BEFORE
SEAN J. ROGERS
ARBITRATOR

In the Matter of Arbitration between:

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 222, AFL-CIO and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1450

Unions,

and

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Agency.

DECISION AND ORDER ON HUD'S MOTION IN LIMINE REGARDING DAMAGES (Motion 9)

APPEARANCES:

On behalf of the American Federation of Government Employees, Council 222:

Michael J. Snider, Esq., Snider & Associates, LLC – *representing the Unions and the Grievants.*

On behalf of the Department of Housing and Urban Development:

Daniel B. Abrahams, Esq., Peter M. Panken, Esq. and Frank C. Morris, Jr., Esq., Epstein Becker & Green P.C. – *representing the Employer.*

I. PROCEDURAL BACKGROUND

On May 23, 2006, the Department of Housing and Urban Development (HUD or Employer) submitted the *Agency's Motion in Limine Regarding Damages* (*Motion*). The *Motion* was filed in relation to the arbitration between the American Federation of

Government Employees, Council 222, AFL-CIO and the National Federation of Federal Employees, Local 1450 (collectively the Unions) involving two Grievances of the Parties (GoP) challenging HUD's alleged failures: to pay employees FLSA overtime for travel during non-duty hours (Travel grievance); to classify employees properly under the FLSA overtime provisions; and to compensate employees properly and fully for overtime work (FLSA grievance). HUD's *Motion* seeks to avoid potential double recovery of wages and overtime by bargaining unit employees who are the grievants in this dispute. HUD moves for the Arbitrator to apply the fluctuating workweek method pursuant to 29 CFR § 778.114, as so known as the half-time method, as the appropriate remedy in failed exemption cases when an employee should have been classified as non-exempt but was treated as exempt and paid a salary.

In support of its *Motion*, HUD's General Counsel, Keith Gottfried, Esq., sent an e-mail to the Department of Labor (DOL) Solicitor, Howard M. Radzely, seeking,[1]

> an opinion from the Department of Labor . . . Solicitor's Office of the Wage and Hour Administrator on legal issues arising from the possible application of the fluctuating workweek method of compensation (29 C.F.R. 778.114).

On June 22, 2006, the Unions submitted the *Union's Memorandum in Opposition to Agency's "Motion in Limine" Re: Damages* (*Reply*) in response to HUD's *Motion* and requested oral argument.

On July 12, 2006, HUD submitted the *Agency's Memorandum in Response to the Union's Opposition to the Agency's Motion in Limine* (*Rebuttal*).

Also, on July 12, 2006, DOL Acting Administrator, Wage and Hour Divisions, Alfred Robinson, Jr. responded to Gottfried's request concerning 29 CFR § 778.114.[2]

On July 20, 2006, the Unions submitted the *Union's Sur-reply to Agency's Reply to*

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[1] The United States Senate confirmed Robert M. Couch, Esq. on June 13, 2007 to serve as HUD's General Counsel replacing Gottfried.

[2] Robinson's letter does not constitute a DOL opinion on this dispute. Robinson expressly states,

> . . . our response is limited to the FLSA statutory and Department of Labor ("DOL") regulatory provisions, and does not address the Office of Personnel Management ("OPM") regulations that generally apply to federal sector employees. In addition, our response is limited to the fluctuating workweek method of compensation under the FLSA, and takes no position on the application of the principles discussed herein to the particular facts in your case, or the exempt/non-exempt status of the affected employees. (Citations omitted).

Robinson's letter explains the elements of the 29 CFR § 778.114(b) method for calculating overtime premium pay. For these reasons, Robinson's letter lacks probative weight regarding the relevant issues presented in HUD's *Motion*.

Union's Opposition to Agency's Motion in Limine Re: Damages (*Sur-reply*). Attached to the *Sur-reply* was the declaration of Monica Gallagher, formerly the Associate Solicitor, Fair Labor Standards Division, Solicitor's Office, DOL, concerning the method of computing overtime set forth in 29 CFR § 778.114.[3]

On July 21, 2006, the Parties presented oral arguments in support of their submissions and a transcript (Tr) was taken. In addition, each Party was afforded the opportunity to and did submit case precedents in support of their positions.

