**IN THE MATTER OF ARBITRATION**
**BEFORE ARBITRATOR SEAN J. ROGERS**

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| THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 222, AFL-CIO<br><br>and<br><br>NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1450<br><br>Unions,<br><br>- and -<br><br>U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,<br><br>Agency. | : | ISSUE: FLSA OVERTIME |

**UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT'S POST-HEARING BRIEF ON GS-360 DAMAGES**

The United States Department of Housing and Urban Development ("Agency" or "HUD"), through counsel, respectfully submits this Post-Hearing Brief on the issue of Fair Labor Standards Act ("FLSA") overtime compensation for HUD employees in the Equal Opportunity Specialist ("EOS") series (GS-360s and one GS-1101).[1] For the reasons set forth in this brief, HUD asks the Arbitrator to find that the Grievants have not met their burden of showing that overtime allegedly worked by EOSs was in fact "suffered or permitted" within the meaning of the applicable regulations at 5 C.F.R. §551.104. To the extent that the Arbitrator finds that any overtime work was suffered or

[1] HUD notes that a hearing on the exempt status of the same employees covered by this brief was held in September 2005. To date, the Arbitrator has issued no ruling on that question, and HUD continues to maintain that the employees in the GS-360 series in grades 11 and above are properly classified as exempt. HUD's filing of this brief regarding damages is not intended, and should not be construed, as an admission that any employee is non-exempt. And, contrary to the Union's repeated assertions during the damages hearing, at no time has HUD admitted that employees in the GS-360 series are non-exempt.

permitted by HUD, the Agency asks the Arbitrator to find that the Grievants have failed to produce sufficient evidence to show the amount and extent of the overtime work as a matter of just and reasonable inference. In other words, the Arbitrator should find that the Grievants' specific claims as to the number of overtime hours they allegedly worked are unsupported and not credible, and that the Agency has successfully negated the reasonableness of any inference to be drawn from the Grievants' evidence. Also, HUD asks the Arbitrator to find that the Grievants have failed to show that the testimony presented by the Grievants was an adequate sample upon which to award overtime compensation under the FLSA to the entire group of EOSs. In addition, to the extent that the Arbitrator finds the Grievants to be entitled to any damages, HUD asks the Arbitrator to find that the Agency had reasonable grounds for believing that its actions and omissions were not violations of the FLSA; thus, any violations occurred despite the Agency's good faith, and the Grievants therefore are not entitled to liquidated damages. Likewise, the Arbitrator should find that any FLSA violations by HUD were not willful. Finally, HUD asks the Arbitrator to find that the Agency is not the "losing party" within the meaning the cost-shifting provisions of the applicable collective bargaining agreements ("CBAs" or "contracts"), and that the Grievants are not entitled to attorney fees.

## Statement of the Issues

Pursuant to Section 23.08 of the Contract between the Agency and the American Federation of Government Employees ("AFGE") and Section 10.08 of the Contract between the Agency and the National Federation of Federal Employees ("NFFE"), the

Agency submits the following issues for determination by the Arbitrator:[2]

1. Whether the arbitrator should find that HUD does not owe Equal Opportunity Specialists overtime pay because the Grievants have failed to meet their burden of proof to show that any EOS was "suffered or permitted" to work overtime hours within the meaning of 5 C.F.R. §551.104, which includes a requirement that supervisors knew or had reason to believe the Grievants were performing over-tour work and/or had an opportunity to prevent the work from being performed or to control the work;

2. Whether the arbitrator should find that, even if any Grievant has shown that he or she was suffered or permitted to work overtime, the Grievants have failed to meet their burden of proof to show the amount and extent of the overtime work as a matter of just and reasonable inference;

3. Whether the arbitrator should rule that the Grievants have failed to meet their burden of proof to show that the evidence introduced with respect to time allegedly worked by certain EOSs at certain GS levels in a few of HUD's offices represents an adequate sample upon which to award overtime compensation to other EOSs regarding whom no such evidence was introduced;

4. Whether the Arbitrator should find that, even if there is some liability for overtime, the measure of damages should be limited to the half time formula as applied by the U.S. Department of Labor and the courts;

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[2] HUD has previously taken exception to the Grievants' framing of the issues. Tr. (8/29) at 33 & 35. Indeed, some of the issues proposed by the Grievants are not in dispute at all. For example, there is no dispute that misclassified employees, if any exist, should be paid any difference between "capped overtime" and "FLSA overtime." On the other hand, the proper calculation of "FLSA overtime" is in dispute.

5. Whether the arbitrator should find that, even if he finds that the Agency violated the FLSA, no liquidated damages are due because the Agency acted in good faith and had reasonable grounds for believing that its actions and omissions were not violations of the FLSA;

6. Whether the arbitrator should find that, even if he finds that the Agency violated the FLSA, any damages are limited to proven overtime worked by AFGE Grievants after November 3, 2003 (the limitations period applicable to the grievances filed under the AFGE Contract) and proven overtime worked by NFFE Grievants after September 4, 2005 (the limitations period applicable to the grievance filed under the NFFE Contract);

7. Whether the arbitrator should find that, even if he finds that the Agency violated the FLSA, HUD is not liable for an extended limitations period because the Agency did not know or show reckless disregard for the matter of whether its conduct was prohibited by the statute;

8. Whether the arbitrator should find that the AFGE Grievants failed to meet their burden of proof with respect to their Sunday travel grievance;

9. Whether the arbitrator should find that HUD is not a losing party with respect to these grievances; and

10. Whether the arbitrator should find that the Grievants are not entitled to an award of attorney fees.

## Proposed Findings of Fact

### The Grievances

1. On June 18, 2003, AFGE filed a Grievance of the Parties entitled “Non-duty hour travel” (hereinafter, the “AFGE Travel Grievance”). The AFGE Travel

Grievance alleged that "[o]n Sunday, May 4, 2003, employees were required to travel on Sunday to attend training." The grievance further alleged that the requirement to travel on Sunday was a violation of the AFGE CBA, law, rule and regulation; that employees who are or should be covered by the FLSA did not receive compensation for travel as passengers on non-workdays during hours that correspond to their regular working hours, in alleged violation of Section 25.03 of the Contract; and that "this is part of a pattern and practice by the [A]gency to violate the [AFGE CBA], law, rule and regulation." A copy of the AFGE Travel Grievance was previously submitted to the Arbitrator as Joint Exhibit 2 for the September 2005 mediation-arbitration proceedings. *See* Letter from Sean J. Rogers to Ms. Federoff and Messrs. Snider and Mesewicz dated September 12, 2005.

2. On December 24, 2003, AFGE filed, by fax, a grievance entitled "FLSA Overtime Grievance" on behalf of all bargaining unit members represented by AFGE Council 222 (hereinafter, the "AFGE Overtime Grievance"). The AFGE Overtime Grievance alleged that HUD had violated the FLSA, the CBA and other "relevant and applicable law, rule and regulation" by allegedly failing to properly classify bargaining unit employees as FLSA nonexempt, failing to pay proper compensation for overtime to bargaining unit employees, improperly offering bargaining unit employees compensatory-time-off in lieu of overtime, and failing to pay suffered or permitted overtime to employees. A copy of the AFGE Overtime Grievance was previously submitted to the Arbitrator as Joint Exhibit 3 for the September 2005 mediation-arbitration proceedings. *See* Proposed Finding of Fact ("PFF") ¶1.

3. HUD did not render a decision on the AFGE Overtime Grievance within the 30-day time frame contemplated by the AFGE Contract (*i.e.*, by January 23, 2004).

AFGE took no further action to pursue its grievance for almost 1½ years. On or about July 18, 2005, AFGE filed a demand for arbitration. A copy of the Invocation of Arbitration was previously submitted to the Arbitrator as Joint Exhibit 4 for the September 2005 mediation-arbitration proceedings. *See* PFF ¶1 above

4. On October 19, 2005, NFFE filed, by fax, a grievance entitled "FLSA Overtime Grievance" on behalf of all bargaining unit members in HUD Region IX (hereinafter, the "NFFE Grievance"). The NFFE Grievance alleged that HUD had violated the FLSA, the CBA and other "relevant and applicable law, rule and regulation" by allegedly failing to properly classify bargaining unit employees as FLSA nonexempt, failing to pay proper compensation for overtime to bargaining unit employees, improperly offering bargaining unit employees compensatory-time-off in lieu of overtime, and failing to pay suffered or permitted overtime to employees.[3]

5. By letter to NFFE's attorney (Michael Snider) dated December 1, 2005, HUD denied the NFFE Grievance as applied to employees above the GS-10 level.

6. On or about December 23, 2005, NFFE invoked arbitration.

7. NFFE has not filed a grievance relating to Sunday travel. Tr. (11/14) at 6.

8. On November 14, 2006, the parties informed the Arbitrator that they had agreed to consolidate the AFGE and NFFE grievances. Tr. (11/14) at 5-6.

9. The Union presented no evidence in the GS-360s hearing relating to employees represented by NFFE.

[3] The NFFE Grievance, NFFE Contract, invocation of arbitration and other related documents were discussed at the beginning of the November 14, 2006 hearing but were never made exhibits.

## The Collective Bargaining Agreements

10. The following excerpts from the AFGE CBA (Joint Ex. 1 to the 360s hearings) are pertinent to the issues raised by the AFGE Travel Grievance and/or the AFGE Overtime Grievance:

> ARTICLE 3
> Rights and Obligations of the Parties
>
> Section 3.01 – Governing Authorities. In the administration of all matters covered by this Agreement, the parties are governed by existing and future laws, existing Government-wide regulations, and existing and future decisions of outside authorities binding on the Department.
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> * * *
>
> ARTICLE 6
> Labor-Management Relations (LMR) Meetings
>
> Section 6.02 – Purpose. The primary purpose of the joint Labor-Management Relations Committee meeting shall be to promote and facilitate understanding, and constructive and cooperative relationships between Union and Management. Committee meetings under this Article shall provide the parties with a structured opportunity to hold informal discussions and consult on personnel practices and other working condition. . . .
>
> (2) The consultation or informal discussions that take place during these meetings shall not prejudice either party from exercising its bargaining rights . . . .
>
> Section 6.06 – Agenda. The parties shall exchange agenda for the LMR meetings. The agenda should be exchanged at least two (2) weeks in advance . . . .
>
> * * *
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> ARTICLE 12
> Training and Career Development
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> Section 12.12 – Premium Pay. No funds appropriated or otherwise available to the Department may be used for the payment of premium pay (overtime, compensatory time, or credit hours) to an employee engaged in training by, in, or through Government facilities or non-governmental facilities, or while traveling to/from training, except are as [sic] follows:

| | Nonexempt | Exempt |
|---|---|---|
| Travel Time | 5 CFR 551.422 | 5 USC 5542(b)(2)(B)<br>5 CFR 550.112(g) |
| Training Time | 5 CFR 551.423 | 5 USC 4109<br>5 CFR 410.602 |

* * *

ARTICLE 17
Hours of Duty – Alternative Work Schedules

Section 17.02 – Definitions. . . . (2) Flexitime. A method of establishing individual work schedules that allows employees some discretion with respect to their arrival/ departure times. The "Gliding Schedule" flexible work schedule provided under this Agreement allows employees to vary their arrival and departure times each day, so long as they are on duty during the office's established core hours.

* * *

(5) Credit Hours. Credit for work performed by an employee in excess of an eight-hour tour of duty on any workday in order to vary the length of a subsequent workday. Such work is compensated by an equal amount of time off (*i.e.*, one (1) hour of work in excess of the employee's regularly scheduled eight-hour tour of duty is compensated by one (1) hour off on a subsequent workday). . . . Work performed for credit hours is not compensated as, nor is it subject to the rules and regulations governing, overtime work.

* * *

Section 17.04 – Tours of Duty. . . .

(2) Credit Hours. . . .

(e) When an employee is performing additional work on a given workday in order to earn credit hours, overtime work on that day shall be defined as work that has been ordered or approved by Management in excess of the employee's basic eight-hour work requirement plus the additional work time approved in order to permit the employee to earn credit hours (*i.e.*, if an employee is approved to work one (1) credit hour, overtime work is work ordered or approved by Management in excess of nine (9) work hours on that workday). Time worked to earn credit hours shall not be

subsequently converted to or compensated as overtime work. . . .

(3) Compressed Work Schedules. . . .

(g) Overtime work under a compressed work schedule shall be defined as work which has been ordered or approved by Management in excess of nine (9) hours, on those days when the employee is scheduled to work a nine-hour tour of duty, and in excess of eight (8) hours, on those days when the employee is scheduled to work an eight-hour tour of duty.

* * *

Section 17.06 – Employee Responsibilities. . . .

(3) Each employee shall be responsible for his/her own compliance with the rules governing this Alternative Work Schedules program. Any employee who willfully falsifies time and attendance information on the sign in/sign out register[4] or fails to comply with the rules governing the Alternative Work Schedules program may, at Management's discretion, be prohibited from varying their daily work hours from the official business hours of their office for an appropriate period of time. In addition, they shall be subject to appropriate disciplinary action, in accordance with Federal Regulations, published HUD policies, and this Agreement.

* * *

ARTICLE 22
Grievance Procedures

Section 22.01 – Definition and Scope. This Article constitutes the sole and exclusive procedure for the resolution of grievances by employees of the bargaining unit and between the parties.

* * *

Section 22.06 – Time Limits.

(1) Time limits for the filing of a grievance under this procedure, unless mutually waived by the parties, shall begin to run from the next workday after the grievant became

[4] The "sign in/sign out" register was eliminated pursuant to CBA Supplement No. 1; however, the rest of this paragraph remains in effect.

aware or should have become aware of the matter being grieved.

* * *

Section 22.15 – Grievance of the Parties.

(1) Should either party have a grievance over any matter covered by this procedure, it shall inform the designated representative of the other party of the specific nature of the complaint in writing within forty-five (45) days of the date when the party became aware or should have become aware of the matter being grieved. . . .

(3) Within thirty (30) days after receipt of the written grievance, the receiving party shall send a written response stating its position regarding the grievance. If the response is not satisfactory, the grieving party may refer the matter to arbitration.

* * *

ARTICLE 23
Arbitration

Section 23.02 – Notice. Either the Union or Management shall notify the other party of its submission of a matter to arbitration by giving written notice within twenty (20) days of a final rejection at the last step of the grievance procedure.

* * *

Section 23.04 – Arbitration Fees and Expenses. The losing party shall pay the arbitrator's fees and expenses. The arbitrator should indicate which party is the losing party. If, in the arbitrator's judgment, neither party is the clear losing party, costs shall be shared equally.

* * *

Section 23.08 – Stipulations. If the parties fail to agree on a joint submission of the issue for arbitration, each shall submit a separate statement and the arbitrator shall determine the issue to be heard.

* * *

Section 23.10 – Authority of the Arbitrator.

. . . (2) The arbitrator shall not have authority to add to, subtract from, or modify any of the terms of this Agreement, or any supplement thereto. In the case of a back-pay award

based on the employee having been affected by an unjustified or unwarranted personnel action, the arbitrator may authorize reasonable attorney's fees . . . .

* * *

ARTICLE 25
Travel and Per Diem

Section 25.03 – Overtime Pay in Travel Status. . . .

(2) FLSA nonexempt employees must either:

(a) Perform work while traveling;

(b) Travel as a passenger to a temporary duty station and return during the same day; or

(c) Travel as a passenger on non-workdays during hours that correspond to his/her regular working hours.

11. The following excerpts from the NFFE CBA[5] are pertinent to the issues raised by the NFFE Grievance:

ARTICLE 1
Employee Rights / Standards of Conduct

Section 1.11: Compensation. Employees are entitled to timely receipt pf wages provided that appropriate documentation is submitted.

