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,	)	
Agency.	)	

UNION'S SUR-REPLY TO AGENCY'S REPLY TO UNION'S OPPOSITION TO AGENCY'S MOTION IN LIMINE RE: DAMAGES

The Union, by and through its undersigned counsel, hereby submits its sur-reply to Agency's Reply Brief in the instant matter and states in support thereof:

INTRODUCTION

The motion in limine filed by the Agency is premature, as no evidence has been taken or is even available on any "understanding" between HUD and the bargaining unit employees. The issue of whether there was a clear and mutual understanding between the employer and employees regarding what the salary was intended to compensate, at the very least, requires testimony from employees, documentary evidence, i.e. the CBA, and employment contracts, that can be presented at a hearing. Furthermore, the evidence about uncompensated overtime hours will still need to be presented at a hearing on damages, whether the ultimate remedy is 1.5 or .5 times the regular rate. *See* Agency Reply at 2. The same evidence will need to be presented regarding number of hours worked and not properly compensated. Contrary to the Agency's argument, there is no "prejudicial evidence" to strike regarding the number of

uncompensated hours each employee worked, especially if each hour is still being counted, albeit only being remedied at the .5 rate. There is no jury to be prejudiced, either.

I. There is no regulation or proposed version of OPM guidelines that adopts the fluctuating work week rule for retroactive backpay in misclassified exemption cases.

The Agency claims that OPM could 'easily adopt' the fluctuating work week rule (FWW rule) to federal sector general schedule employees, like those in this matter. *See* Agency Reply at 2-3. The guidance is already provided by the DOL regulations. Yet, the current OPM regulations, as well as the most recent proposed version, specifically do not adopt the fluctuating work week rule as the a priori method of payment and does not mention it in any way, shape or form.

While the Agency contends that the FWW method of payment is the preferred method in "failed exemption" cases, there is no supporting authority for this contention. In fact, Monica Gallagher, who was Associate Solicitor for the US Department of Labor, disputes this claim. See Affidavit of Monica Gallagher ("Affidavit"). In fact, the policy of DOL is to seek full back wages to make the grievant whole. That means to pay the grievant as he would have been paid if he was properly classified, ie, time-and-a-half for retroactive unpaid overtime. It is only in a very small minority of cases that the conditions for using the FWW method of compensation are present. *Id*. However, the conditions for the FWW rule have not been met in the case at bar.

II. The Grievants' workweeks did not "fluctuate" as to number of hours they are *required* to work.

One of the conditions for using the FWW rule is that the workweeks of the employees fluctuate with regard to number of hours required to work. *See* Affidavit. The

employees at HUD were all general schedule employees that were required to work 40 hours each workweek in order to receive the fixed salary. Any "suffer and permit" overtime performed by misclassified exempt employees must be compensated at the rate at which the employee would have been paid but for the "failed exemption." In this matter, the employees are owed the straight time and half time portion of the overtime rate for all hours over 40.

III. There was no clear mutual understanding as to what the salary was intended to compensate.

The key issue in this matter is whether the exempt employees and HUD had a "clear mutual understanding" that the salary being paid was meant and intended to compensate those employees for all hours worked each week. The Agency's Motion in Limine must be denied as there is no serious dispute that there was no clear mutual understanding. If there was any understanding, it was that employees were being paid the fixed salary for 40 hours of work, and receiving no compensation for uncompensated hours in excess. The very fact that a fixed salary was paid does not mean it was intended to compensate the employee for all hours worked, especially in the federal government. *See* Affidavit. Employees could receive a plethora of additional compensation for hours over 40, such as credit hours, comp time, Title V overtime, religious comp time, etc. Further their pay would be docked, as a matter of law, for working less than 40 hours without sufficient leave. This is an automatic disqualification from the WFFR.

HUD claims it has a "common law right" to pay under the half-time method and that no regulation or applicable binding precedent holds otherwise. *See* Agency Reply at 5. However, besides that fact that there is no "common law" exception to the FLSA

and the FLRA has never created such a defense to paying full backpay, there is only a common law right to pay under the half-time method if there was a clear mutual understanding between the parties. In other words, you have to meet the requirements of the rule to avail yourself of the payment method. *See* Affidavit. Also, the employees at issue here would be entitled to time-and-a-half under the Back Pay Act even if not under the FLSA.

A. There was no clear mutual understanding that the fixed salary paid compensated the Greivants for the straight time portion of all hours worked.