At the July 21, 2006 oral argument, the Parties reached agreement on a number of collateral issues involving the calculation of FLSA damages, if any, for the affected employees. In particular, the Parties agreed that there are no damages as regards credit hours, compensatory time off for religious observance and compressed work schedules. (Tr 6-9). In addition, the Parties' counsels discussed rounding and *de minimus* time keeping rules impacting potential damage claims and the adjudication of this *Motion*. (Tr 13-17). The Arbitrator determined that these issues were to be left to the Parties' counsels for discussion and possible resolution and the Parties' counsels agreed to that approach. (Tr 17). Absent resolution by the Parties, the Arbitrator will rule on any relevant dispute issues.

This Decision and Order resolves HUD's *Motion in Limine Regarding Damages*.

II. HUD's CONTENTIONS

HUD contends as follows:

The basis of the fluctuating work week method of overtime calculation assumes that the employer has agreed employees will be paid a fixed salary for all hours worked no matter how few or how many. Overtime liability is calculated by dividing the fixed salary by the hours worked in a week to reach a regular rate of pay. Then, based on this calculation, the one-half of the regular hourly rate of pay is paid for each hour worked over 40 hours. Department of Labor (DOL) regulations endorse this method for salaried employees whose hours of work vary from week-to-week. (29 CFR § 778.114(a) and (b)).

Federal employers may pay employees on this basis just like other employers based on 5 CFR § 551.511(a) which courts had recognized as equivalent to 29 CFR § 778.109. Together with 29 CFR § 778.114 these regulations form the underpinning of the half-time method and every hour counts in determining the regular rate. Since the "1" in the "1½"

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[3] Gallagher's affidavit is advanced by the Unions to support its assertion that there is no supporting authority for HUD's contention that the fluctuating workweek rule described in 29 CFR § 778.114 is the preferred method in failed exemptions. Gallagher's affidavit merely restates the Unions' argument in the context of DOL's enforcement policy and, like Robinson's letter, lacks probative weight regarding the relevant issues presented in HUD's *Motion*, in particular, the applicability of 29 CFR § 778.114 to Federal sector employees.

overtime premium has already been paid, all that is left to pay is the "½." The Office of Personnel Management (OPM) regulation 5 CFR § 551.301(a) and (b) contemplate the half-time method.

For an employer to use the half-time method there must be: an understanding between the employer and employee that the fixed salary is compensation of all hours worked whatever the number; an understanding that the employee's base salary will not fluctuate even though the employee works varying or fluctuating hours; and the employee's salary never falls below the minimum wage.

The Parties collective bargaining agreement clearly reflects the understanding that the employees' salary is intended as compensation for whatever hours they work and that their hourly rate may vary from week-to-week. Moreover, all General Schedule (GS) employee should be presumed to understand that they are salaried because their compensation is stated as a salary and OPM does not offer a calculator for identifying an employee's hourly rate. All affected employees were previously FLSA exempt and so they necessarily understood their salary covered all hours worked. The Union's claims of FLSA non-exempt status now, does not change that.

The half-time method is appropriate for compensation in failed exemptions because the very fact that these FLSA claims are being made indicates that the employees have fluctuating workweeks. Court precedent recognizes the fluctuating workweek/half-time method for determining FLSA back-pay for failed exemptions is appropriate.

In the private sector, the half-time method is used by DOL in every case involving salaried employees found to have non-exempt duties almost since time immemorial and courts have recognized the half-time method for make-whole relief.

In the Federal sector, the half-time method has been applied in *Zumerling v. Devine*, 769 F.2d 745 (Fed. Cir. 1985) (*Zumerling*) and this precedent should be followed in this dispute.

The half-time method has been universally recognized as an appropriate method for payment of salaried, non-exempt workers specifically in the First, Fourth, Fifth, Sixth, Seventh, Ninth, Eleventh, D.C., Federal Circuit Courts and D.C. Courts. The overwhelming majority of state courts have recognized the method as well. The Federal Labor Relations Authority (FLRA) has never addressed the issue, but would follow recognized law if faced with this issue.

HUD is entitled to offset payments for credit hours, compensatory time-off, flexible work schedules and other allowances to avoid employee-windfall. The Union may stipulate to these matters and the Arbitrator will not need to rule on this aspect of HUD's *Motion*.

Under the collective bargaining agreement, irregular or occasion overtime work is rounded to the nearest quarter hour. Therefore, it is legally proper for the Unions to agree

that no overtime claim could be made for less than 7½ minutes and such claims may not be aggregated.