* * *

ARTICLE 7
Telecommuting Program

Section 7.02: Definitions.

A. Telecommuting – A supervisor-approved work option that allows an employee an opportunity to perform duties during the established regular/flexible work hours at an alternative work site during an agreed upon portion of the work week.

* * *

Section 7.08: Supervisory Approval of the Work Schedule.[6]

5 *See supra* note 3.

A. Supervisors must approve telecommuting schedules in advance to ensure that the employee's time and attendance can be properly certified and to preclude any liability for premium or overtime pay.

. . . D. Time and attendance procedures will remain the same for employee who telecommute as those employees who work in the Office. . . .

* * *

Section 7.10: Premium Pay. There are no provisions for self-approved overtime. Therefore, eligible telecommuters must ensure that overtime is properly approved prior to working beyond their scheduled hours of work.

* * *

ARTICLE 9
Grievance Procedures

Section 9.12: Grievance of the Parties.

A. If either Party has a Grievance over any matter covered by this Agreement, it shall inform the Union President or Regional Director (or equivalent successor position) or the designated representative of the other Party of the specific nature of the complaint, in writing, within 30 days of the date when the Party became aware or should have become aware of the matter being grieved.

* * *

ARTICLE 10
Arbitration

Section 10.05: Arbitration Fees and Expenses

A. The losing party shall pay the arbitrator's fees and expenses. The arbitrator should indicate which party is the losing party. If, in the arbitrator's judgment, neither party is the clear losing party, costs shall be shared equally.

* * *

Section 10.08: Stipulations.

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[6] A similar requirement for supervisory approval of tele-work schedules applies to all HUD employees, including the AFGE Grievants. *See* PFF ¶19 below.

A. If the Parties fail to agree on a joint submission of the issue for arbitration, each shall submit a separate statement and the arbitrator shall determine the issue to be heard.

* * *

Section 10.10: Authority of the Arbitrator. . . .

D. . . . [T]he Arbitrator shall possess the authority to make an aggrieved employee whole, to the extent such remedy is not limited by law, rule, or regulation . . . .

* * *

ARTICLE 20
Hours of Work (Credit Hours, Flexitour, CWS) and Attendance Procedures

Section 20.05: Credit Hours.

[B.2](f) When an employee is performing additional work on a given workday in order to earn credit hours, overtime work on that day shall be defined as work that has been ordered or approved by Management in excess of the employee's basic eight-hour work requirement plus the additional work time approved in order to permit the employee to earn credit hours (*i.e.*, if an employee is approved to works 1 additional hour beyond his/her scheduled 8-hour tour of duty in order to earn 1 credit hour, overtime work is work ordered or approved by Management in excess of 9 work hours on that workday). Time worked to earn credit hours shall not be subsequently converted to or compensated as overtime work.

* * *

Section 20.08: Other Forms

A. Form HUD-25012, Time and Attendance Record.

1. This is the official form used to record daily time and attendance of each employee. The timekeeper shall complete the daily record portion of this form; review the form for completeness; sign the form to certify the accuracy of the entries; and provide the signed Time and Attendance Record to the employee at the end of each pay period for review and verification prior to submitting the forms to the supervisor for certification.

2. The employee shall review the HUD-25012 provided by the timekeeper at the end of the pay period; verify the data/ information; sign (not initial) the form in the designated area to affirm the data to be true and correct; and return the form to the timekeeper. . . .

B. Form HUD-25020, Employee Record and Certification of Extra Hours of Work

This form is used to record actual time authorized extra hours of work, *i.e.*, credit hours, overtime and compensatory time. The employee shall complete and sign the form and submit it to the supervisor at the end of each pay period. The employee's signature certifies the accuracy of the entries, which must be consistent with the authorizing document (form HUD-1040, Overtime Authorization, or HUD-25018, Notification of Intent to Work Credit Hours).

* * *

ARTICLE 22
Overtime

Section 22.02: Approval. All overtime and compensatory time must be approved in advance by the appropriate official.

* * *

ARTICLE 32
Training and Career Development

Section 32.07: Premium Pay. No funds appropriated or otherwise available to the Department may be used for the payment of premium pay (overtime or compensatory time) or credit hours to an employee engaged in training by, in, or through Government facilities or non-governmental facilities, or while traveling to/from training, except as allowed by the Code of Federal Regulations (CFR) or United States Code (USC).

12. NFFE represents bargaining unit employees in HUD's Region IX, which includes the San Francisco Regional Office and Field Offices in Fresno, Los Angeles, Sacramento, San Diego and Santa Ana, California; Las Vegas and Reno, Nevada; and Phoenix and Tucson, Arizona. NFFE CBA, at i; *see also* Tr. (11/14) at 15.

Agency Timekeeping Procedures and Policies

13. Time and attendance ("T&A") is recorded on a Form HUD-25012. *See, e.g.,* Employer Ex. 1.

14. T&A records Form HUD-25012 are prepared by each employee's timekeeper, who then gives the time record to the employee to verify and sign. Tr. (8/29) at 173-74. The employee certifies that the entries are correct and the record is passed on to the supervisor. Tr. (8/29) at 174 (Cardullo testimony); Tr. (8/30) at 226 (Johnson testimony); Tr. (9/7) at 187-88 (Buchanan testimony).

15. An employee who intends to work over-tour hours is required to complete the HUD form entitled "Notification of Intent," before working the over-tour hours. Tr. (8/29) at 230.

16. After working the over-tour hours, the employee is required to complete Form HUD-25020, entitled "Employee Record and Certification of Extra Hours." Tr. (8/29) at 230; Employer Ex. 5. When completing this form, the employee must insert a code to select credit hours, compensatory-time-off ("comp-time"), or overtime. Tr. (8/29) at 230-31.

17. A supervisor of EOSs may supervise dozens of employees with individualized schedules and cannot be expected to recognize when an employee is in the office past his or her tour-of-duty. *See* Tr. (9/14) at 100.

18. Employees in two HUD offices admitted that supervisors allowed off-the-books comp-time system when they knew about over-tour work. *See, e.g.,* Tr. (11/1) at 123; Tr. (12/13) at 71. In one office, this was referred to it as "wink" time. Tr. (12/13) at 71. By its very nature, no records exist regarding the quantity of such comp-time that was given.

19. HUD's "Telework Program Policy Guide," is a Government document available on the Internet and subject to arbitral notice. It states in relevant part:

> 2.1.1 SUPERVISORY APPROVAL OF THE WORK SCHEDULE:
>
> Supervisors must approve telecommuting schedules in advance to ensure that the employee's time and attendance can be properly certified and to preclude any liability for premium or overtime pay.
>
> The Telecommuting Agreement must be used to document an approved telecommuting arrangement and it must identify the type of work schedule and the days the employee will work in each work setting.
>
> * * *
>
> 2.1.4 PREMIUM PAY:
>
> There are no provisions for self-approved overtime. Therefore, eligible telecommuters must ensure that overtime is properly approved prior to working beyond their scheduled hours of work.
>
> Official work schedules determine the entitlement to premium pay.

*Available at* http://www.hud.gov/offices/adm/jobs/telework/telwork4.cfm#top.

Equal Opportunity Specialists

20. FHEO investigates or otherwise deals with complaints of discrimination in housing and real estate transactions based on race, color, religion, sex, disability or national origin. Tr. (8/29) at 216.

21. FHEO consists of three branches: the Intake Branch, the Enforcement Branch, and the Program Compliance Branch. Tr. (8/29) at 39-40. In some offices there is also an Administration Branch. Tr. (8/31) at 5.

22. FHEO offices are located around the country in offices of varying sizes. For example, there are approximately 35 EOSs in Fort Worth; four in Houston; two in

San Antonio; one in Albuquerque; three in Oklahoma City; three in Little Rock; and five in New Orleans. Tr. (9/13) at 6-7. There are approximately 20 to 25 grade 12 EOSs in Chicago plus an additional six or seven GS-13's. Tr. (9/11) at 72; Tr. (9/29/2005) (liability phase) at 201. Philadelphia has eight GS-360-12's and 13's. Tr. (9/13) at 199. As discussed below, there are also EOSs in Atlanta; Boston; Columbia, S.C.; Denver; Jackson, Mississippi; Kansas City; Knoxville; Louisville; Miami; New York; Orlando; Pittsburgh; Seattle; Washington, D.C. as well as in other field offices. *See also* Union Ex. 38; Tr. (9/29/2005) (liability phase) at 109, 136; Tr. (11/3/2005) (liability phase) at 39.

23. An EOS in the Intake Branch is responsible for taking calls and "perfecting" complaints. This means that they interview complainants; gather names, addresses and telephone numbers of witnesses; and receive any documentation that the complainant is able to provide. Tr. (8/29) at 214; Tr. (8/30) at 249; Tr. (9/11) at 88. The Intake Branch also sends letters to the subjects of the complaints. Tr. (8/29) at 216. Finally, the Intake Branch attempts to conciliate complaints before a full-scale investigation begins. Tr. (8/29) at 217; *see also* Tr. (9/13) at 9-14.

24. After assembling the above information, the Intake Branch forwards the file to the Enforcement Branch (Tr. (8/29) at 215) unless the case falls under the Fair Housing Assistance Program ("FHAP"). Tr. (9/13) at 12-13. *See* PFF ¶29 below.

25. An EOS in the Enforcement Branch completes any initial documentation that the Intake Branch did not complete. In addition, the Enforcement Branch EOSs prepare investigation plans, interview witnesses, and conduct independent research to support or refute the allegations in the complaint. Tr. (8/29) at 219; Tr. (9/13) at 19-26. For example, Ms. Vivienne Cardullo, a GS-13 EOS in the Philadelphia Regional Office

described how she conducted research regarding Attention Deficit Hyperactivity Disorder ("ADHD") to determine whether the behavior of the complainants' children was a manifestation of a protected disability. Tr. (8/29) at 249; Union Ex. 6, at 5, 20.[7] *See also* Tr. (8/31) at 143-148 (Ms. Jessyl Ann Woods' step-by-step description of the enforcement process).

26. Preparing the typical investigative plan takes less than one hour. Tr. (9/13) at 138-39. Such plans are supposed to be "road maps" and are not required to be detailed. Tr. (9/13) at 140. Some EOSs claim they simply type information into an existing Microsoft Word template. Tr. (9/29/2005) (liability phase) at 122, 142.

27. The HUD handbook for EOSs states that investigators may need to contact witnesses outside of business hours. This does not necessarily require EOSs to perform uncompensated work at home or on weekends. For example, the "business hours" of the FHEO office in Fort Worth are 8:00 A.M. to 4:30 P.M. Tr. (9/13) at 149. However, some EOSs have tours-of-duty that begin as early as 6:00 A.M. Tr. (9/13) at 175. Moreover, an EOS can request comp-time to make a late night phone call, and some do make such requests. Tr. (9/13) at 176.

28. Investigators in the field perform their duties without direct supervision. Tr. (10/11/2005) (liability phase) at 43.

29. Some EOSs are responsible for oversight of State government entities that conduct investigations instead of HUD under programs called FHAP and Fair Housing Initiative Program ("FHIP"). Tr. (9/7) at 8, 12, 61.

[7] HUD notes that the initiative exhibited by Ms. Cardullo in independently designing an appropriate investigation plan is indicative of her FLSA exempt status.

30. When a case is referred to a State agency under FHAP, it is not processed further by HUD's EOSs. Tr. (9/13) at 13; Tr. (11/7) at 197.

31. EOSs in the Washington, D.C. office may have alternative responsibilities for Congressional inquiries. Tr. (9/29/2005) (liability phase) at 167-68, 173.

32. Part of the work of an EOS involves using a computer program called Title Eight Automated Paperless Office Tracking System ("TEAPOTS"). *See* Tr. (8/29) at 66; Tr. (9/29/2005) (liability phase) at 142, 158-59.

33. TEAPOTS does not record the times when data entry begins and ends. Tr. (8/31) at 173.

34. Title VIII of the Civil Rights Act of 1968 (also known as the "Fair Housing Act"), the enabling statute for the work of the EOSs, calls for cases to be closed in 100 days "unless it is impracticable to do so." Tr. (9/11) at 178; Tr. (9/20) at 103; *see also* 42 U.S.C. §3610. Under HUD's procedures, "complex" cases are not required to be completed in 100 days. Tr. (9/13) at 223.

35. In practice, the 100-day clock does not start until the case is referred to the Enforcement Branch to investigate. Tr. (9/20) at 144, 197-98; Tr. (11/15) at 118. Before that time, the matter is referred to as an "inquiry" and is governed by a separate 20-day clock. Tr. (9/13) at 129; Tr. (11/15) at 118; *see also* Union Ex. 38, at 4 ("Inquiries closed or Converted with 20 Days"), 5 (same).

36. It is not uncommon in some offices for investigators not to turn in their cases until the 95$^{th}$ or 98$^{th}$ day. Tr. (9/13) at 132; *see also* Union Exhibit 81 and PFF ¶438 below (more than 326 days).

37. The 100-day deadline is routinely *not* met. For example, the Philadelphia region closed only 55% of cases in 100 days in Fiscal Year 2004. Tr. (9/13) at 248-49.

In Chicago, the office's *goal* has decreased every year from closing 75% of cases in 100 days to a goal of 65% and currently to 60%. Tr. (9/20) at 103-04, 159.

38. One supervisor testified that "As a practicable [sic] matter, most any case that is going to result in a determination of reasonable cause is going to go over 100 days." Tr. (9/20) at 106.

39. Another supervisor, who was a former EOS herself, explained:

> Sometimes cases do age. It wasn't a problem for me, like, a performance problem, no. But periodically, you would have a case that would extend beyond the hundred days. You know, the regulations do allow us a way out in terms of there's some generic language in the regulations that say unless it's impractical to do so.

Tr. (11/15) at 134.

40. In practice, EOSs do not work under any firm deadlines and therefore have no need to work more than 40 hours in a workweek. Tr. (11/1) at 106-07; Tr. (11/15) at 109 (it is not part of an investigator's job to work more than 40 hours in a week). The fact that someone doesn't complete a case within a hundred days, would not prevent that individual from getting an "outstanding" rating. Tr. (11/1) at 108.

41. Nearly all of the Grievants in this arbitration came from the FHEO offices with the worst records for closing cases within 100 days, at least in Fiscal Year 2004 -- Philadelphia, Atlanta, Chicago, Fort Worth, and Seattle. Union Ex. 38, at 7. There were no overtime claims from the three best performing offices -- New York, Boston and San Francisco. *See id.*

42. There is a wide variation in the number of cases closed by GS-360s, even those at the same grade level. *See, e.g.,* Tr. (9/13) at 110-114; Employer Ex. 57.

43. Within FHEO offices, many GS-360s at grades 14 and 15 have supervisory duties. Tr. (9/13) at 199; Tr. (11/7) at 64, 67, 173-74; Tr. (9/29/2005) (liability phase) at 112, 185, 193; Tr. (10/11/2005) (liability phase) at 78.

44. GS-360s supervisors such as Mr. Rayford Johnson have the authority to make personnel changes that include, but are not limited to, selecting, removing, advancing in pay, or promoting subordinate employees, or have the authority to suggest or recommend such actions with particular consideration given to these suggestions and recommendations. *See* Tr. (9/13) at 63, 70-72.

Vivienne Cardullo

45. For the entire period covered by the grievances, Vivienne Cardullo was employed as a GS-360, grade 13, in the FHEO office in the Philadelphia Regional Office. Tr. (8/29) at 37.

