Fedex) and held that the half-time method should be used to compensate employees to whom Fedex had improperly denied overtime because it did not consider them Fedex employees. *See also Perez, supra,* ***another failed exemption case***, which expressly rejected Rainey as contrary to the majority rule and instead following the rule set forth by the many of the cases listed on pages 3-4 above.

The other decision on which much of the Union's case rests is *Dingwall v. Friedman Fisher Associates, P.C.*, 3 F.Supp.2d 215 (N.D.N.Y. 1998). *See* Union's Opposition at 14. However, that decision does not support the Union's argument. Firstly, the *Dingwall* judge did not reject the half-time method. Rather, he merely found that it did not apply on the facts before him. Second, if the *Dingwall* judge had rejected the half-time method, he simply would have been placing himself in the tiny minority of cases, which the Arbitrator should not follow.

Finally, even on the facts before him, the *Dingwall* judge reached the wrong decision. In particular, the judge interpreted the statement in the employee manual that a workweek would "normally" be 40 weeks to mean that the workweek would never fluctuate. However, the dictionary definition of "normally" says exactly the opposite. *See, e.g., Webster's Third New Int'l Dictionary* 1540 (1981) ("normally" defined as "commonly, usually"). By definition, "normally" contemplates exceptions. Thus, the fact that HUD employees normally, commonly or usually work 40 hours in a workweek does not preclude the possibility of overtime or of a fluctuating workweek, as the mere fact of the Union's grievance proves. Accordingly, nothing in the *Dingwall* case can support an argument that because HUD's employees had a normal 40-hour workweek, they were not paid a salary that was intended to cover all hours worked.

Accordingly, HUD's motion should be granted and any back pay found to be due to any employees who are found to have been improperly treated as exempt should be limited to half-time. In addition, to the extent that such employees already received compensatory time-off or other compensation in excess of half-time, they should take nothing.

Dated: July 12, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Agency's Memorandum in Response to the Union's Opposition to the Agency's Motion In Limine was sent to counsel for the Union on July 12, 2006 by email to mike@sniderlaw.com and carolyn_federoff@hud.gov.

/s/
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