Also under the collective bargaining agreement, employees may "work compensatory overtime for the purpose of taking time off without charge to leave or loss of pay when personal religious beliefs require that the employee abstain form work during certain periods." Such overtime is compensated hour-for-hour at the straight-time rate. Therefore, no claims should be heard for overtime compensation for employee's working religious compensatory time.

HUD's *Rebuttal* reiterates its arguments and rebuts the arguments presented in the Unions' *Reply*. HUD's *Rebuttal* asserts, in pertinent part, that "the only issue is whether half-time is the preferred method of ***retroactive*** compensation in so-called 'failed exemption' cases."[4] HUD argues that it "***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.***"[5]

For these reasons, HUD concludes that the proper method of calculation is the half-time method which HUD argues is supported by an overwhelming majority of courts. Therefore, HUD asks that its *Motion* be granted.

III. THE UNIONS' CONTENTIONS

The Unions contend as follows:

HUD's *Motion* is not a *Motion in Limine*, but actually a motion for summary judgment on damages which HUD is seeking to litigate without hearing. No Federal GS employee has ever been paid on a fluctuating workweek/half-time method for a failed exemption, except *Zumerling* which involved firefighters and which is a decision limited to that case.

The appropriate remedy for the affected employees in the instant grievances is compensation at the overtime rate of 1.5 times the employee's regular rate of pay. HUD did not meet the fluctuating work week rule which is used in certain narrow situations only and not in this case.

The fluctuating workweek does not apply to the employees in this arbitration because HUD failed to define the fluctuating work week rule properly under the regulation's 5 requirements.[6] The regulation's requirements are: first, the bargaining unit employees'

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[4] Emphasis in original, *Rebuttal* p. 5.

[5] Emphasis in original, *Rebuttal* p. 5.

[6] The third requirement, that the employees must be sufficiently compensated at the regular rate not less than the legal minimum wage, is not in contention between the Parties.

hours do not regularly fluctuate from week-to-week; second, the bargaining unit employees were not paid a fixed weekly salary regardless of the number of hours they worked; third, the employer and employees did not have a clear mutual understanding that the employer will pay the employees the fixed weekly salary regardless of hours worked; and fourth, the employees were not paid the required 50% overtime premium for hours they worked in excess of 40 which would qualify HUD for the fluctuating workweek rule.

The proper overtime payment method for overtime work is not the half-time method because the employees do not work fluctuating work weeks. Furthermore, HUD employees did not have a clear, mutual understanding with regard to a fluctuating workweek as required in the case law. The fluctuations in HUD employees' schedules are not consistent enough to justify the half-time method. In addition, HUD has no DOL-approved fluctuating work plan.

HUD's *Motion* makes bold and general statements about case law that does not apply to the instant grievance. HUD's arguments are supported only by cherry-picking inapplicable case law. None of HUD's case law precedents supports its contention that "half-time is universally recognized as the proper method for salaried non-exempt employees," as HUD claims. Furthermore, case law establishes that the application of the half-time method involves employees contemporaneously paid overtime compensation at the 50% premium rate. In the instant grievance, HUD employees were not paid contemporaneously at the 50% premium rate for excess hours worked because they were improperly classified as FLSA exempt.

Contrary to HUD's assertion, the fluctuating/half-time method is not proper for misclassified employees or failed exemptions. In *Rainey v. American Forest and Paper Association*, 26 F. Supp. 2d 82 (DDC 1998) (*Rainey*), a District of Columbia Federal Court has held the opposite, specifically that the fluctuating workweek rule is only applicable to current employees and cannot apply retroactively. Furthermore, if an employee is misclassified as FLSA exempt, then there is neither a clear mutual understanding between the employer and the employee that overtime premiums would not be paid, nor can there be contemporaneous 50% overtime payments. Therefore, misclassifying employees as FLSA exempt precludes a mutual understanding or contemporaneous payment of the additional 50% premium. HUD's argument would require an implied-in-fact agreement which is not supported by facts.