46. Ms. Cardullo originally worked in the Intake Branch, and, later, in the Enforcement Branch. Tr. (8/29) at 215.

47. The Enforcement Branch in the Philadelphia Regional Office employs twelve GS-12s and three GS-13s. Tr. (8/29) at 40. At various times covered by the grievances, the Enforcement Branch in Philadelphia employed additional GS-13s and also one or more GS-11s. *Id.* There was no testimony regarding the number of EOSs in the other two Intake and Program Compliance Branches in the Philadelphia Regional Office.

48. Ms. Cardullo's supervisor was Mr. Wayman Rucker. Tr. (8/29) at 39. Mr. Rucker's supervisor was Ms. Wanda S. Nieves. Tr. (8/29) at 42.

49. Ms. Cardullo's tour of duty was from 8 A.M. to 4:30 P.M. Tr. (8/29) at 38.

50. Ms. Cardullo testified that she never arrived at the building in which her office was located before 8 A.M. Tr. (8/29) at 43. If her train was delayed, she would arrive five to ten minutes later. Tr. (8/29) at 38.

51. Since Ms. Cardullo admits that she never arrived at the building in which her office was located before 8 A.M. and that she had to pass through two secure doorways to reach her work space (Tr. (8/29) at 43), it is clear she was *never* at her work location at her 8 A.M. starting time.

52. Ms. Cardullo stayed late beyond her 4:30 quitting time four times a year for about 1¼ hours. Tr. (8/29) at 54-55.[8] On all such occasions, she was compensated with credit hours. Tr. (8/29) at 55.

53. On all other occasions, Ms. Cardullo left work promptly at 4:30 in order to catch a train home. Tr. (8/29) at 54. Ms. Cardullo acknowledged that she was motivated to make her regular train because she "would have to wait a considerable period of time for another train." *Id.* This was confirmed by Ms. Cardullo's corroborating witness, Mr. Volpini. Tr. (9/6) at 115.

54. Ms. Cardullo typically took one hour for lunch, either from 12 to 1 or 1 to 2. Tr. (8/29) at 56. Her colleague David Marshall testified that he would "quite often" stop at her desk to "see what she was doing for lunch." Tr. (9/6) at 13. The fact that Mr. Marshall needed to inquire regarding Ms. Cardullo's lunch plans is evidence that she was not habitually eating lunch at her desk.

55. Mr. Marshall did testify that he sometimes saw Ms. Cardullo eating at her desk but admitted that he did not know whether she was working at the same time. Tr.

[8] *See also* Tr. (8/29) at 285-86 ("5:30, six o'clock . . . that is the latest I ever left there.")

(9/6) at 28-29. He also did not know whether she left the office after eating at her desk. Tr. (9/6) at 38.

56. The only exception to Ms. Cardullo's practice of taking a full hour for lunch was from April 2002 to October 2003, when she left her desk for 15 minutes to heat a Weight Watchers meal and then ate at her desk. Tr. (8/29) at 57.

57. Ms. Cardullo offered no testimony that her supervisor knew or had reason to know that she ever worked through lunch during her Weight Watchers period except a claim that her supervisor "would *occasionally* stop by the desk and see me working while I was eating." Tr. (8/29) at 59 (emphasis added). Ms. Cardullo offered no evidence regarding the frequency with which this occurred.

58. During the period covered by the grievances, Ms. Cardullo took five weeks of annual leave every year. Tr. (8/29) at 60.

59. Ms. Cardullo telecommuted from home two days a week from February 2002 through the date of her testimony. Tr. (8/29) at 56.

60. Ms. Cardullo's tour of duty when she telecommuted was 8 A.M. to 4:30 P.M. Tr. (8/29) at 61.

61. Ms. Cardullo testified that "If I knew I had to work extra hours, I would begin at seven o'clock, but I would write an e-mail to my supervisor to let him know I was starting at seven o'clock." Tr. (8/29) at 61. Only two "early start" e-mails were introduced into evidence, and these covered two days in September 2004.[9] Union Ex. 6, at 31, 32. This clearly does not establish a pattern that would have put Ms.

[9] As shown below, and contrary to Ms. Cardullo's testimony, neither e-mail reflected a 7:00 A.M. start time.

Cardullo's supervisor on notice that she was routinely beginning work early and performing over-tour work.

62. Moreover, Ms. Cardullo's own evidence shows that she did not send those e-mails sufficiently in advance that her supervisor would have had an opportunity to prevent her from performing before-tour work or to control her work. For example, Union Exhibit 6, page 31 of 109, shows that Ms. Cardullo e-mailed her supervisor at his work e-mail address at 7:10 A.M., as follows:

> Subject: Early Start
>
> Wayman: I am starting work early this morning.
>
> Viv

On another occasion, she e-mailed her supervisor at 7:13 A.M. to say she was starting work two minutes later at 7:15 A.M. Union Ex. 6, at 32. Ms. Cardullo knew that Mr. Rucker did not arrive at work until 9:30 A.M. Tr. (8/29) at 285. Thus, Ms. Cardullo had no expectation that her supervisor would see the e-mails, nor is there evidence that he did see the e-mails, in time to have an opportunity to prevent the before-tour work from being performed or to control her work.

63. Except regarding one day in the entire grievance period, Ms. Cardullo did not present any evidence that she told her supervisor that she was beginning work one hour early and *not* ending work one hour early.[10]

64. Some of the e-mails that Ms. Cardullo offered as evidence of working before 8 A.M. or after 4:30 P.M. were not sent to her supervisor Mr. Rucker at all, but rather to herself, coworkers, third-parties or higher-level officials such as Wanda Nieves

[10] The only exception to this was on September 15, 2004, when she informed Mr. Rucker by an e-mail at 7:13 A.M. that: "I am starting work at 7:15 am this morning. I plan to work as long as I can." At 7:24 P.M. that day, she informed Mr. Rucker that she had stopped working at 7:15 P.M., and she requested four hours of comp-time. Union Ex. 6, at 32-33.

who had no reason to know what Ms. Cardullo's tour-of-duty was. *See* Tr. (8/29) at 126 *and see* Union Ex. 6, at 8, 11, 18, 21, 24,[11] 25, 28, 29, 36, 38, 41, 47, 52, 53, 57, 58, 59, 60, 62, 67, 71, 57, 76, 78, 79, 80, 85, 87, 88, 97, 98, 99, 100, 102,[12] 106, 108, 109.

65. In addition, some of those e-mails were so short that they reflect no more than a *de minimis* amount of work -- sometimes less than one minute. *See* Tr. (8/29) at 248. A list of e-mails with no text or with only one or two lines of text that were offered by the Ms. Cardullo as "proof" of her over-tour work is as follows: Union Ex. 6, pages 8, 9, 16, 41, 83 (two lines each); pages 14, 17, 21, 23, 26, 45, 71, 75, 78, 80, 81 (one line each); and pages 38, 57, 67, 72, 76, 77, 79, 86, 97, 99 (no text in e-mail). Each of these e-mails reflects *de minimis* work at most.[13]

66. Ms. Cardullo testified that she began work at home at 8 A.M. "Ninety-nine point nine percent of the time." Tr. (8/29) at 63. Accordingly, Ms. Cardullo could have begun work at home at 7 A.M. *at most once* during the entire period covered by the grievances.[14] Even if Ms. Cardullo underestimated slightly the percentage of time when she began early, she offered no credible evidence she began work early more than twice in a six-year period. (As already noted, the two occasions reflected in the evidence were in the same month in 2004.)

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[11] The e-mail on page 24 was sent to Wanda Nieves at 4:55 P.M., well within the normal tour-of-duty for many HUD employees. There would have been no reason for Ms. Nieves to suspect that Ms. Cardullo was doing over-tour work.

[12] This e-mail contained a death notice for a colleague's brother and does not reflect any work being performed.

[13] It is not clear that the matter discussed on pages 45-46 of Union Exhibit 6, however laudable, qualifies as working time at all.

[14] From February 2002, when Ms. Cardullo began telecommuting, until the end of August 2006, when Ms. Cardullo testified, there were approximately 186 workweeks when Ms. Cardullo was not on annual leave. If she telecommuted twice a week, she was at home on approximately 372 workdays. One-tenth-of-one-percent of 372 is less than one.

67. Ms. Cardullo testified that she worked through lunch approximately six times a month while telecommuting. Tr. (8/29) at 65. Ms. Cardullo offered no testimony that she *ever* informed her supervisor that she worked through lunch at home.

68. Ms. Cardullo testified that she worked 3½ hours past her quitting time approximately 3½ times per month while telecommuting. Tr. (8/29) at 67-68, 76. E-mails offered by Ms. Cardullo reflect that she gave her supervisor advance notice only three times in 4½ years of telecommuting. Union Ex. 6, at 32, 37, 92. This deprived her supervisor of the ability to prevent her from working overtime.

69. In any case, Ms. Cardullo's testimony was contradicted by her daughter Michelle Cardullo, who testified that Ms. Cardullo worked late once a month. Tr. (9/11) at 11-12.

70. Union Exhibit 2 consists of "screenshots" of Microsoft Word document properties and of directories of files on Ms. Cardullo's computer. Some of these screenshots reflect that documents were modified outside of Ms. Cardullo's tour of duty. However, Grievants offered no evidence whatsoever as to how much time Ms. Cardullo purportedly spent modifying these documents or whether her supervisor knew or should have known of her out-of-tour work or had the opportunity to prevent or control it.

71. Another EOS, Delorah Durbin-Dodd, explained in her testimony why the "date modified" field on a screenshot is not evidence of work being performed. She said:

> I could go in and change the date on something and it's been modified, or I could go in and work on 12 different paragraphs in the document and it's modified. So I have no idea.

Tr. (9/21) at 88.[15]

72. Ms. Cardullo claimed in her testimony that she worked at home from 7 or 8 A.M. until 7:30, 8:30 or 10 P.M. without any interruption, even for lunch. Tr. (8/29) at 189. This testimony is not credible and is obviously exaggerated.

73. Ms. Cardullo has two daughters who were teenagers when she began telecommuting. Tr. (8/29) at 187. Ms. Cardullo testified that she *never* talked to her daughters while working at home. Tr. (8/29) at 187-189. This testimony was not credible. Indeed, this claim is belied by evidence that Ms. Cardullo called home regularly while traveling. *See, e.g.,* Union Ex. 5, at 16, 17, 18, 20, 24; *see also id.* at 9 (two calls to unlisted number in the Philadelphia area); *id.* at 2 (unspecified long distance telephone charges while traveling). A reasonable estimate of the amount of time that Ms. Cardullo was distracted from her work at home by talking to her daughters is 15 minutes per daughter per day, or ½ hour per day.

74. Ms. Cardullo assumed that her supervisor knew she was working late because she sent him e-mails from her computer in the evening. Tr. (8/29) at 68, 71. Ms. Cardullo offered no evidence that her supervisor saw those e-mails or when he saw them. She also did not testify that she sent the alleged e-mails sufficiently in advance of working after-hours that her supervisor would have had an opportunity to prevent her from performing that work or to control that work. Mr. Rucker testified that if an e-mail was sent to him at 8:39 P.M., he would not see it before the next workday. Tr. (9/13) at 224. He also testified that he would not normally look at or notice the time that an e-mail was sent to him unless he had a specific reason to do so. Tr. (9/13) at 245-46.

[15] Indeed, the screenshots offered on behalf of another Grievant, Ms. Judy Sanchez, showed 16 documents modified in the span of 19 minutes on one day and eight documents modified in four minutes on another day. Union Ex. 54H, page labeled “6 of 21.”

75. Ms. Cardullo did introduce a few e-mails notifying her supervisor of late work from home. With two exceptions (Union Ex. 6, at 32-33, 92), these were all sent after the fact such that the supervisor could not have prevented the work for being performed. *See* Union Ex. 6, at 30, 34,[16] 37, 93, 95, 101, 107. For example, the e-mail on page 30 of Union Exhibit 6 reads:

> Hi Wayman:
>
> I just finished for the day. I worked 3¼ hours comp time tonight.
>
> Viv

76. Moreover, these e-mails represent only nine occasions of late work over a 4½-year period of telecommuting. This does not establish a pattern that would have put Ms. Cardullo's supervisor on notice that she was routinely working late and performing over-tour work. Indeed, on March 1, 2006, Mr. Rucker expressed surprise that Ms. Cardullo was still working at 6:16 P.M., stating in an e-mail to her: "You are working late!" Union Ex. 6, at 96.

77. Ms. Cardullo testified that on one occasion -- October 6 and 7, 2005 -- she worked an entire day until 4:04 A.M. the next morning. Tr. (8/29) at 68-69; *see* Union Ex. 6, at 3 and 79. Ms. Cardullo also testified that she was on sick leave on October 6th -- the day preceding the 4:04 A.M. completion time -- and that she had left her home midday to keep an 1½-hour long appointment for a haircut. Tr. (8/29) at 69-70. There is no evidence that Ms. Cardullo ever informed her supervisor of her "all-nighter" either before, during or after it occurred. The only e-mail offered into evidence that referred to

[16] The e-mail on page 35 merely recaps the e-mails on pages 32 and 34. Page 32 reflects the one exception alluded to when Ms. Cardullo did give advance notice of an intention to work late from home.

that event was addressed to David Marshall, who is not a supervisor -- in fact, Mr. Marshall is himself a grievant. *See* Union Ex. 6, at 79; Tr. (8/29) at 169; Tr. (9/6) at 7-8. Furthermore, Ms. Cardullo's admission that she abused her sick leave benefit by taking leave when she was not too ill to work and that she used her leave to attend a haircut appointment calls into question her credibility.

78. On May 20, 2003, Ms. Cardullo testified at an arbitration hearing relating to tele-working and she made certain statements that she asserts put HUD on notice that she was working overtime hours at home. Tr. (8/29) at 89-90; Union Ex. 7. Ms. Cardullo was asked by the Grievants' counsel: "Who knew about that testimony to your knowledge?" She responded: "There were managers in the, at the hearing." Tr. (8/29) at 90. Ms. Cardullo did not identify the managers present and did not testify that *her* managers were at the hearing or had any knowledge of it whatsoever. Thus, Ms. Cardullo's allegations at the prior hearing cannot be deemed to have put *her* supervisor on notice that she may have been working unapproved overtime and they are not evidence that *her* supervisor suffered or permitted her to work overtime.

79. Ms. Cardullo applied for and received comp-time covering about ten percent (10%) of her alleged after-hours work. Tr. (8/29) at 71, 77. Ms. Cardullo used all of that comp-time except for 12 hours. Tr. (8/29) at 72.

80. Ms. Cardullo explained that she did not request more comp-time for alleged over-tour work at home because she knew her workload would never permit her to enjoy the additional time-off. Tr. (8/29) at 190. Nevertheless, the fact remains that her conscious decision not to inform her supervisor of all of her extra work deprived the supervisor of the opportunity to know of the work and to prevent it.

81. During all or part of the time covered by the grievances, Ms. Cardullo had a boyfriend by the name of Tom Volpini. Tr. (8/29) at 74. Ms. Cardullo testified that she "would take work to his house sometimes at night just so that we could be together, but I know [sic] I had a deadline to meet and I would work there." *Id.* She also testified that, while at her boyfriend's house, she sat beside him and worked while he watched television. Tr. (8/29) at 222. There was no testimony regarding the frequency of this alleged occurrence. In any case, any suggestion that Ms. Cardullo worked all of the time that she was at her boyfriend's home or that she was fully focused on her work while sitting next to her boyfriend in front of a television is not credible.