The *Rainey* Court understood the requirements of the FWW rule when it concluded that the failure to make contemporaneous payment precluded the employer in that case from utilizing the half-time method. *See Rainey v. American Forest and Paper Association*, 26 F.Supp.2d. 82, 101-102 (D.D.C. 1998); *See also Cowan v. Treetop Enterprises*, 163 F.Supp.2d 930, 941-942 (M.D. Tenn. 2001); *Spires, et al., v. Ben Hill County, et al.*, 745 F.Supp. 690 (M.D. Georgia 1990). It was not that failure to pay contemporaneous overtime was a requirement in itself. Rather, it was material evidence that there was **not a clear mutual understanding** that the salary was only intended to pay the straight time portion of all hours worked and that the employees were entitled to the half-time payment for overtime hours. *See* Union's Opposition at 12-13; *See also* Affidavit.

That is the case in this matter. In fact, the Agency paid exempt employees the straight time portion capped at GS 10, step 1 for overtime hours that were ordered and approved. If the Agency already paid those employees the straight time portion as salary for all hours worked, then it would only have paid those employees the half-time

portion owed under the fluctuating work week rule for overtime hours. The fact that the Agency paid the capped overtime rates for ordered and approved overtime proves that the Agency did not have a mutual understanding with employees that the salary was intended to pay all straight time portion for all hours worked each week.

The Agency's citation to the so-called almost universal rejection of *Rainey* is based on a few cases that merely hold that the FWW rule can be applied if the requirements are met.

The Court in *Sutton* specifically only declined to follow *Rainey* to the extent the facts were not distinguishable. *See* Agency Reply at 12. The Court in *Tumulty* only reiterated that the First and Fifth Circuits have held that: "employers who inappropriately misclassified an employee as exempt from the FLSA *may* apply Section 778.114 to determine overtime due **because** the employees understood that they would be paid a fixed weekly salary regardless of hours worked." (Emphasis added). *Tumulty v. Fedex Ground Package System, Inc.*, 2005 WL 1979104 (W.D. Wash. 2005). *See 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). *See also* Agency Reply at 12-13.

The Union itself has agreed with the proposition that the FWW can apply if very specific conditions are met. But the facts of this matter are distinguishable from *Valerio* and *Blackmon* because the general schedule employees at HUD did not understand that they would be paid a fixed weekly salary regardless of hours worked. Put in other words, there was no clear mutual understanding as to what the salary was intended to compensate. The fact that the hours do vary does not prove that there was an understanding that the hours would vary. See Affidavit.

B. **The only clear mutual understanding between the Agency and Grievants was that the salary was intended to compensate for 40 hours of work each week – no more and no less.**

The Union does not mind if the Arbitrator rejects the FWW rule the way the *Dingwall* court did. *See* Agency Reply at 13-14. The Agency misstates the Union's and Court's argument when it contends that the mere fact that HUD employees normally work 40 hours does not preclude possibility of fluctuating workweeks. *Id.* The fact that HUD employees normally work 40 hours is material to prove that the mutual understanding was that the fixed salary compensated employees for 40 hours of work.

The argument made by the Plaintiffs in *Dooley* and rejected by the Court was that the bad faith by the employer precluded a clear mutual understanding because the plaintiffs were induced into believing they were exempt and not entitled to overtime. *See* Agency Reply at 10-11; *See also Dooley v. Liberty Mut. Ins. Co.*, 307 F.Supp.2d 234 (D.Mass. 2004). The Court did not reject the argument asserted by the Union that there was no clear mutual understanding as to the number of hours the salary was intended to compensate. Furthermore, the Court in *Roy* held that: "Lexington County explained to the employees and the employees *understood that they were paid a fixed salary apart from overtime*, even though the regular hours upon which that fixed salary was based actually varied among weeks." (Emphasis added) *See Roy v. County of Lexington*, 948 F.Supp. 529 (D. S.C. 1996). Unlike the employees in *Roy*, the Grievants in this matter did not have a clear mutual understanding that the fixed salary was apart from overtime.

Furthermore, the First Circuit has held that the receipt of "additional compensation" for any hours worked under 40 in any workweek precludes a finding of a

clear mutual understanding "that the employer will pay [a] fixed salary regardless of the number of hours worked." *O'Brien v. Town of Agawam*, 350 F.3d 279, 288-289 (1st Cir. 2003) (holding that no clear mutual understanding exists when employer pays employees "additional compensation" for hours worked "regardless [of] whether their total number of hours worked for the week exceeds forty"). As the First Circuit explained in *Agawam*:

> This case does not fit the §778.114 mold. It is true, as the district court emphasized, that each week the [employees] receive 1/52 of their annual base salary, irrespective of the number of shifts worked that week. But under the [employment agreements], that sum does not constitute all of the straight-time compensation that the [employees] may receive for the week. This is significant because by the plain text of §778.114, it is not enough that the [employees] receive a fixed *minimum* sum each week; rather, to comply with the regulation, the [employer] must pay each [employee] a "fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, *whether few or many*."