HUD is not entitled to deny legitimate overtime pay to misclassified employees based on its erroneous claim that this time falls outside other allowances. The Unions do not seek double compensation, but they do seek a make-whole remedy because misclassified employees were denied the choice between compensatory overtime and paid overtime. The employees are entitled to overtime pay and, at their express election, to compensatory time. To make the affected employees whole, HUD must pay the employees for each hour of compensatory time earned at their overtime rate offset by their straight-time hourly rate. Under the FLSA and FLRA precedent, an employee must receive overtime compensation for any hours worked beyond their tour of duty, unless they

expressly choose compensatory time. FLSA misclassified employees were denied the choice. For this reason, they are entitled to the half-time that they would have been paid had they correctly been given the choice.

The Unions agree that some claims are *de minimus* and cannot result in a reasonable claim. However, HUD cites no law disallowing aggregation of overtime worked less that 7½ minutes. This time should be fully credited since HUD failed to keep accurate time records.

The Unions agree that religious compensatory time and credit hours involve a system of full hour-for-hour offset for overtime premium pay.

The Unions' *Sur-reply* reiterates its arguments and rebuts the arguments presented in HUD's *Motion* and *Rebuttal*. The Unions' *Sur-reply* includes as an attachment the Monica Gallagher affidavit which has been discussed above.[7]

For the foregoing reasons, the Unions conclude that the Arbitrator should grant judgment on HUD's *Motion* in the Unions' favor.

IV. DISCUSSION

HUD seeks to have the Arbitrator limit the overtime entitlement of salaried employees by applying the fluctuating workweek method pursuant to 29 CFR § 778.114, also known as the half-time method, for back-pay damages that may arise as the result of HUD's FLSA failed classification of bargaining unit employees represented by the Unions. No award of FLSA back-pay has been made by the Arbitrator based on the Unions' grievances.

Under the half-time method, a bargaining unit employee's salary by definition would include straight-time pay or all hours the employee worked in a workweek. Therefore, the FLSA back-pay damages would be only one-half the employee's regular rate of pay for any hours worked in excess of 40 hours in a workweek and thereby fully compensate the employee at one-and-one-half the regular rate of pay for the overtime hours worked as required by the FLSA. The application of the half-time method to FLSA back-pay damages would substantially reduce HUD's liability for FLSA back-pay damages, if any, since HUD would have already paid the "one" in the "one-and-one-half" overtime premium rate.

HUD has the burden of proof to prove that the half-time method is the proper method for determining the FLSA back-pay damages, if any, for bargaining unit employees misclassified as FLSA exempt who are the subject of the Unions' grievances. For the reasons discussed below, HUD's *Motion in Limine Regarding Damages* is denied, with prejudice.

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[7] See: Footnote 3.

STATUTORY AND REGULATORY BACKGROUND

The fluctuating workweek method, or half-time method, assumes a fixed salary for employees who work fluctuating hours. To apply the half-time method to an employee's compensation in compliance with the FLSA, the employer must follow the provisions of DOL's implementing regulation 29 CFR §778.114 – *Fixed salary for fluctuating hours*, which states,

> (a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he 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. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

For an employer to satisfy FLSA's overtime pay requirements by means of the half-time method, 6 elements of the DOL regulation must be satisfied. First, the employee must be employed on a salaried basis. Second, the employee's hours of work must fluctuate from week-to-week. Third, the employee's salary must be a fixed amount as straight-time pay for whatever hours the employee worked in a workweek. Fourth, the employee's salary must be paid pursuant to a clear mutual understanding between the employee and employer that the salary is for straight-time pay for whatever hours the employee worked in a workweek, whether few or many. Fifth, the amount of the employee's salary must not be less than the minimum wage. Sixth, if the other elements are met, then the employer's payment for overtime hours at one-half the employee's hourly rate satisfies the FLSA overtime premium pay requirement.

The Parties agree that HUD bargaining unit employees are salaried and they agree

the salary amount is not less than the minimum wage satisfying the first and fifth elements of the regulation. However, on the remaining elements the Parties disagree, not only as to the underlying facts, but also the application of the regulation to the facts and circumstances of the instant grievance.

The DOL regulation at issue in this *Motion*, and other implementing and administrative regulations of the FLSA reflect the intent of Congress that, in general, the Secretary of Labor be given the responsibility to administer the FLSA. However, the Civil Service Commission (CSC), now the OPM, opposed bringing federal employees under the FLSA when the FLSA was amended in 1974 to include Federal sector employees. In response, Congress charged the CSC, not the OPM, with the administration of the FLSA so far as federal employees were concerned. Thus, the FLSA at § 4(f) provides,

> Notwithstanding any other provision of this chapter, or any other law, the Director of the Office of Personnel Management is authorized to administer the provisions of this chapter with respect to any individual employed by the United States . . .