82. Ms. Cardullo also testified that Mr. Volpini is an avid golfer and that on weekends she "would ride in the [golf] cart with him and I would proofread my final investigation reports, or review documents." Tr. (8/29) at 77. Ms. Cardullo claims she did not even talk to Mr. Volpini on these occasions because she was so engrossed in her work. Tr. (8/29) at 197. Mr. Volpini testified that this occurred on 25% of 60% of weekends, in other words, at most eight times a year (assuming that Mr. Volpini golfed on every single weekend regardless of the weather, which is unlikely in the Philadelphia area). *See* Tr. (9/6) at 123-24. In any case, any suggestion that Ms. Cardullo worked all of the time that she was at a golf course or that she was fully focused on her work while sitting on a golf cart while her boyfriend golfed -- not even talking to him -- is not credible.

83. Ms. Cardullo testified that on one occasion when she was on annual leave she called her supervisor from a golf course and said, "Wayman, I am on the golf course." Tr. (8/29) at 78, 198. She offered no evidence that she called her supervisor sufficiently in advance of working at her boyfriend's house or at the golf course that her

supervisor would have had an opportunity to prevent her from performing that work or to control that work.

84. Ms. Cardullo recalled three occasions between 2000 and 2006 when she departed before her tour of duty for out-of-town travel. Tr. (8/29) at 84. For two of those trips she left home at an unspecified time between 5 A.M. and 6 A.M.; for the third trip she left home at 6 A.M. Tr. (8/29) at 85. On at least two of those occasions, she traveled as a passenger in a government vehicle driven by her colleague David Marshall. Tr. (8/29) at 85, 116, 117; Tr. (9/6) at 26.

85. Ms. Cardullo normally left her house at 7 A.M. Tr. (8/29) at 85. Her normal commute was one hour. Tr. (8/29) at 201-02.

86. Ms. Cardullo acknowledged that her timekeeper would have no way of knowing that Ms. Cardullo had left home early in the morning for work-related travel. Tr. (8/29) at 171. It follows that her supervisor would not know or have reason to know of Ms. Cardullo's alleged extra work.

87. Ms. Cardullo's supervisor accompanied her on only one out-of-town trip. Tr. (8/29) at 88. David Marshall, who traveled with Ms. Cardullo, is not a supervisor. Tr. (8/29) at 169. As noted above, Mr. Marshall is also a Grievant in this case (*see* Tr. (9/6) at 7-8), and therefore not an objective witness.

88. Furthermore, Union Exhibit 23 is an affidavit from Mr. Marshall in support of Ms. Cardullo's claims regarding travel and working through lunch in 2002 and 2003. Significantly, when Mr. Marshall testified by telephone as a corroborating witness for Ms. Cardullo, he admitted that he could not recall events in 2002. Tr. (9/6) at 29. Indeed, at least twice during his telephone testimony he admitted referring to his

affidavit to refresh his memory -- once about an event in 2002 and once about an event in 2004. Tr. (9/6) at 20, 23.

89. Although Ms. Cardullo claimed to have worked at night in her hotel room during her trips, she offered no testimony that her supervisor knew or should have known of the work or had an opportunity to prevent or control it. Even her corroborating witness, Mr. Marshall, could only testify that she worked at a hotel on one occasion. Tr. (9/6) at 22.

90. Ms. Cardullo recalled attending one work-related event on a Saturday and acknowledged receiving comp-time for that work. Tr. (8/29) at 119-20.

91. During the entire period covered by the grievances, Ms. Cardullo received comp-time or credit hours every time she requested it. Tr. (8/29) at 168. Ms. Cardullo's knowledge of the procedures for requesting compensation for over-tour duty (*see* PFF ¶95) and her successful use of those procedures on repeated questions calls into question the credibility of her claim that she worked large amounts of unreported overtime. At a minimum, her supervisor's knowledge that Ms. Cardullo knew how to ask for compensation when she worked over-tour duty deprived him of a reason to suspect that she was working unreported overtime.

92. Ms. Cardullo's supervisor, Mr. Rucker, testified that Ms. Cardullo had never told him she was working over-tour hours without compensation, nor was he aware of such work by Ms. Cardullo or any other EOS under his supervision. Tr. (9/13) at 193-95, 206, 210.

93. Ms. Cardullo recalled three occasions on which she traveled for work on a Sunday. Tr. (8/29) at 227.

94. Ms. Cardullo had no recollection of ever telling her supervisor that she had worked on a holiday. Tr. (8/29) at 232.

95. At all relevant times, Ms. Cardullo was aware of HUD's procedures for authorizing overtime work, including the requirement to request authorization before working over-tour hours by completing the "Notification of Intent" form. Tr. (8/29) at 164, 166-67, 230. She also was familiar with the purpose and proper use of the form entitled "Employee Record and Certification of Extra Hours" (Tr. (8/29) at 230-31) and the Form 1040 entitled "Overtime Authorization." Tr. (8/29) at 272; Employer Exs. 5, 9, 10, 11.

96. Ms. Cardullo agreed during her testimony that the description in PFF ¶14, above, of the process for submitting and certifying T&A records is correct, and she acknowledged that her signature on each T&A record (*e.g.,* Employer Ex. 1) was a certification that each record is true. Tr. (8/29) at 173-74, 176-77, 225.

97. Despite Ms. Cardullo's bi-weekly certification that her T&A records were true, the gravamen of her testimony at the hearing was that her certified T&A records were not true and that she worked many more hours than recorded in her T&A records. For example, she claimed at the hearing to have worked past the end of her tour of duty on April 12, 2001, but her certified T&A records show only eight hours of work on that day. *Compare* Tr. (8/29) at 238 *and* Union Ex. 5, at 5, *with* Employer Ex. 6. By not accurately recording her hours of work, Ms. Cardullo deprived her supervisor of the opportunity to know of and prevent or control alleged over-tour work.

98. Ms. Cardullo testified that on one occasion she brought home a laptop and discovered -- erroneously it turned out -- that she did not have a power cord. Tr. (8/29) at 252. Ms. Cardullo sent an e-mail to her office about the (not) missing power cord. Union Ex. 6, at 6. It is not clear how much compensation Ms. Cardullo is claiming for

this event, when she provided no benefit to HUD because she did in fact have the power cord. Tr. (8/29) at 252. In any case, by her own admission, she only "Signed on *briefly* to report missing power cord." Union Ex. 6, at 1 (emphasis added).[17]

99. One of the e-mails that Ms. Cardullo included in her package of e-mails that allegedly prove over-tour work discusses "Red Wine and Olive Oil, Aspirin, ADHD Hotline." Union Ex. 6, at 5. Ms. Cardullo testified that this e-mail was related to a case she worked on involving a complainant named Kernan. Tr. (8/29) at 249. The "Red Wine and Olive Oil" e-mail is dated "08/25/2003." Union Ex. 6, at 5. However, other e-mails in Exhibit 6 make clear that the *Kernan* case was pending 184 days later -- on February 25, 2004. *See* Union Ex. 6, at 18, 20. This fact calls into question Ms. Cardullo's testimony that she had to work overtime because of constant pressure to complete her cases in 55 days. *See* Tr. (8/29) at 41.[18]

100. As noted in PFF ¶37 above, the 100-day deadline is routinely not met in Philadelphia. For example, only 55% of cases in 100 days in Fiscal Year 2004. Tr. (9/13) at 248-49.

101. Mr. Rucker testified that in one year he assigned Ms. Cardullo only two cases the entire year because he knew her cases were complex. Tr. (9/13) at 250. This equates to more than 180 days to close a case.

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[17] Although the Arbitrator accepted the first three pages of Union Exhibit 6 as a table of contents, and not as evidence (Tr. (8/29) at 128), Ms. Cardullo's own statement in the table of contents is nevertheless an admission against interest. *See* Tr. (8/29) at 123 (indicating that Ms. Cardullo created the summary).

[18] In her testimony in the liability phase of the 360s hearing, Ms. Cardullo acknowledged that investigators are allowed 180 days for complex cases. Tr. (11/4/2005) at 56. And, she admitted that supervisors do not strictly enforce that 180-day limit (*id.* at 57), testimony that is borne out by the age of the *Kernan* case. *See also* PFF ¶101.

102. In another year, Ms. Cardullo was assigned only four cases. Tr. (9/13) at 251. The average caseload in Philadelphia is seven to nine cases per year. Tr. (9/13) at 251.

103. Regarding the quality of Ms. Cardullo's work, Mr. Rucker testified that he has counseled her to include *less* detail in her reports. Tr. (9/13) at 237. Mr. Rucker said:

> So a lot of the work that she's complaining about it's impossible to do, it is possible to do if she would follow the instructions. I've talked to her about that in the past.

Tr. (9/13) at 238. For example, an investigative report is supposed to contain a summary of pertinent documents but "Ms. Cardullo describes every document she gathers in an investigation and not all of those documents are pertinent." Tr. (9/13) at 237. When asked whether Ms. Cardullo would still get an outstanding rating if she performed less work, Mr. Rucker responded: "Sure she would." Tr. (9/13) at 239.[19] A reasonable inference from these facts is that Ms. Cardullo's over-tour work, if any, did not benefit the Agency.

104. For part of the period covered by the grievances, Ms. Cardullo had a part time job at Home Depot on Tuesday nights and some Fridays, Saturdays and Sundays. Tr. (8/29) at 256, 263; Tr. (9/6) at 5. Needless to say, Ms. Cardullo was not performing after-tour or weekend work for HUD during the same hours she was working at Home Depot.

[19] Ms. Cardullo testified in the liability phase of the 360s hearing that it is necessary to close 24 cases a year to earn an "outstanding" rating. Tr. (11/4/2005) at 85. This testimony apparently was not accurate.

105. Throughout the grievance period, Ms. Cardullo certified each pay period that her T&A records were "correct and accurate." Employer Exs. 12, 13, 14, 15, 16, 17, 18.

106. In summary:

a) Ms. Cardullo knew the proper procedures for informing supervisors of planned overtime work and obtaining authorization. She chose to use those procedures on some occasions, but not on other occasions.

b) Ms. Cardullo does not claim any before-tour work for days on which she worked in the Philadelphia Regional Office. In fact, the evidence shows she was habitually late.

c) Ms. Cardullo claims after-tour work in the Philadelphia Regional Office on four occasions per year lasting 1¼ hours each. However, for each such occasion, she was compensated with credit hours. Furthermore, one-quarter hour must be subtracted from each occurrence on the presumption that Ms. Cardullo arrived at work at least 7½ minutes late on each of those occasions.

d) Ms. Cardullo admitted to taking a one hour lunch break despite being entitled to only ½-hour. This further reduces by ½-hour any claim she may have for working late.

e) Ms. Cardullo asserted that for approximately 1½ years -- from April 2002 to October 2003 -- she worked for half of her lunch break (15 minutes) while eating a Weight Watchers meal at her desk. However, she offered no testimony that her supervisor knew or had reason to know that she was working through lunch except a vague claim that her supervisor "would occasionally stop by the desk and see me working while I was eating." Her claim also is not

credible, as the Arbitrator may take arbitral notice that Weight Watchers meals require utensils to be eaten, thus occupying the eater's attention.

f) Regarding the days when she worked at home, Ms. Cardullo provided evidence suggesting that she started work before her tour-of-duty no more than twice. However, on both of those occasions, Ms. Cardullo's failure to provide adequate notice of her plans deprived her supervisor of the ability to prevent her from working overtime.

g) Ms. Cardullo testified that she worked at home past her quitting time approximately 3½ times per month for an average of 3½ hours each -- a total of 55 hours over 4½ years of telecommuting. However, e-mails offered by Ms. Cardullo reflect that she gave her supervisor advance notice only three times in those 4½ years. This deprived her supervisor of the ability to prevent her from working overtime. Approximately half of the e-mails she offered as evidence of late work were not sent to her supervisor but rather to other individuals. They are therefore irrelevant.

h) Ms. Cardullo also testified about unspecified amounts of work at her boyfriend's house and on golf courses. Aside from the lack of notice to her supervisor and his inability to prevent the work from being accomplished, Ms. Cardullo's testimony about those events lacked credibility.

i) In fact, nearly every aspect of Ms. Cardullo's testimony lacked credibility. For example, she claimed that she was under pressure to finish her cases in 55 days and that her supervisor knew this required overtime work, yet her own testimony about the *Kernan* case showed it to have been on her desk for more than 184 days. The sum total of Ms. Cardullo's testimony is that she may

have worked on occasion outside her tour of duty, but her supervisor had no knowledge of it and no ability to prevent it except in those instances where he was asked to approve comp-time or credit hours. Moreover, Ms. Cardullo has not convincingly proven the extent of any overtime work.

j) Ms. Cardullo offered no testimony that would support a conclusion that her work, her workload and/or her experience with over-tour / overtime work were representative of the work, workload and/or experience with over-tour / overtime work of other EOSs in the Philadelphia Regional Office or nation-wide.

Dr. Donald Johnson

107. For the entire period covered by the grievances, Dr. Donald Johnson was employed as a GS-360, grade 12, in the FHEO office in Chicago. Tr. (8/30) at 59, 63.

108. However, Dr. Johnson performed no work from April 17, 2000 through August 22 or 23, 2000, and again from May 30, 2003 through very late June 2003. Tr. (8/30) at 63.

109. Dr. Johnson was employed in the Enforcement Branch II of FHEO. Tr. (8/30) at 59.

110. Dr. Johnson had four different supervisors during the period covered by the grievances: Ms. Cheryl Smith until 2001; Mr. Maurice McGough during a short period in 2001; Mr. Ivory Smith from 2001 until his death in November 2002; Mr. McGough (again) from November 2002 until February 2006; and Mr. Gordon Patterson from February 2006 on. Tr. (8/30) at 76-77.

111. Dr. Johnson's tour of duty in 2000, 2001 and part of 2002 was from 9:30 A.M. to 6 P.M. Tr. (8/30) at 113. In 2002, his tour of duty changed to 9 A.M. to 5:30

P.M. Tr. (8/30) at 68, 113. His tour of duty was a "Flexitour," which allowed him to vary his arrival and departure times. *See* Employer Ex. 29; AFGE Contract §17.02.

112. During their respective tenures as Dr. Johnson's supervisors, Ms. Cheryl Smith and Mr. McGough typically arrived later than Dr. Johnson and had no way of knowing what time Dr. Johnson had arrived, while Mr. Ivory Smith and Mr. Patterson typically arrived earlier than Dr. Johnson and, in Dr. Johnson's opinion, could have known when Dr. Johnson arrived "if they chose to." Tr. (8/30) at 112. In other words, even Mr. Smith and Mr. Patterson would not necessarily know when Dr. Johnson arrived merely by the fact that they were already in the office when he arrived.

113. In fact, Mr. Patterson's office and Dr. Johnson's cubicle are "about as far apart as you can get physically in the FHEO regional office, which is a large office." Tr. (8/30) at 133; *see also id.* at 112, 254; Arbitrator's Ex. 1.

114. Dr. Johnson's cubicle also was far away from the offices of his prior supervisors. Tr. (8/30) at 254-55; Tr. (9/20) at 108. When Mr. McGough and Ms. Cheryl Smith were his supervisors, they did not visit his workstation regularly. Tr. (8/30) at 256.

115. Mr. McGough did not observe Dr. Johnson working over-tour hours during the period of time he supervised Dr. Johnson. Tr. (9/20) at 96. Even if he saw Dr. Johnson in the office after 5:30, he would not know what time Dr. Johnson had arrived that day. Tr. (9/20) at 151-52.

116. Dr. Johnson arrived at his scheduled arrival time ninety percent of the time during the grievance period. Tr. (8/30) at 67.

117. Dr. Johnson would sometimes arrive at work early in order to use his office computer to browse the internet for personal purposes, including reading the local news. Tr. (8/30) at 74-75.