Agawam, 350 F.2d at 288 (emphasis in original). In *Agawam*, the employees received "additional compensation" for work performed on nighttime shifts, or for hours worked on otherwise off-duty time or when work hours exceeded eight in one day. *Id.* at 288-289.

A weekly **minimum** sum is not the same as a weekly **fixed** sum. *Agawam*, 350 F.3d at 288 ("by the plain text of §778.114, it is not enough that the officers receive a fixed *minimum* sum each week; rather, to comply with the regulation, the [employer] must pay each [employee a] 'fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, *whether few or many*'") (emphasis in original). Absent an understanding that the employee "will receive such **fixed** amount as straight-time pay for whatever hours he is called upon to work in a workweek, whether few or

many" (*see* 29 C.F.R. § 778.114) (emphasis added), Defendant cannot avail itself of the fluctuating workweek method to calculate the hourly rate of pay of the Grievants, because it cannot prove that the parties reached the "clear mutual understanding" required by 29 C.F.R. §778.114.

C. **Employees are expected to work 40 hours each workweek.**

The Agency makes a very long jump from the Union's admission that the employees are salaried to the conclusion that they understood they were receiving salary for all hours worked. *See* Agency Reply at 10-11. As noted, the CBA states that the basic work week is 40 hours. Additional provisions support the conclusion that the salary was intended to compensate for 40 hours of work per week:

Section 17.04 - Tours of Duty.

(1) **Flexitime**. Full-time employees, excluding those working compressed work schedules, shall be permitted to vary their daily work hours, subject to the following limitations:

(a) The standard workweek shall be Monday through Friday.

(b) Except for employees participating in the credit hour program, ***full-time employees shall account for forty (40) work hours during each workweek, consisting of five (5) eight-hour workdays,*** plus the office's established lunch period each day. The hours worked each day shall be consecutive, except for the lunch period.

Section 25.03 - Overtime Pay in Travel Status.

(1) ***For FLSA exempt employees*** to receive overtime while in a travel status, the assignment must meet both of the following conditions:

(a) ***Hours of work officially ordered and approved in excess of forty (40) hours in an administrative workweek*** or in excess of eight (8) hours in one (1) day; and

(b) The hours of work result from an event that could not be scheduled or controlled administratively.

(Emphasis added). See CBA.

Furthermore, the OPM salary tables are based on a 40 hours work week. This is material evidence that the salary was intended to compensate the employees for 40 hours of work each week. *See* Agency Reply at 10, FN 5. The employees are general schedule employees that considered their regular workweek to be 40 hours, were subject to a CBA that said that their normal workweek was 40 hours, and were told (as federal employees) that they would get credit hours, comp time, Title V overtime and/or religious comp – all as additional compensation (at normal hourly rate) above and beyond their 40 hours.

Once again, the very fact that a fixed salary was paid does not mean it was intended to compensate the employee for all hours worked, especially in the federal government. *See* Affidavit. But that is the key to determining what the employees believed the salary was intended to compensate. See 29 C.F.R. § 778.113(a). That is what the courts in those cases that applied the FWW rule concluded; they determined what the employee and employer agreed to as a regular or basic workweek and applied the fixed salary to the straight time portion for those hours.

Most recently, the United States District Court for Southern District of Texas found:

> Hopkins has met his burden of showing the **fluctuating workweek** method is **not applicable** here. There was no clear mutual understanding that the salary paid to Hopkins was intended to compensate him for all hours he was called upon to work in a workweek, whether few or many. Hopkins testified without contradiction that his supervisor told him, both when he was hired and when he was rehired, that he would be paid a salary based on a 40 hour workweek. Unlike in *Samson,* there is no evidence in this case that Mast Climbers had consciously adopted the fluctuating workweek method in advance, or that anyone from Mast Climbers ever explained the fluctuating workweek policy to Hopkins. The

> employee handbook did indicate that more than 40-hours might be required in a week, but it did not address whether the salary was intended to cover all hours worked, or how the employee would be compensated for overtime hours. There simply is no basis to conclude that Hopkins clearly understood that his salary was to compensate him for all hours worked in any given workweek.
>
> Because the fluctuating workweek standard does not apply, the court calculates Hopkins's damages on the assumption that his salary was based on a 40 hour workweek, and that he has not received any straight time compensation for overtime hours.

See Hopkins v. Texas Mast Climbers, L.L.C., et al., 2005 WL 3435033 (Dec. 14, 2005). The Arbitrator in this matter should do the same. The Union employees agreed to work 40 hours each week and expected to be paid for 40 hours of work. Any extra hours of work were uncompensated.

IV. The Agency cannot avail itself of the FWW rule because the fixed salary is not paid for all hours worked, regardless of number of hours worked.