The legislative history of the 1974 Amendment indicates that the Committee on Education and Labor intended that the CSC,

> . . . will administer the provisions of the [FLSA] in such a manner as to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy.[8]

Based on the administrative responsibilities imposed by the FLSA, OPM has developed regulatory requirements and interpretive guidance for the classification of federal employees as exempt or nonexempt under the FLSA, and the general implementation and administration of the FLSA as well.

For these reasons, the Federal Circuit has held,

> OPM regulations, rather than the Labor Department regulations . . . govern the application of the [FLSA] to [federal employees]. To be valid, however, the OPM regulation must be consistent with the Labor Department regulation.[9]

In the implementation and administration of the FLSA, it is well established that

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[8] H. Rep. No. 93-913, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 2811, 2837; *Zumerling v. Devine*, 769 F.2d 745, 749-750 (Fed. Cir. 1985).

[9] *Billings v. United States*, 322 F.3d 1328, 1331 (Fed. Cir. 2003).

OPM's regulations must harmonize with DOL's regulations. Further, it is also well established that while DOL's regulations establish the minimum level of employee rights and benefits under the FLSA, OPM's regulations may provide for more, but not less, rights and benefits for federal sector employees consistent with law.

This statutory and regulatory foundation forms the basis of consideration of HUD's *Motion*.

THE MERITS OF HUD'S *MOTION IN LIMINE*

A. The Applicability of 29 CFR § 778.114

While HUD asserts that the Arbitrator should apply the half-time method described in 29 CFR § 778.114 to any award of FLSA back-pay in this dispute, the Unions assert that the half-time method has no application to these Federal sector employees.

HUD cites no OPM regulation comparable to 29 CFR § 778.114(b) and no OPM regulation applying 29 CFR § 778.114(b) or the half-time method to Federal sector employees. Indeed, the Unions assert, correctly, that none exists. HUD's strongest statement in this regard is that "Federal employers may pay employees on a half-time basis just as other employers may."[10] The assertion is advanced without support with the exception of one case, *Zumerling v. Devine*, 769 F.2d 745 (Fed. Cir. 1985) (*Zumerling*), discussed in detail below. HUD's arguments are based on inferences, speculations and deductions from other OPM regulations that mirror DOL regulations, and private and public sector cases applying 29 CFR § 778.114(b), often to public safety employees. The core of HUD's argument is that OPM could apply 29 CFR § 778.114 to Federal sector employees, if it wanted.

For example, HUD argues,

> It is a given that HUD employees have fixed tours of duty. Thus, they do not have fluctuating schedules. However, the very fact that overtime claims are being made indicates that they do have – or claim to have – fluctuating workweeks. That is all that is required to use the half-time method.[11]

In support of this conclusion, HUD cites two cases: *Flood v. New Hanover County*, 125 F.3d 249 (4th Cir. 1997) and *Griffin v. Wake County*, 142 F.3d 712 (4th Cir. 1998). Both cases are public sector cases involving Emergency Medical Technicians and Emergency Medical Services employees, respectively. For these reasons, HUD case law is not sufficiently probative to support the proposition that 29 CFR § 778.114(b) applies to

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[10] *Motion* p. 4.

[11] *Motion* p. 8.

Federal sector employees absent OPM regulations or other administrative action.

While HUD's speculation that OPM could apply the half-time method to FLSA overtime premium pay for Federal sector employees is a correct statement, the fact is that OPM has not.

The strongest argument that HUD advances is that OPM's regulations at 5 CFR § 551.301(b) "contemplate" the half-time method.[12] This argument is also not supported by case precedent and wholly speculative. Furthermore, the regulation that HUD cites is merely conforming language in relation to other OPM and DOL regulations and the regulation forms no material basis to conclude that OPM has ever contemplated the application of the half-time method to Federal sector employees.

HUD admits its search for Federal Labor Relations Authority (FLRA) case precedent "revealed no instance in which the FLRA discussed the half-time method."[13] Therefore, there is no FLRA case precedent support for HUD's *Motion*. This fact supports the conclusion that issues involving the half-time method for FLSA back-pay damages has not been the subject of labor-management disputes in the Federal sector.