118. During 2006, Dr. Johnson sometimes would also arrive early in order to interact with his supervisor, Mr. Patterson, whose tour of duty began and ended early in the day. Tr. (8/30) at 75. However, Mr. Patterson was Dr. Johnson's supervisor only beginning in February 2006. Tr. (8/30) at 76. Thus, any early arrivals prior to February 2006 were not for the work-related purpose of interacting with Mr. Patterson.

119. Dr. Johnson typically entered his office through a back door using a code entered on a keypad. Tr. (8/30) at 68-69. Dr. Johnson was not assigned a unique code for that keypad. Tr. (8/30) at 69.

120. Dr. Johnson testified that he sometimes signed-out of his office at the end of his day and admitted that this could be as early as 5:35 P.M. Tr. (8/30) at 70. Those sign-out records were controlled by the General Services Administration and not by HUD. Tr. (8/30) at 70, 259-260.

121. Dr. Johnson occasionally left notes on Mr. Patterson's desk when he worked late, but not regularly. Tr. (8/30) at 93. Even regarding those occasions when Dr. Johnson did leave a note, Mr. Patterson never had the opportunity to see the notes on the same day they were left, as Dr. Johnson acknowledged that Mr. Patterson consistently left the office at 4:30 P.M. Tr. (8/30) at 257. Thus, Dr. Johnson's notes did not afford Mr. Patterson an opportunity to prevent Dr. Johnson from performing this over-tour work or to control it.

122. Nevertheless, the record shows that Mr. Patterson *did* admonish Dr. Johnson for working beyond his tour of duty when Mr. Patterson became aware of it. Tr. (8/30) at 116, 133.

123. Each of Dr. Johnson's notes to Mr. Patterson that was offered as evidence bears a date and time. *See* Exhibit 15. Even assuming that those times indicate when the notes were actually generated, this would only establish that Dr. Johnson was in the office at the noted hours, nor that he worked straight through until those hours.

124. Moreover, the time notation on Dr. Johnson's notes did not stand out from the content of the notes (*see* Union Ex. 15), and there is no evidence that Mr. Patterson even noticed the times on the notes or that a reasonable reader of the notes would have noticed the times on them, rather than focusing on the substance of the notes.

125. In addition, even if Mr. Patterson did notice the times and see that Dr. Johnson had worked beyond his tour of duty, Mr. Patterson explained that:

> I had spoken to Mr. Johnson on numerous occasions about him coming late -- coming into work late, and his response to that is that, "Well, I" -- you know, that "I will work later in the evening to make up for it." And I sort of given him a little slack in that regard. So unless he were to specifically come to me and ask me for comp. time if he was here a little bit later, given our previous conversations, I would assume that it would be -- that he did not come -- that he did not come in when he was supposed to, that he came in later.

Tr. (11/1) at 123. Dr. Johnson apparently alluded to this arrangement when he admitted that he received comp-time off the books. Tr. (8/30) at 122-23.

126. In any case, as noted above, Mr. Patterson became Dr. Johnson's supervisor only in February 2006. Dr. Johnson did not claim that he left similar notes for his prior supervisors and, in fact, implied that he was not doing so. *See* Tr. (8/30) at 119.

127. Mr. McGough testified that Dr. Johnson sometimes left him notes, but they did not contain a time. Tr. (9/20) at 131. Even if Mr. McGough is wrong about that fact, and there is no evidence that he is, his testimony at least indicates that he did not routinely notice the time on the notes.

128. Dr. Johnson asserted that Mr. McGough knew that Dr. Johnson was working late because "he saw me leave late and would say good-bye to me." Tr. (8/30) at 119. This testimony does not establish that Mr. McGough saw Dr. Johnson perform any work.

129. Indeed, Dr. Johnson admitted that sometimes he stayed in the office late, not to work, but to study materials that he felt would advance his career. Tr. (8/30) at 113-14. He also testified:

> I saw myself as a possible next supervisor for program operation. . . . I [had] taken [materials] off the Internet, taken them home with me, reading them at home, reading them at work. And I still have them on my desktop if anyone wants to call me up for that job.

Tr. (8/30) at 246.

130. Also, when he stayed late, he made personal phone calls and browsed the internet. Tr. (8/30) at 114.

131. Furthermore, there was no testimony regarding the frequency with which Mr. McGough saw Dr. Johnson staying after hours or what time it was.

132. Dr. Johnson similarly asserted that Ms. Smith knew that Dr. Johnson was working late because "she passed by my work station." Tr. (8/30) at 119. Again, this testimony does not establish that Ms. Smith saw Dr. Johnson perform any work. Furthermore, there was no testimony regarding the frequency with which Ms. Smith passed by Dr. Johnson's work station after hours or what time it was.

133. Dr. Johnson testified that he sometimes was working at 1:12 A.M., 2:49 A.M. and 4:01 A.M. Tr. (8/30) at 100. However, he did not answer counsel's question when he was asked whether he worked straight through the night on those occasions. Tr. (8/30) at 101. He also did not claim that his supervisors knew or should have known of his work at those hours, or that his supervisors had the opportunity to prevent him from performing that work or to control it.

134. Ms. Brenda Shavers, formerly an EOS in Chicago, testified that Dr. Johnson "was not one of the people who would be in the office when I worked past my tour of duty." Tr. (11/7) at 13. She explained that if she had to work late -- which she did two or three times a week (Tr. (11/7) at 14-15) and for which she always requested permission (Tr. (11/7) at 7) -- she was always concerned to know who was there or whether she was alone in the office. Tr. (11/7) at 12.

135. Dr. Johnson testified that he worked over-tour hours to complete his cases in 100 days and earn a promotion. Tr. (8/30) at 100, 120. Later he testified that he completed many cases in "*under* the hundred days" by working extra time. Tr. (8/30) at 184 (emphasis added).

136. In contrast, Dr. Johnson's performance appraisals in Union Exhibit 10 demonstrate that Dr. Johnson was not required to, and did not typically, close his cases in 100 days. For example, on March 8, 2002, Dr. Johnson was rated "Fully Successful" under Critical Element 1, which rating indicates that in 70-80% of his cases, he "analyzes all pertinent data, makes necessary contacts[,] writes up Final Investigative Report (FIR) and draft appropriate letters" during days 90-130. Union Ex. 10, fifth page. He received a similar rating under Critical Element 2, which rating also indicates that he

completed 70-80% of his cases in 90-130 days. *Id.*, ninth page. Dr. Johnson admitted on cross-examination that he does not close all cases in 100 days. Tr. (8/30) at 191.

137. Mr. McGough explained that performance appraisals are based more on balancing the case load than on meeting the 100 day goal in individual cases. Tr. (9/20) at 165-66.

138. Dr. Johnson's performance appraisals also indicate that he worked with a significant degree of independence, a fact that he confirmed in his testimony. Ex. 10; Tr. (8/30) at 207. This would tend to negate any testimony that his supervisors knew or should have known of his hours of work or that they had an opportunity to prevent him from working or to control his work.

139. Union Exhibit 12 is a series of charts setting out the over-tour work that Dr. Johnson claims to have performed during the grievance period. Dr. Johnson testified that he has already been compensated for all of the hours set forth in Exhibit 12. Tr. (8/30) at 87. At most, he may have been uncompensated for 6.5 hours. Tr. (8/30) at 88.

140. Later, Dr. Johnson appeared to recant his testimony that he has already been compensated for all of the hours set forth in Exhibit 12, claiming that he received no extra compensation after 2001. Tr. (8/30) at 101. However, he later contradicted himself again and said that he was compensated for ten percent of his late work. Tr. (8/30) at 121. In any case, he admitted that he received comp-time and credit hours for over-tour work in 2000 and 2001. Tr. (8/30) at 77.

141. As noted above, Dr. Johnson admitted that he received comp-time off the books. Tr. (8/30) at 122-23. This off the books comp-time totaled about eight percent of his claimed over-tour work. Tr. (8/30) at 123-24.

142. To the extent that any time in Exhibit 12 was uncompensated, that exhibit was not based on actual records of work performed but rather on Dr. Johnson's alleged recollection and his personal application of statistical analysis tools. Tr. (8/30) at 90-91, 94.

143. However, Dr. Johnson admitted that his personal recollection of how much over-tour compensation he received was not accurate. Tr. (8/30) at 122 ("I didn't realize I'd received that much."); *see also* Tr. (8/30) at 124 ("[T]hat's a ballpark figure. I'm pulling that one off the top of my head."); *id.* at 210 ("You're asking me to go back six years, eight months . . .").[20]

144. Also, Dr. Johnson claimed to have expertise in the use of statistical analysis tools based on his previous stint as a research scientist. Tr. (8/30) at 91. It should be noted that no such expertise or experience appears in Union Exhibit 9, which purports to be Dr. Johnson's "Professional Resume." Rather, Dr. Johnson's resume indicates that his educational and professional backgrounds are in the fields of education and political science. Indeed, at a different point in his testimony, Dr. Johnson claimed to have been an elementary school teacher in the U.S. Virgin Islands. Tr. (8/30) at 191. Highlighting the lack of credibility in his testimony, Dr. Johnson's resume implies that he held five jobs simultaneously in 1981, while, at the same time, he was studying towards a Ph.D. degree. *See* Union Ex. 9, at 2-3.

145. Dr. Johnson also was argumentative (*see, e.g.,* Tr. (8/30) at 101, 191), practiced selective recall (*see, e.g.,* Tr. (8/30) at 210), and seemed concerned as much or more with promoting himself as he was in furthering HUD's mission. *See, e.g.,* Tr.

[20] *Compare* Tr. (8/30) at 223 (testifying regarding a specific day in 2001: "I only worked five and a half hours on one day. I believe that was on a Wednesday.")

(8/30) at 92 ("I knew about certain cases that would change the country. I was going to set some legal precedent, so the numbers [of hours allegedly worked] reflect that."); *see also* Tr. (8/30) at 84 (admitting that he worked harder only when he believed it would further his goal of being promoted to GS-13); *id*. at 100, 112-13, 147, 246.

146. Dr. Johnson admitted that he knew the procedures for notifying HUD of over-tour work but did not consistently follow those procedures because "it's a pain." Tr. (8/30) at 120. But he acknowledged, "Obviously, if I got 200 credit hours or 190 credit hours, I would have to have requested it." Tr. (8/30) at 209; *see also* Employer Exs. 27, 28.

147. Dr. Johnson also admitted that he worked over-tour hours even after his supervisor turned down his request for permission to work over-tour hours. Tr. (8/30) at 211.

148. Dr. Johnson claimed to have worked through lunch on many occasions, but admitted that half of his one-hour lunch period was paid. Tr. (8/30) at 145-46.

149. Dr. Johnson also admitted that he never told any of his supervisors that he worked through lunch and does not know whether his supervisors knew he worked through lunch, because even if they saw him at his desk during part of the lunch period, they would not know if he took lunch during some other part of the 11 A.M. to 2 P.M. lunch period. Tr. (8/30) at 148, 256.

150. Dr. Johnson testified that he could not "guesstimate" the number of times he told his supervisors he was working through lunch. Tr. (8/30) at 257.

151. Mr. Richard Anthony was offered as a corroborating witness for Dr. Johnson's claims but Mr. Anthony admitted that his own duties prevent him from seeing Dr. Johnson working at all times of the day. Tr. (9/11) at 92. Mr. Anthony also admitted

that he does not know what Dr. Johnson's job consists of, since they perform different functions (even though they are both GS-360s). Tr. (9/11) at 92.[21]

152. A taxi regularly picked Dr. Johnson up at his home between 7 and 7:45 A.M. Tr. (8/30) at 168. Dr. Johnson claimed he worked in a taxi on the way to work and that his regular taxi driver saw him working. Tr. (8/30) at 150.

153. The Arbitrator should take arbitral notice that during much of the year, Dr. Johnson's taxi rides from home to work and/or from work to home would have taken place in total or partial darkness. *See* http://aa.usno.navy.mil/data/docs/RS_OneYear.html (sunrise/sunset table generator run by U.S. Naval Observatory, a government agency).

154. Dr. Johnson also claimed to have performed HUD work at home in the evenings. Tr. (8/30) at 150. However, some of the activities he described were not work, but rather studying materials that he felt would advance his career. Tr. (8/30) at 150-51, 246.

155. Dr. Johnson admitted that he was not sure whether he ever told his supervisors that he worked at home. Tr. (8/30) at 175-76. He offered no evidence that his supervisors knew he was working at home, only his opinion that they should have known because of his output. Tr. (8/30) at 156. However, the evidence as a whole, including Dr. Johnson's evaluations (Union Ex. 10) and Dr. Johnson's own repeated admission that he has not received promotions that he considers himself entitled to, establishes that Dr. Johnson's supervisors did not share his view of work output. Indeed, his supervisor, Mr. McGough, testified that "Dr. Johnson has a relatively light case load and work load compared to other investigators" because "his ability to timely

[21] To the extent that any part of Mr. Anthony's testimony supports the Grievants' claims, it is given no weight for the reason explained in PFF ¶273.

complete work assignments is limited." Tr. (9/20) at 187. Mr. McGough also testified that Dr. Johnson works slowly yet is not thorough. Tr. (9/20) at 193.

156. Dr. Johnson traveled on HUD business eight times during the grievance period. Tr. (8/30) at 79.[22] Two of his trips were weekend trips to Minneapolis and were made in 2000. Tr. (8/30) at 163. The other six trips occurred on workdays in 2005 and were all in and around the Chicago area. Tr. (8/30) at 165.

157. As noted above, Dr. Johnson usually left his home between 7 and 7:45 A.M. His regular commute ranged from 35 to 60 minutes and averaged 45 minutes. Tr. (8/30) at 168-169.

158. One business trip about which Dr. Johnson testified in particular was to Lisle, Illinois. This trip took one or 1.5 hours each way (Tr. (8/30) at 168, 261), so the round-trip was a total of one-half to 1.5 extra hours over his regular commute. Dr. Johnson's regular taxi-driver testified that this trip began at 9:30 or 10:00 A.M. and lasted four to five hours. Tr. (9/6) at 109-10.

159. Three of Dr. Johnson's trips were to Catholic Charities housing in South Chicago. Tr. (8/30) at 169, 171. Dr. Johnson left home for those trips at 6:30 A.M. and traveled to HUD to meet other HUD employees. Tr. (8/30) at 171. This was not working time, but rather home-to-work commuting. On these occasions, he was home at 4:30 P.M. Tr. (8/30) at 172. Dr. Johnson admitted that he worked no overtime on the

[22] Dr. Johnson originally mentioned nine trips but later recalled that one trip was outside of the grievance period. *See* Tr. (8/30) at 170.

occasions of these trips. Tr. (8/30) at 172 ("I acted as if I was a 7:30 person or 7:00 person that day").[23]

160. Since Dr. Johnson cannot drive (Tr. (8/30) at 167), he always traveled as a passenger. *See also* Tr. (8/30) at 157, 172 (Dr. Johnson testified he did not even know how to borrow a HUD vehicle).

161. Dr. Johnson agreed during his testimony that the description in PFF ¶14, above, of the process for submitting and certifying T&A records is correct, and he acknowledged that his signature on each T&A record was a certification that each record was correct and that he had worked only 80 hours. Tr. (8/30) at 228.

162. Throughout the grievance period, Dr. Johnson certified each pay period that his T&A records were "correct and accurate." Employer Exs. 19, 20, 21, 22, 23, 24, 25.

163. Despite Dr. Johnson's bi-weekly certification that his T&A records were true, the gravamen of his testimony at the hearing was that his certified T&A records were not correct and that he had worked many more hours than recorded in his T&A records. By not accurately recording his hours of work, Dr. Johnson deprived his supervisor of the opportunity to know of and prevent or control alleged over-tour work.