The Agency further misunderstands the Union's position if it thinks the "leave" argument concerns the salaried status of employees or the fact that employees were required to use approved leave for personal days. See Agency Reply at 7-8. The Union's "leave" argument is that the Agency's leave policy violates the FWW rule because deductions from salaries were allowed, based on numbers of hours worked, if there was no approved leave left for the employee to take. *See* Union's Opposition at 5-6. The relevant Agency policy states:

> **Section 24.16 - Unauthorized Absences**. An employee who fails to report for duty and has not received supervisory approval for leave shall be carried in an absent without leave (AWOL) status for timekeeping purposes and may be subject to disciplinary action.

DOL regulations are very clear that the employer cannot have a policy that deducts from wages based on number of hours worked. The employee must receive his entire fixed

salary regardless of number of hours worked. The HUD employees were subject to a "leave" policy that allowed for deductions to the fixed salary precisely based on number of hours worked.

Furthermore, as DOL notes, the question is not whether deductions were actually made; it is the policy of whether deductions could be made that matters. **If** an employee **could** be paid less than the "agreed upon" salary for working less than 40 hours, the FWW Rule by its own terms does not and cannot apply. It is not whether any particular employee was docked pay for any particular workweek or pay period, but rather whether they could have been, if their leave had been exhausted. ***Since any of the Grievants could have been docked pay*** if they worked under 40 hours per week, without sufficient approved leave, ***the FWW Rule cannot ever apply*** to these general schedule federal employee.

The Agency's reliance on the "public accountability" exception is misplaced given the Union's actual argument. *See* Agency Reply at 6-7. That exception merely allows the Agency to still avail itself of the salary requirement of a particular exemption, i.e. administrative, professional, executive. It does nothing to support the argument that its leave policy does not violate the fluctuating work week rule based on allowance for deductions to the fixed salary. The Union does not argue that these employees are not salaried because the agency deducts from wages if there is no approved leave left. *See* Agency Reply at 7-8. The Union also does not argue that being required to use approved leave for personal days violates the FWW rule. *Id.* The Union's position is that the Agency's burden under the FWW rule to pay the full fixed salary for all hours worked, regardless if less or more than 40, cannot be met with the leave policy in place.

V. The Arbitrator has the authority to grant full time and a half damages under the Back Pay Act

The Union further contends that the Arbitrator can conclude that damages are proper under the Back Pay Act rather than the FLSA, precluding any finding of fluctuating work week rule. There is no alternative pay method under the Back Pay Act for the damages claimed in this matter.

As federal employees, plaintiffs are protected by two statutes requiring compensation for overtime work. Section 7(a)(1) of the FLSA, 29 U.S.C. § 207(a)(1), requires overtime pay "for a workweek longer than forty hours;" and section 5542(a) of the Federal Employees Pay Act (FEPA), 5 U.S.C. § 5542(a), requires overtime pay for work "in excess of 40 hours in an administrative workweek, or ··· in excess of 8 hours in a day." *See Agner v. U.S.,* 8 Cl. Ct. 635, 636*, affirmed, 7*95 F.2d 1017 (Fed. Cir. 1986). Federal employees were covered only by the FEPA until 1974 when the FLSA was extended to them by Pub.L. No. 93-259, 88 Stat. 55 (1974) (codified in various sections of 29 U.S.C.). Under this dual coverage, where there is an inconsistency between the statutes, employees are entitled to the greater benefit. *See* Library of Congress Reg. 2013-18, Section 3; *See also* Comp.Gen. 371 (1974).

VI. Undisputed Facts Favor the Union

The Union prevails due to the following undisputed facts:

1. Bargaining Unit employees ("Grievants") receive a base salary every week.
2. The Grievants receive additional compensation when they work in excess of 40 hours a week, in the form of credit hours, comp time, Title V overtime, religious comp and other forms of compensation.

3. The Grievants receive different amounts of weekly compensation when they work additional hours,

4. All of the additional compensation received by Grievants (credit hours, comp time, Title V overtime, religious comp and other forms of compensation) are, at a minimum, “hour-for-hour,” not “half-time” or “half-pay.”

5. Agency policy (indeed, US Government Policy) is that GS employees who have no leave and work less than 40 hours, or who work less than 40 hours without approved leave, are docked pay.

These undisputed facts clearly make the FWWR not applicable to the Grievants, as a matter of law.

CONCLUSION

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

Respectfully Submitted,

/s/

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Certificate of Service

I certify that a copy of the foregoing was provided to the Arbitrator and appropriate named representatives by fax, hand-delivery, e-mail or by placing it in the U.S. mail with the first class postage attached and properly addressed as of the date indicated below.

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