The one federal sector employee case cited by HUD which applies the half-time method is *Zumerling*. Like most of HUD's public sector case cites, *Zumerling* involves a public safety employee, [c]urrent and former employee of the United States employed in fire protection and law enforcement activities."[14] Public safety employees are the subject of several wage and hour exceptions under the FLSA and work irregular and fluctuating schedules, unlike the typical General Schedule Federal sector employee.

Furthermore, *Zumerling* states at the outset of the decision,

> In contrast to the typical general schedule (GS) employee who is scheduled for a 40-hour workweek, the appellants typically work six 24-hour shifts, or 144 hours, in every 14-day work period. Also, unlike a typical employee who is on duty for all working hours, the firefighters are only on duty for 8 hours of each 24-hour shift; the remaining 16 hours are standby time where the firefighters may do as they please within the confines of the duty area. Congress has recognized that appellants' work schedules are different from those of typical government employees, and in Title V set forth the computation for firefighters' pay in recognition of this difference.[15]

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[12] *Motion* p. 5.

[13] *Motion* p. 17.

[14] *Zumerling*, p. 745

[15] *Zumerling*, p.746

The record establishes that the affected employees in this dispute are the "typical general schedule employees," as described in *Zumerling*, who are scheduled for a 40-hour workweek and they are on duty for all working hours. For these reasons, the express language of *Zumerling* supports the conclusion that the half-time method is not applicable to the bargaining unit employees in this dispute. Finally, as an example of judicial application of the half-time method to Federal sector employees, *Zumerling* stands alone.

Finally, HUD's argument is an example of *post hoc, ergo propter hoc* flawed logic because it confuses sequence with consequence. HUD's logic is that since DOL has crafted the half-time method in its regulations, then the method must apply to the back-pay damages in this dispute involving Federal sector employees. The argument ignores that OPM has the responsibility under the FLSA to author implementing regulations and OPM has not extended the half-time method through its regulations to Federal sector employees. HUD's argument also ignores that, regarding typical Federal sector employees, excepting public safety employees under *Zumerling*, no court has extended the half-time method to Federal sector employees and HUD's argument also ignores that the FLRA has no case law on the application of the half-time method to Federal sector employees.

HUD argues in its *Rebuttal* that it "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."[16] HUD's argument is unsupported by case precedent, speculative and without merit.

For these reasons, the Arbitrator finds that the half-time method for calculating FLSA back-pay is not applicable to the bargaining unit employees covered by the Unions' grievances.

B. The Elements of 29 CFR § 778.114(b)

Assuming, *arguendo*, that 29 CFR § 778.114(b) applies to HUD bargaining unit employees, HUD has not proven all the elements of the regulation are present in this dispute.

The Parties agree that the bargaining unit employees in this dispute are employed on a salaried basis and the amount of the bargaining unit employee's salary is not less than the minimum wage. But every other element of 29 CFR § 778.114(b) is disputed between the Parties.

HUD asserts that the employee's hours of work fluctuate from week-to-week. Yet

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[16] Emphasis omitted, *Rebuttal* p. 5.

HUD also asserts that "[i]t is a given that HUD employees have fixed tours of duty." [17] HUD attempts to distinguish the employees' fixed tours of duty from the regulatory requirement that the employee's hours of work fluctuate from week-to-week, by asserting the employees work a fluctuating workweek. The assertion is confusing, unsupported and ignores the realities of the HUD workplace and Federal sector personnel regulations and policies. For example, HUD's claim ignores the Parties' collective bargaining agreement which sets the basic work week at 40 hours. Moreover, if HUD employees want to fluctuate their workweek and work fewer hours, they will be charged annual leave, compensatory leave, leave without pay or absence without leave pursuant to both the collective bargaining agreement and HUD's personnel policies. Conversely, if HUD employees want to fluctuate their workweek and work more hours, they need supervisory approval pursuant to both the collective bargaining agreement and HUD's personnel policies. Furthermore, HUD has presented no evidence of planned fluctuating workweeks for any bargaining unit employees covered by the Unions' grievances in this case. For these reasons, the Arbitrator finds that HUD has failed to prove that the hours of work of the employees covered by the Unions' grievance *fluctuate* week-to-week as that term is used in 29 CFR § 778.114.