164. In the three offices included in the Chicago region, investigator workload varies from five or six cases per year to 13-15 cases per year. Tr. (9/20) at 162.

165. In summary:

[23] Even without Dr. Johnson's admission, if left his house at 6:30 A.M., commuted 45 minutes to HUD, left HUD for travel, took a ½-hour lunch, returned to HUD, commuted 45 minutes home, and was home at 4:30 P.M., his total work hours would be exactly eight.

a) Dr. Johnson knew the proper procedures for informing supervisors of planned overtime work and obtaining authorization. He chose not to use those procedures because he considered them "a pain."

b) There is no persuasive evidence that Dr. Johnson performed, or that his supervisors were aware of, more than a *de minimis* amount of before-tour work.

c) Likewise, there is no persuasive evidence that Dr. Johnson performed, or that his supervisors were aware of, more than a *de minimis* amount of after-tour work.

d) Dr. Johnson claimed to have worked through lunch regularly but admitted that his supervisors did not know, and had no reason to know, of that work.

e) Nearly every aspect of Dr. Johnson's testimony lacked credibility. He contradicted himself repeatedly regarding the amount of comp-time and credit hours he received. He admitted that figures in his testimony came "off the top of his head." His resume, which the Union submitted as an exhibit, showed evidence of being inflated.

f) To the extent that Dr. Johnson's testimony established any over-tour work, there was no evidence that his supervisors knew or should have known of the work or had the opportunity to prevent that work from being performed or to control it.

g) Dr. Johnson offered no testimony that would support a conclusion that his work, his workload and/or his experience with over-tour / overtime work were representative of the work, workload and/or experience with over-tour /

overtime work of other EOSs in the Chicago Regional Office or nation-wide. To the contrary, his testimony indicated that he handled 37 cases in only eight months, while the EOS sitting next to his workspace handled only four cases in an entire year. Tr. (8/30) at 205.

h) As the Arbitrator ruled during the hearing, Dr. Johnson's vague testimony about travel was not precise enough to support a claim for damages. Tr. (8/30) at 159.

Jessyl Ann Woods

166. From October 16, 2001 to October 2002, Jessyl Ann Woods was employed as a GS-360, grade 11, in the FHEO office in Fort Worth, Texas. Tr. (8/31) at 5-6. From October 2002 through the hearing date, Ms. Woods was employed as a GS-360, grade 12, in the FHEO office in Fort Worth. Tr. (8/31) at 5-6.

167. Ms. Woods office is located on 27th floor of the building at Burnette Plaza, 801 Cherry Street, Fort Worth. Tr. (8/31) at 10. HUD occupies space on the 24th through 28th floors of that building. Tr. (8/31) at 11-12. No evidence was presented suggesting that HUD controls the Burnette Plaza building or the building access or security arrangements there. To the contrary, Ms. Woods testified that the logbook in the building lobby was controlled by the building manager. Tr. (8/31) at 82; *see also* Tr. (9/13) at 101.

168. The FHEO office in Fort Worth has four divisions: Intake, Enforcement, Program Operations, and Administration. Tr. (8/31) at 5. Ms. Woods is employed in the Enforcement Division. Tr. (8/31) at 5.

169. Ms. Woods' supervisor since 2004 has been Mr. Rayford Johnson. Tr. (8/31) at 9. Prior to that, Ms. Woods' supervisor was Mr. Thurman Miles. Tr. (8/30) at 10.

170. Ms. Woods' tour of duty was from 9:30 A.M. to 6:00 P.M. Tr. (8/31) at 19. Because she had a flexible schedule, she was entitled to vary her starting and stopping times, but never to start later than 9:30. Tr. (8/31) at 21.

171. Ms. Woods' normal commute is about 45 minutes. Tr. (8/31) at 111-12.

172. Mr. Garry Sweeney, the director of the Fort Worth office where Ms. Woods works, testified that he sees Ms. Woods come in at "usually around 9:30." Tr. (9/13) at 98.

173. Ms. Woods testified that she came in early "a number of times." Tr. (8/31) at 21. She also said: "I have been in sometimes as early as maybe seven o'clock, 7:15." Tr. (8/31) at 47. When asked how frequently she came in early, she answered: "Oh, it's hard to say exactly." Tr. (8/31) at 48. Taken together, this testimony is too vague to allow a reasonable inference regarding the amount of before-tour work Ms. Woods performed, if any.

174. Ms. Woods also testified that she came in early "maybe two or three times a week." Tr. (8/31) at 48. However, Union Exhibit 20 shows this claim to be exaggerated except during a short period in 2003 (*see* next paragraph). Union Exhibit 20 shows, for example, that in the six-week period from January 1 through February 11, 2002, Ms. Woods arrived before her 9:30 A.M. start time on only nine days -- *i.e.*, fewer

than two times a week. It also suggests that she was late at least four times. Ms. Woods did not submit leave slips for those four late arrivals. *See* Employer Ex. 32.[24]

175. Union Exhibit 20 further shows that, in the ten-week period from January 1 through March 10, 2003, Ms. Woods arrived before her 9:30 A.M. start time a total of 26 times -- *i.e.*, an average of about 2½ times a week. In contrast, from March 11-25, 2003, Ms. Woods never arrived early. *See id.* This suggests that the concentration of early arrivals in the first ten weeks of 2003 was an aberration, especially when it is compared to the data from the year before (in PFF ¶174) and the year after (in PFF ¶176).

176. Union Exhibit 20 further shows that, in the ten-week period from January 1 through March 9, 2004, Ms. Woods arrived before her 9:30 A.M. start time a total of 15 times – *i.e.*, an average of about 1½ times a week.

177. Finally, Union Exhibit 20 further shows that, in the twelve-week period from January 1 through March 25, 2005, Ms. Woods arrived before her 9:30 A.M. start time a total of six times – *i.e.*, an average of less than once every two weeks. During the same period, she was late at least seven times without taking leave. *See* Employer Ex. 35.

178. At most, the foregoing evidence permits an inference that Ms. Woods experienced a spate of early arrivals in early 2003, but subsequently reverted to her normal tour of duty with only rare exceptions. Even accepting her testimony that she had "quite often come in with someone else, which would not show a record" (Tr. (8/30) at 54), there is no basis to presume that the unrecorded entries were early arrivals

[24] Even if Ms. Woods was present in the office before the times shown, of which there is no evidence, the records at least prove she did not begin work immediately upon arriving at the office.

rather than on-time or late arrivals. To the contrary, a reasonable presumption would be that she would be more likely to enter with other people if she arrived at a time when other employees were starting work -- for example, 9:30 A.M. -- than if she arrived at a random early time. In short, there is no persuasive evidence that Ms. Woods arrived early with any consistency or pattern throughout the period from October 2001 to the present.

179. When asked who was aware that she came in early, Ms. Woods responded:

> I would say I had a few other coworkers that would be there when I'd get there or either we'd come in at the same time. And occasionally there may have been one supervisor in the area that was there.

Tr. (8/31) at 22.

180. Ms. Woods testified that her supervisor, Mr. Johnson, typically arrives after 9:30 A.M. Tr. (8/31) at 23. Thus, he would not know if she arrived early.

181. Ms. Woods testified that she "never left before six o'clock." Tr. (8/31) at 47. This testimony is not probative of over-tour work because 6:00 P.M. was merely the end of her tour-of-duty. She also said, "Sometimes I would stay as late as 7:30, eight, 8:30." Tr. (8/31) at 47. Later in the hearing, Ms. Woods offered slightly more detailed, but contradictory, testimony about her departure time. She testified that she worked: "At least until six, 6:30, seven. The times just kind of varied. But I'm usually there at least an hour and a half past the time which I am supposed to leave." Tr. (8/31) at 63. "[S]ix, 6:30, seven" are all much less than "an hour and a half past the time which [Ms. Woods is] supposed to leave" -- *i.e.*, 6:00 P.M. *See* PFF ¶170. Still later she testified that "6:30, maybe even seven o'clock has been the latest they [*i.e.*, her supervisor, Mr. Miles, and his supervisor, Mr. Sweeney,] have observed me still being

there." Tr. (8/31) at 81. Taken together, Ms. Woods' testimony is too vague and contradictory to allow a reasonable inference regarding the amount of after-tour work Ms. Woods performed, if any.

182. Union Exhibit 21 included evidence that could show Ms. Woods was at work at 9:54 P.M., but Ms. Woods called that "rare." Tr. (8/31) at 78-79.[25]

183. To the extent Ms. Woods did work late, she testified that her supervisor, Mr. Johnson, typically departed at 4:30 P.M. Tr. (8/31) at 23. Thus, he would not have witnessed Ms. Woods working late, if she did.

184. To the extent Ms. Woods did work late, she testified that her previous supervisor, Mr. Miles, typically departed at 5:30 P.M. Tr. (8/31) at 24. Thus, he also would not have witnessed Ms. Woods working late, if she did.

185. Finally, to the extent Ms. Woods did work late, she acknowledged that "6:30, maybe even seven o'clock has been the latest [supervisors] have observed me still being there." Tr. (8/31) at 81. In addition, she gave the following testimony in response to questions from the Union's counsel:

> Q. Did you ever tell your supervisors that you're working so much?
>
> A. I've never really told them that I'm working late, I mean, because they've always seen me pretty much stay late.
>
> Q. What do you mean by that?
>
> A. Well, usually when Mr. Johnson is leaving, which is at 4:30, he'll see me still in my cubicle still working. And then Mr. Miles, from time to time he'll just holler over the partition, "Good night, Ms. Woods," and I'll say, "Good night." Or Mr. Sweeney will say, "Ms. Woods, you still there?" and I'll say, "Yes, I'm still here." He'll say, "Well, I'm gone. Good night."

[25] Union counsel incorrectly obtained Ms. Woods' agreement that: "Some of them are as late as 9:54 P.M." Tr. (8/31) at 78. In fact, there is only one such document in Union Exhibit 21.

> Q. But Miles and Johnson leave before six o'clock, usually.
>
> A. Right.
>
> Q. How do they know you're staying after six, which is the end of your normal tour? I'm taking care of all your questions so you don't have to ask them.
>
> A. I think it's just -- I think it's just probably common knowledge with them because I've been there so long and I've done this for so many years. It's not like I just started doing this, so they just automatically know that I'm there, you know.

Tr. (8/31) at 87-88.

186. Ms. Woods' assumption that her alleged later work is common knowledge does not impute actual or constructive knowledge to her supervisors. Furthermore, her own testimony establishes that her supervisors would have no actual or constructive knowledge of any work beyond 6:00 PM, or at the latest 7 P.M., and no opportunity to prevent or control such work. Even Ms. Woods' corroborating witness, Phyllis Ann Bell, said that she did not know whether Ms. Woods informed her supervisor that she planned to work late. Tr. (9/6) at 47.

187. Ms. Woods received 283 credit hours and 42 comp-time hours between 2002 and 2006. Union Ex. 17.

188. Ms. Woods testified that she works through lunch approximately twice a week. Tr. (8/31) at 89. Her testimony was contradicted by Kaeron Masters High, a HUD employee called by the Union as a corroborating witness. Ms. High testified that she ate lunch with Ms. Woods "[t]hree-fourths of the time" and that they left the office together for lunch, typically for an hour. Tr. (8/31) at 188, 195. When asked whether Ms. Woods ever told her that she was working through lunch, Ms. High said: "Sometimes. It's not a lot, not often." Tr. (8/31) at 193.

189. In any case, Ms. Woods' testimony did not establish that her supervisors knew or should have known of her alleged pattern of working through lunch or that they had any opportunity to prevent or control it. Although Ms. Woods testified that "sometimes around the lunchtime hour I would -- excuse me -- I've gone into their office to maybe ask a question or I've seen them in the hallway or something of that nature" (Tr. (8/31) at 90), she also acknowledged that the lunch period extends over a 2½ hour window. Tr. (8/31) at 91. Thus, even to the extent her supervisors actually saw her eating while she worked (*see id.*), they would not necessarily know if she did not take the full lunch break nevertheless.

190. Ms. Woods took a full hour for lunch, of which half was paid. Tr. (8/31) at 161, 175.

191. Ms. Woods testified that she takes work home "[m]ost Fridays." Tr. (8/31) at 92. However, she also gave the following testimony in response to questions from the Union's counsel:

> Q. The work at home, were you compensated for that?
>
> A. No, I was not compensated for that.
>
> Q. Does your supervisor, to your knowledge, know about it?
>
> A. I would think that he knows about it because he always says you do whatever you have to do to get a case closed or to get the job done.
>
> Q. Did you ever tell your supervisor you took work home on the weekends, did this on Saturday, worked on this case over the weekend?
>
> A. I've never told him, but he has seen me because a few times he has been into the office on a Saturday.
>
> Q. All right. I was talking about work at home on Saturday.

A. Oh, my actually working on the case on Saturdays?

Q. At home.

A. No, I never -- I never told him because it just wasn't necessary.

Q. Would he have reason to know because the work wasn't done on Friday and was done on Monday?

A. I don't know if, you know, he thinks like that, but I would -- I would say he knows that I'm working constantly.

Tr. (8/31) at 94-95. Ms. Woods' assumption that her supervisor knows she takes work home because "he knows I'm working constantly" -- an obvious exaggeration -- does not impute actual or constructive knowledge to her supervisors.

192. Regarding Ms. Woods' workload and her testimony that her supervisor "always says you do whatever you have to do to get a case closed or to get the job done," Ms. Woods testified that she had six cases open at the time of her testimony. Tr. (8/31) at 138.

193. The Arbitrator ordered the Union to produce Ms. Woods' log of cases assigned to her. Tr. (8/31) at 141-42. The Union has not produced this document. The Arbitrator should draw an adverse inference that the log, if produced, would show a very light case load that did not require, or should not have required, any overtime to complete in a normal tour-of-duty.

194. Mr. Sweeney, the director of the Fort Worth office where Ms. Woods works, testified that 100% of Ms. Woods' cases were aged beyond 100 days. Tr. (9/13) at 64; *see also id.* at 71, 82, 84. Employer Exhibit 60 shows that the only case that Ms. Woods had closed during the grievance period in less than 147 days was a case closed because the complainant could not be located. Thus, any claim that by Ms. Woods that

her supervisors knew or should have known she was working overtime to complete her cases on time cannot be accepted.

195. Regarding Ms. Woods' testimony that "a few times [her supervisor] has been into the office on a Saturday," she apparently retracted later in her direct testimony and said that none of her supervisors had seen her in the office on a weekend. Tr. (8/31) at 99.

196. Regarding work that was not completed on Friday, but was finished by Monday, Ms. Woods agreed that her supervisor would have had no reason to know that she had worked over the weekend, if she had. Tr. (8/31) at 158, 160. Ms. Woods did not interact closely with her supervisors in the course of her work and they did not necessarily know what work activities she was engaged in. Tr. (8/31) at 148, 151. Ms. Woods' supervisor did not stop at her desk before he left for the day to see what she was working on. Tr. (8/31) at 158. Furthermore, Ms. Woods said, "There's no specific time frame in which I have to get back with him to discuss or work on with him. It's just -- I just work on the case load that I have." Tr. (8/31) at 151.

197. Ms. Woods alluded to working in the office on weekends but did not testify about it directly. Other evidence suggested any such work was rare, if it occurred at all. For example, Ms. Woods' corroborating witness, Ms. High, testified that when she wanted to reach Ms. Woods on a weekend, she first called Ms. Woods' home, then, if there was no answer at home, her cell phone, and only then, if there was still no answer, Ms. Woods' office. Tr. (8/31) at 199. This demonstrates that Ms. Woods' weekend work was so rare that her friends considered it to be the exception rather than the rule.