HUD asserts that the employees' salaries are a fixed amount as straight-time pay for whatever hours the employee worked in a workweek. This assertion, like the previous assertion, ignores the Parties' collective bargaining agreement and Federal sector personnel policies and regulations. The Parties' collective bargaining agreement and HUD's personnel policies establish that when an employee takes time off, the time is charged to annual leave, compensatory leave, leave without pay or absence without leave and is accounted in these pay categories in the employees' biweekly time and attendance/pay report. In the case of an employee on leave without pay and absence without leave, their pay will be reduced on an hourly basis equal to the time away from work. The Parties' collective bargaining agreement and HUD's personnel policies establish that, while the employees covered by these grievances are salaried, much of their pay administration is done on an hourly basis predicated on a fixed 40-hour workweek. Once again, HUD has presented no evidence that the employees' salaries are fixed for whatever hours the employee worked in a work week. For these reasons, the Arbitrator finds that HUD has failed to prove that the employees' salaries are a fixed amount as straight-time pay for whatever hours the employee worked in a workweek.

HUD asserts that the employee's salary is paid pursuant to a clear mutual understanding between the employee and the employer that the salary is for straight-time pay for whatever hours the employee worked in a workweek, whether few or many. HUD's argument under this element is based on the repeated use of the word "salary" in the Parties' collective bargaining agreement. HUD also argues that "the compensation of GS

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[17] *Motion* p. 8.

employees always is stated as a salary."[18] None of HUD's arguments establishes that the employees had a clear mutual understanding that their salary was for straight-time regardless of how many hours they worked and the Unions, as exclusive representatives of the bargaining unit, deny any such clear mutual understanding. Furthermore, numerous OPM documents present GS salary schedules as an hourly rate, including overtime rates at 1.5 times the hourly rate, and hourly rates are found on employees' biweekly time and attendance/pay reports. HUD's claim regarding this element of the regulation is wholly without merit. For these reasons, the Arbitrator finds that HUD has failed to prove that the employee's salary is paid pursuant to a clear mutual understanding between the employee and employer that the salary is for straight-time pay regardless of the hours the employee worked in a workweek.

HUD's *Motion* does not address the final element of the regulation involving the employer's payment for overtime hours at one-half the fluctuating work week rate to satisfy the overtime pay requirement. Based on *Rainey v. American Forest and Paper Association*, 26 F. Supp. 2d 82 (DDC 1998), the Union asserts that the fluctuating work week is only applicable to currently non-exempt employees that are entitled to overtime compensation and cannot apply retroactively to failed exemptions as HUD seeks in its *Motion*. The core of the Parties' disagreement on this element is that while HUD seeks the half-time method as a method for calculating and reducing its FLSA back-pay damages, if any, the Union asserts that the half-time method is only applicable to currently non-exempt employees entitled to overtime compensation. HUD's *Rebuttal* responds that *Rainey* is a District of Columbia case with limited precedential value therefore. HUD argues that the case has been soundly rejected in other District of Columbia cases which have applied the half-time method to failed FLSA exemptions. The Arbitrator finds that HUD's argument on this element is well supported and correctly states that the half-time method is applicable to failed FLSA exemptions.

For these reasons, even assuming *arguendo* that 29 CFR § 778.114 applies to the employees covered by the Unions' grievances, the Arbitrator finds that HUD has failed to prove three of the six elements of the regulation. Therefore, the half-time method is not appropriate for FLSA back-pay damages, if any, in this dispute.

C. CONCLUSION

For all these reasons, the Arbitrator finds that the half-time method of 29 CFR § 778.114 has no applicability to the calculation of FLSA back-pay damages, if any, in this dispute. Therefore, HUD's *Motion in Limine Regarding Damages* is denied, with prejudice.

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[18] *Motion* p.7.

ORDER

1. HUD's *Motion in Limine Regarding Damages* is denied, with prejudice; and

2. Pursuant to the Parties' collective bargaining agreement at Article 23, **Arbitration**, **Section 23.04 - Arbitration Fees and Expenses**, the Arbitrator's fees and expenses regarding the preparation of this **DECISION AND ORDER** shall be paid by HUD.

Sean J. Rogers, Esq.
Leonardtown, Maryland
October 22, 2007