198. Ms. Woods testified that her supervisors did not know or have reason to know of her holiday work, if any. Tr. (8/31) at 106.

199. Ms. Woods agreed during her testimony that the description in PFF ¶14, above, of the process for submitting and certifying T&A records is correct, and she acknowledged that her signature on each T&A record (*e.g.,* Employer Ex. 1) was a certification that each record is true. Tr. (8/31) at 101, 122--23, 127. She also acknowledged her understanding of the system for obtaining advance approval to perform over-tour work. Tr. (8/31) at 129.

200. Ms. Woods was at one time a timekeeper. Tr. (8/31) at 162.

201. Throughout the grievance period, Ms. Woods certified each pay period that her T&A records were "correct and accurate." Employer Exs. 32, 33, 34, 35, 36.

202. Despite Ms. Woods' bi-weekly certification that her T&A records were true, the gravamen of her testimony at the hearing was that her certified T&A records were not correct and that she had worked many more hours than recorded in her T&A records. By not accurately recording her hours of work, Ms. Woods deprived her supervisor of the opportunity to know of and prevent or control alleged over-tour work.

203. On cross-examination, Ms. Woods agreed with the statement that "[I]t's possible that employees are working many more hours and the supervisor just doesn't know." Tr. (8/31) at 131-32.

204. In summary:

a) Ms. Woods knew the proper procedures for informing supervisors of planned overtime work and obtaining authorization.

b) There is no persuasive evidence that Ms. Woods performed, or that her supervisors were aware of, more than a *de minimis* amount of before-tour work.

c) Likewise, there is no persuasive evidence that Ms. Woods performed, or that her supervisors were aware of, more than a *de minimis* amount of after-tour work.

d) Ms. Woods claimed to have worked through lunch twice a week, but her testimony was contradicted by her lunch partner, Ms. High. In any case, there is no evidence that Ms. Woods' supervisors knew, or had no reason to know, of her alleged work through lunch.

e) Nearly every aspect of Ms. Woods' testimony about over-tour work was contradictory and/or was too vague to allow any reasonable inferences as to the amount of time worked, if any.

f) To the extent that Ms. Woods' testimony established any over-tour work, there was no evidence that her supervisors knew or should have known of the work or had the opportunity to prevent that work from being performed or to control it. To the contrary, she admitted that her supervisors could not have known of much of it.

g) Ms. Woods offered no testimony that would support a conclusion that her work, her workload and/or her experience with over-tour / overtime work were representative of the work, workload and/or experience with over-tour / overtime work of other EOSs in the Fort Worth Regional Office or nation-wide.

h) For the reasons discussed in PFF ¶347 below, the Arbitrator must find that Ms. Woods was not a credible witness.

Phyllis Ann Bell

205. Ms. Phyllis Ann Bell was employed by FHEO as a GS-360, grade 11 from October 2003 until October 2004, and a GS-360, grade 12 from October 2004 onward. Tr. (9/6) at 40-41.

206. Ms. Bell's tour-of-duty was from 7:00 A.M. to 5:30 P.M. four days a week. Tr. (9/6) at 42.

207. Ms. Bell claimed to work past the end of her tour-of-duty but admitted that she only told her supervisor about it after the fact. Tr. (9/6) at 47.

208. Ms. Bell claimed that when she traveled she worked 10 or 11 hour days. Tr. (9/6) at 51. Since her normal tour-of-duty was 10 hours and she offered no further detail regarding the length of her day, no just and reasonable inference can be drawn from her testimony regarding overtime worked.

209. Ms. Bell agreed during her testimony that the description in PFF ¶14, above, of the process for submitting and certifying T&A records is correct, and she acknowledged that her signature on each T&A record (*e.g.,* Employer Ex. 1) was a certification that each record is true. Tr. (9/6) at 63-64.

210. Furthermore, at all relevant times, Ms. Bell was aware of HUD's procedures for authorizing overtime work, including the requirement to request authorization before working over-tour hours. Tr. (9/6) at 62-63, 68-69. Indeed, she used those procedures on occasion. Employer Exs. 37, 38.

211. Ms. Bell testified that she sometimes worked over-tour hours in the field without prior authorization because there is no way to predict what hours will be required in the field; for example, there may be no way to know whether a witness is

available. Tr. (9/6) at 83-84. Accepting this testimony as true, then clearly her supervisor cannot be charged with knowledge of over-tour work.

212. Ms. Bell carried a cell phone and could have called her supervisor to report her late work in the field, but she did not do so. Tr. (9/6) at 89. By this failure, she deprived her supervisor of the opportunity to prevent her from working overtime or to control her work.

213. Ms. Bell testified that she sometimes traveled with another investigator and they worked on each other's cases without having been instructed to do so. Tr. (9/6) at 79-80.

214. Ms. Bell admitted to not having a clear memory of work done in 2004. Tr. (9/6) at 95-96.

215. In summary:

a) Ms. Bell knew the proper procedures for informing supervisors of planned overtime work and obtaining authorization.

b) There is no persuasive evidence that Ms. Bell performed, or that her supervisors were aware of or had the opportunity to prevent or control, more than a *de minimis* amount of work outside of her tour of duty.

Phoebe R. Buchanan

216. Throughout the grievance period, Ms. Phoebe R. Buchanan was employed in the FHEO office in Pittsburgh, Pennsylvania as either a GS-360, grade 13, or a GS-1101, grade 13. Tr. (9/7) at 5-6. Her job duties did not change when she was transferred from the 1101-series to the 360-series. Tr. (9/7) at 6.

217. Ms. Buchanan was on extended leave and did not work from October through December 2002. Tr. (9/7) at 11.

218. The building in which the Pittsburgh FHEO office is located did not have an electronic scan-in procedure prior to 2005. When a scanner was installed, it was controlled by the building manager and not by HUD. Tr. (9/7) at 30.

219. The staffing level in the Pittsburgh FHEO office has increased 25-40% during the grievance period. Tr. (9/7) at 23. There at least four other EOSs in the Pittsburgh office, three of whom have the same duties as Ms. Buchanan. Tr. (9/7) at 7.

220. Ms. Buchanan reports to Mr. Richard Payne, who is a bargaining unit member, and is referred to as a "lead." Tr. (9/7) at 7, 9, 133. Ms. Buchanan acknowledged that Mr. Payne "is not technically a supervisor." Tr. (9/7) at 134; *see also* Tr. (11/15) at 63. Indeed, the AFGE contract excludes supervisors from the bargaining unit. Joint Ex. 1 (AFGE Contract), §1.03(1). Therefore, Mr. Payne, or any other "lead" who is a member of the bargaining unit, is not a "supervisor."[26]

221. Ms. Buchanan's actual supervisor was Ms. Ruby Carter, whose office was in Philadelphia, hundreds of miles from Pittsburgh. Tr. (9/7) at 9, 134; Tr. (11/15) at 5-6.

222. Ms. Buchanan's tour of duty was from 9:30 A.M. to 6:00 P.M. Tr. (9/7) at 26. She testified that she typically arrived between 9:15 and 9:25 A.M., but also testified that she arrived at 9:30 ninety percent of the time. Tr. (9/7) at 27.

223. Ms. Buchanan testified to working late on some occasions. However, she admitted to taking care of personal matters on HUD time and storing personal information on her HUD computer. Tr. (9/7) at 51. Ms. Buchanan admitted to using her work computer for a variety of personal matters including: her daughter's resume (Tr. (9/7) at 140); her tax return (*id*. at 140); multiple documents relating to a dispute over

[26] *See also* Tr. (10/11/2005) (liability phase) at 110 (a "lead" in a field office is not a "supervisor").

her personal telephone bill (*id.* at 152-54); a letter for her sister regarding employment (*id.* at 156-57); an unspecified letter on her daughter's behalf (*id.* at 157); a letter to a doctor (*id.* at 158); a letter to Duquesne University (*id.*); a general power of attorney (*id.* at 160); her last will and testament (*id.* at 163); correspondence relating to her life insurance (*id.* at 164); and a pound cake recipe (*id.* at 171).

224. Some of items referred to in the previous paragraph were accessed or modified during Ms. Buchanan's tour of duty rather than during overtime. Tr. (9/7) at 153; *see also* Union Ex. 26. Ms. Buchanan claimed that HUD policy permitted employees to engage in personal activities at work. Tr. (9/7) at 51-52. Ms. Buchanan did not testify that she received permission from her supervisor to use the HUD computer for personal reasons rather than the work she certified she was doing during her regular hours, nor that she worked beyond her normal quitting time to be sure she worked a full tour on that day. Taken as a whole, the evidence casts doubt on Ms. Buchanan's claim that she needed to, and did, work overtime in order to complete her job duties.

225. Ms. Buchanan testified about one specific occasion of working late that allegedly happened on the Friday before her testimony in this arbitration. On that occasion, she said, she was in the office until 1:00 A.M. Tr. (9/7) at 57. When she was asked if her supervisor knew she was there at that hour, she said only that her supervisor knew she was part of a team that had a deadline. Tr. (9/7) at 57-59. There was no testimony regarding the supervisor's knowledge or lack of knowledge of the status of that project at the end of the preceding business day. Thus, Ms. Buchanan's testimony does not establish that her supervisor knew or had reason to know of the late

work allegedly performed by Ms. Buchanan on the Friday before her testimony, or that her supervisor had the opportunity to prevent or control it.

226. Union Exhibit 28 purports to contain *every* e-mail message sent by Ms. Buchanan after 6:00 P.M. during the grievance period. Tr. (9/7) at 63. That exhibit establishes that she sent e-mails after the end of her tour-of-duty only four times in 2003, eight times in 2004, twice in 2005, and once in 2006. Many of the e-mails reproduced in Union Exhibit 28 show times well before 6:00 P.M. or so close to 6:00 P.M. (before or after) that they reflect at most *de minimis* time in the office past Ms. Buchanan's tour-of-duty. *See also* Tr. (9/7) at 63 ("I was probably there a *bit* after[.]" (emphasis added)).

227. Furthermore, of the 15 e-mails in Union Exhibit 28 that evidence after-tour work, only twelve show a supervisor or lead as a recipient. Thus, even if Ms. Buchanan's supervisors could be charged with noticing the time stamp on e-mails she sent them, which itself is unreasonable, they would have been put on notice only of an average of three occasions *per year* of over-tour work. This is not a sufficient number of events to put HUD supervisors on notice of a pervasive pattern of overtime work.

228. Of the same 15 e-mails, eight are between 6:01 and 7:00 P.M.; six are between 7:01 and 8:00 o'clock, and one was at 8:26 P.M. *See* Union Ex. 28.

229. Ms. Buchanan's supervisor, Ms. Carter, may not have been in the office when after-tour e-mails were received. Tr. (11/15) at 26. Thus, she would not see them until the next day.

230. Ms. Carter would not ordinarily pay attention to the time stamp on an e-mail she received. Tr. (11/15) at 12, 57-58.

231. Mr. Payne, Ms. Buchanan's lead, generally works from 6:00 A.M. until 2:30 P.M. Tr. (9/7) at 177. Thus, he would not have witnessed any late work performed by Ms. Buchanan.

232. Ms. Buchanan's normal commute is 15-20 minutes. Tr. (9/7) at 28.

233. Ms. Buchanan traveled prior to her tour-of-duty an average of twice per quarter, for an average of 45-60 minutes on each occasion. Tr. (9/7) at 29.

234. Ms. Buchanan admitted receiving comp-time and credit hours. *See* Tr. (9/7) at 42 *and* Union Ex. 25. However, the figures shown in that exhibit are not reliable since Ms. Buchanan admitted preparing it without understanding what the various "TCs" refer to.[27] Tr. (9/7) at 42.

235. At the very least, the fact that Ms. Buchanan admitted receiving comp-time and credit hours establishes that she understood the system for notifying her supervisor of her intention to perform extra work. Indeed, Ms. Buchanan testified, "Well, if you're working overtime, you're supposed to be able to get approval from your supervisors, you're supposed to explain what your work items are, you're supposed to get a 'yes' or a 'no'." Tr. (9/7) at 131. *See also* Employer Exs. 47, 48.

236. Ms. Buchanan is a smoker and takes regular smoking breaks. Tr. (9/7) at 79-80.

237. On at least one occasion, Ms. Buchanan finished out-of-town training at 1:30 P.M. on a Friday, but voluntarily stayed over until Saturday without taking leave from 1:30 P.M. until 6:00 P.M. (*i.e.*, the end of her tour of duty) on Friday. Tr. (9/7) at

[27] At various points in the hearing, "TC" was interpreted by the parties as "Time Code" or "Transaction Code." Either way, it refers to a numerical code that is entered on time sheets and in computer systems to indicate the type of pay or leave that is being earned or charged. For example, TC 34 means FLSA overtime earned.

90-91; Union Ex. 31. Union's counsel admits that, had Ms. Buchanan traveled home on Friday, she would not have been entitled to pay after 6:00 P.M. Tr. (9/7) at 94.

238. Ms. Buchanan testified to working in her hotel room while on travel. Tr. (9/7) at 100. She acknowledged that even her coworkers who traveled with her did not witness this work. Tr. (9/7) at 101. Obviously, her supervisor, who was not present, would not have known of this work or had the opportunity to prevent or control it.

239. Ms. Buchanan testified to working at home on some occasions. Ms. Buchanan merely assumed that her supervisor knew about this work at home because "he has access to my 'G' drive, so he has the capability of seeing what I'm doing." Tr. (9/7) at 96. This testimony does not establish that Ms. Buchanan's supervisor ever had a reason to examine her "G" drive to determine at what hours she was working, nor that it would be a normal business practice to do so.

240. Ms. Buchanan testified that her adult daughter witnessed her working at home. Tr. (9/7) at 102. However, the Grievants failed to produce Ms. Buchanan's daughter as a witness and the Arbitrator must infer from this that the daughter's testimony would not have supported Ms. Buchanan's claim.[28]

241. Ms. Buchanan agreed during her testimony that the description in PFF ¶14, above, of the process for submitting and certifying T&A records is correct, and she acknowledged that her signature on each T&A record (*e.g.,* Employer Ex. 1) was a certification that each record is true. Tr. (9/7) at 187-88; *see also* Employer Ex. 49.

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[28] In colloquy on page 114 of the September 7, 2006 transcript, Grievants' counsel attempted to shift the burden of proof to the Agency to call Ms. Buchanan's co-workers as rebuttal witnesses. This, of course, is not the law. The Grievants' failure to call the individuals identified by Ms. Buchanan as her corroborating witnesses requires the Arbitrator to discount those witnesses as corroborators and, perhaps, to presume that those witnesses would not support Ms. Buchanan's claims.

242. Throughout the grievance period, Ms. Buchanan certified each pay period that her T&A records were "correct and accurate." Employer Exs. 50,51, 52, 53, 54, 55.

243. Despite Ms. Buchanan's bi-weekly certification that her T&A records were true, the gravamen of her testimony at the hearing was that her certified T&A records were not correct and that she had worked many more hours than recorded in her T&A records. By not accurately recording her hours of work, Ms. Buchanan deprived her supervisor of the opportunity to know of and prevent or control alleged over-tour work.

244. Ms. Buchanan's supervisor, Ms. Carter, was not aware while she was Ms. Buchanan's supervisor that Ms. Buchanan was working over-tour hours without compensation. Tr. (11/15) at 10-11, 59. Indeed, Ms. Carter explained:

> I don't know when she starts that day and do not know when she ends that day. So unless she told me while we were on the phone or something, I would not know. Or unless she sent me documents that say, yes, I started at a certain time and I stayed an hour, two hours or whatever past my tour, I would not know.

Tr. (11/15) at 59-60.

245. Union Exhibit 32 is a series of affidavits from acquaintances of Ms. Buchanan in support of her claims. All of these affidavits are forms in which the affiants simply filled in blanks, and they deserve very little if any weight for the reasons explained in the following paragraphs.

246. The first affidavit, from Ms. Mary Margaret Serapiglia, is entirely conclusory. Ms. Serapiglia, who does not claim to be (and is not) a HUD employee, asserts that she has "had the opportunity to personally observe Phoebe R. Buchanan perform HUD-related work outside of his/her official tour of duty" and "at home after work [and/or] on weekends." In fact, all that Ms. Serapiglia observed was that, "On numerous occasions, when I picked her up from work to take her home, she was taking

work home with her. Many times, this was after 9 PM. There were weekends when I would call and she refused to talk with me saying she was too busy with her 'work' taking priority." In fact, there is no evidence that Ms. Serapiglia ever personally observed Ms. Buchanan performing HUD-related work outside of her tour of duty or at home after work on weekends.

247. Another affidavit, from Amy Genevie, an auditor in the HUD Inspector General Office, swears that she "had the opportunity to personally observe Phoebe R. Buchanan perform HUD-related work outside of his/her official tour of duty." Specifically, Ms. Genevie swears that she saw Ms. Buchanan in the office at 5:30 P.M. 85% of the time. This affidavit is worthless, since Ms. Buchanan's tour-of-duty ended at 6:00 P.M. Tr. (9/7) at 26.

248. In summary:

a) Ms. Buchanan knew the proper procedures for informing supervisors of planned overtime work and obtaining authorization.

b) There is no persuasive evidence that Ms. Buchanan performed, or that her supervisors were aware of, more than a *de minimis* amount of before-tour work.

c) There is no persuasive evidence that Ms. Buchanan's supervisors were aware of more than three occasions of after-tour work per *year*. There also was evidence that Ms. Buchanan stayed at HUD after her tour to work on personal matters.

d) To the extent that Ms. Buchanan's testimony established any over-tour work, there was no evidence that her supervisors knew or should have

known of the work or had the opportunity to prevent that work from being performed or to control it.

e) Ms. Buchanan offered no testimony that would support a conclusion that her work, her workload and/or her experience with over-tour / overtime work were representative of the work, workload and/or experience with over-tour / overtime work of other EOSs in the Pittsburgh office or nation-wide.

Delorah Durbin-Dodd

249. Delorah Durbin-Dodd, who expressed a preference to be referred to as "Ms. Durbin," works in the Office of Enforcement at FHEO Headquarters in Washington, D.C., where she is a GS-360, grade 13. Tr. (9/14) at 5.

250. Ms. Durbin arrives with a carpool at 7:40 or 7:45 AM and leaves 8.5 hours later. Tr. (9/14) at 6-7.

251. Ms. Durbin testified emphatically that "I have not worked beyond my tour of duty in the office." Tr. (9/14) at 9.

252. A week after testifying that she never worked beyond her tour of duty in the office, Ms. Durbin returned and testified that she occasionally worked late. This unexplained change in her testimony casts doubt on her credibility. In any case, she admitted that she did not call her supervisor's attention to the fact that she was staying late. Tr. (9/21) at 90.

253. Ms. Durbin claimed that there were numerous time when she worked through lunch and/or took work home. Tr. (9/14) at 9. However, she said that she had no records or other basis from which to quantify the amount of work allegedly performed. Tr. (9/14) at 10.

254. Ms. Durbin has in the past submitted the proper forms for obtaining authorization to work overtime or comp-time. Tr. (9/14) at 34; Union Ex. 48K.

255. Ms. Durbin testified that when she returned from travel she normally would go straight home and arrive at 1:00 P.M. or 2:00 P.M. Tr. (9/14) at 40. There is no evidence that she took leave on those occasions to account for getting home early. *See* Employer Exs. 62, 63, 64, 65, 66, 67.

256. In summary:

a) Ms. Durbin knew the proper procedures for informing supervisors of planned overtime work and obtaining authorization.

b) There is no persuasive evidence that Ms. Durbin performed, or that her supervisors were aware of or had the opportunity to prevent or control, more than a *de minimis* amount of work outside of her tour of duty.

c) While Ms. Durbin may be entitled to compensation for some weekend travel, the Agency is entitled to a credit for days when she arrived home before the end of her tour of duty and did not take leave.

Albert Grier

257. Albert Grier is a GS-360, grade 13, in the Philadelphia office. Union Ex. 54A.

258. Mr. Grier did not testify in person. He submitted an affidavit (Union Ex. 54A) in which he made general statements such as: "[I]n calendar year 2001, I came in early before my tour of duty on average 2 times per week for a total of 28.8 hours." He also claims to have come in early on average 2 times per week in each and every year since 2001.

259. Mr. Grier's affidavit asserts that "During this time my supervisor knew or *may* have known that I was coming in early and doing work on behalf of the Agency" (emphasis added). This is not sufficient basis for finding that Mr. Grier's supervisor knew or *should* have known about Mr. Grier's alleged early arrivals or had the opportunity to prevent them.

260. Even if Mr. Grier's affidavit could be read as alleging that his supervisor knew or *should* have known of Mr. Grier's alleged over-tour work, no evidence is provided that would support such a conclusion or explain the basis for his belief about what his supervisor knew.

261. Mr. Grier's affidavit also claims that he worked through lunch once a week in each and every year, stayed late at the office twice a week in each and every year, and taken work home eleven times per month in each and every year.

262. As with his alleged early work, there is no evidence sufficient to prove that Mr. Grier's supervisor knew or *should* have known about his alleged over-tour work or had the opportunity to prevent it.

263. Regarding his alleged work at home, Mr. Grier makes no allegation that his supervisor knew, should have known, or even may have known.

264. Mr. Grier tele-worked, and thus was expected to work at home two days a week. Tr. (11/15) at 156.

265. Mr. Grier's supervisor was Wayman Rucker. Tr. (11/15) at 155. Mr. Rucker was not aware that Mr. Grier came in early (Tr. (11/15) at 159), worked late without compensation (Tr. (11/15) at 161, 174), worked at home in the evenings (Tr. (11/15) at 168), worked over-tour hours while traveling (Tr. (11/15) at 169-70, 184), traveled on weekends without compensation (Tr. (11/15) at 183-84), or worked through

lunch (Tr. (11/15) at 164). To the contrary, Mr. Rucker said that "most of the time" Mr. Grier left the office at lunchtime, and, when Mr. Grier ate at his desk, Mr. Rucker regularly saw him reading a newspaper while eating. Tr. (11/15) at 165-66.

266. Mr. Rucker also testified about Mr. Grier that:

> He did not have that much of a caseload to be working the amount of time that he's saying that he worked beyond his tour of duty.

Tr. (11/15) at 176. Mr. Grier agreed that Mr. Rucker was aware of Mr. Grier's workload. Union Ex. 82 ¶4.

267. Mr. Grier was on sick leave for three months in 2005. Tr. (11/15) at 176-77.

268. With the exception of his claims about traveling, Mr. Grier's affidavit does not provide any basis for his recollection as to the number of occasions and the duration of his over-tour work. For example, he does not say whether he reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

269. There are no corroborating affidavits attached to Mr. Grier's affidavit.

Richard Anthony

270. Since March 31, 2003, Richard Anthony has worked in the Chicago FHEO office as a GS-360, grade 12. Tr. (9/11) at 71. Prior to that date he worked in the Philadelphia office as a GS-360. Tr. (9/11) at 74.

271. Mr. Anthony works in the Intake Branch. Tr. (9/11) at 88.

272. Mr. Anthony's tour of duty in Chicago was from 9:30 A.M. to 6:00 P.M. Tr. (9/11) at 73. He testified by telephone that he arrives on time 50% of the time and 30-45 minutes early the rest of the time. Tr. (9/11) at 73-74.

273. Mr. Anthony submitted an affidavit (Union Ex. 54B) in which he swore "under the penalties of perjury" that in each and every year since 2001, he has "come in early on average, 5 times per week." In light of his telephone testimony, it appears that Mr. Anthony may have perjured himself in his affidavit.

274. Mr. Anthony admitted that he is familiar with the procedures for requesting comp-time. Tr. (9/11) at 85.

275. Mr. Anthony asserted in his testimony that supervisors knew who worked late and who worked through lunch. When asked how he knew that the supervisors knew, he answered, "Trust me, they know[.]" Tr. (9/11) at 78. This is not testimony from which the Arbitrator can draw any inference about supervisors' knowledge; to the contrary, it casts additional doubt on Mr. Anthony's credibility as a witness. Indeed, Mr. Anthony admitted a moment later that he was not aware of a single instance in which working through lunch or working late had been discussed with his supervisors. Tr. (9/11) at 80.

276. Mr. Anthony's supervisor, Mr. Parez, works from 7:00 A.M. to 3:30 P.M. Tr. (9/11) at 106. And, Mr. Anthony admitted that, even when Mr. Parez is in the office, they may not see each other the entire day. Tr. (9/11) at 107. In light of these facts, Mr. Parez cannot be charged with knowledge of Mr. Anthony's over-tour work.

277. No other facts or evidence were offered that would support the conclusory statement in Mr. Anthony's affidavit that his supervisor knew or should have known of Mr. Anthony's alleged over-tour work.

278. Ms. Brenda Shavers, a former EOS in Chicago, testified that she frequently passed Mr. Anthony's work station and did not see him in the office after hours. Tr. (11/7) at 11. She also testified about the Chicago office in general:

> I didn't recall seeing very many people after six p.m. I didn't get the sense in that office there was a lot of overtime going on.

Tr. (11/7) at 11. As already noted, Ms. Shavers explained that if she had to work late -- for which she always requested permission (Tr. (11/7) at 7) -- she was always concerned to know who was there or whether she was alone in the office.

279. In summary:

a) Mr. Anthony knew the proper procedures for informing supervisors of planned overtime work and obtaining authorization.

b) There is no persuasive evidence that Mr. Anthony performed, or that his supervisors were aware of or had the opportunity to prevent or control, more than a *de minimis* amount of work outside of his tour of duty.

c) Mr. Anthony's testimony was directly contradicted by a former coworker.

d) Mr. Anthony may have perjured himself in his affidavit designated Union Exhibit 54B and that document can be given no weight.

Catherine Thompson-Burton

280. Catherine Thompson-Burton is a GS-360, grade 12, in the Atlanta office. Union Ex. 54C.

281. Ms. Thompson-Burton did not testify in person. She submitted an affidavit (Union Ex. 54C) in which she made general statements such as: "[I]n calendar year 2001, I came in early before my tour of duty, on average 3 times per month for a total of 16.5 hours." She also claims to have come in early on average 3 times per month in each and every year since 2001.

282. Ms. Thompson-Burton's affidavit asserts that "During this time my supervisor either knew or *may* have known that I was coming in early and doing work on behalf of the Agency" (emphasis added). This is not sufficient basis for finding that Ms. Thompson-Burton's supervisor knew or *should* have known about her alleged early arrivals or had the opportunity to prevent them.

283. Even if Ms. Thompson-Burton's affidavit could be read as alleging that her supervisor knew or *should* have known of her alleged over-tour work, no evidence is provided that would support such a conclusion or explain the basis for her belief about what her supervisor knew or should have known.

284. To the contrary, when Ms. Shavers was asked whether she received communications about Ms. Thompson-Burton coming to work early, she responded: "I got communication about her not coming in to work on time." Tr. (11/7) at 37.

285. Ms. Thompson-Burton also claims to have worked through lunch, stayed late, and taken work home.

286. As with her alleged early work, there is no evidence sufficient to prove that Ms. Thompson-Burton's supervisor knew or should have known about her alleged over-tour work or had the opportunity to prevent it. The only exception may be those occasions when she was required to bring her lunch to a meeting. Even then, however, there is no evidence that Ms. Thompson-Burton did not leave the office for a time before or after the meeting. In fact, the evidence showed that Ms. Thompson-Burton attended regular Weight Watchers meetings during lunch. Tr. (11/7) at 46.

287. Ms. Thompson-Burton's affidavit does not provide any basis for her recollection as to the number of occasions and the duration of her over-tour work. For

example, she does not say whether she reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

288. More importantly, Ms. Thompson-Burton's affidavit omits important facts and gives the false impression that she regularly worked at the HUD office. In fact, Ms. Thompson-Burton was a tele-worker until she was suspended from that program for "failure to comply with telework policies and for being nonproductive." Tr. (11/7) at 38-39. Ms. Brenda Shavers explained:

> The people who telework, they're supposed to communicate with the manager in the morning letting them know that they're starting their work day. They're supposed to notify a manager and they do it -- in this office, they do it via e-mail -- that they were ending their work day, and then they have to do a weekly report. They're supposed to do a report saying what they're going to work on. Then, at the end of the week, they're supposed to report on what their accomplishments were, what work they did.
>
> Q. Did she do that while you were her supervisor?
>
> A. Not even close to consistently.

Tr. (11/7) at 36. Ms. Shavers' testimony is consistent with the requirements of HUD's "Telework Program Policy Guide." *See* PFF ¶19.

289. Ms. Shavers also said that Ms. Thompson-Burton "could not produce any work." Tr. (11/7) at 39. Ms. Thompson-Burton--

> was not responding timely to e-mails, not answering her phone during times she was supposed to be at home. Her work was not being done. She was behind on everything. She was missing deadlines.
>
> It was discovered -- for me -- additional confirmation. I believe it was the end of -- it was sometime in October. She's responsible for reviewing FHAP closures, which are cases that are processed by the state and local agencies. They process the cases, they reach a determination, they send that to us. We review it. If they followed the policies and procedures and ensured the integrity of our work, we

> would authorize payment. They get paid by the number of cases they process.
>
> When we were getting near the -- in August I was reviewing the work to see if we were going to make our management goals. I was told that Cathy had quite a few cases that she needed -- that had not been -- FHAP cases that had not been reviewed. She requested assistance. I offered personal assistance. I asked her to give me 30 of the FHAP closures she had to read and I would read them. When I got them, I noticed that they had been submitted to Cathy as far back as October of 2005.
>
> I made a record of the dates of the ones that I had. I refused to do the work. I said helping her is one thing, but if she's not doing her work, this is showing -- this is August of 2006 and you've gotten work products from your FHAP as far back as October of 2005 and you haven't read the files, you haven't done anything.

Tr. (11/7) at 39-41; *see also id.* at 42.

290. On one occasion, Ms. Thompson-Burton even rigged her phone to make it appear that she was in the office when she was not. Tr. (11/7) at 38.

291. In short, Ms. Shavers stated that:

> Cathy Burton did not produce a sufficient amount of work that would suggest that she worked 40 hours a week, let alone overtime.

Tr. (11/7) at 50.

292. For all of the foregoing reasons, Ms. Thompson-Burton's affidavit is entitled to no weight.

Valecia Bello

293. Valecia Bello is a GS-360, grade 13, in the Atlanta office. Union Ex. 54D.

294. Ms. Bello did not testify in person. She submitted an affidavit (Union Ex. 54D) in which she claims to have worked late, worked at home, and traveled on some Sundays.

295. Ms. Bello's affidavit suffers from the same defects as the affidavit of her coworker, Ms. Thompson-Burton with the sole exception that Ms. Bello has attached a few pages of travel documentation to her affidavit.

296. Ms. Bello's affidavit asserts that "During this time my supervisor knew or should have known" of her over-tour work. However, no evidence is provided that would support such a conclusion or explain the basis for her belief about what her supervisor knew or should have known.

297. Ms. Bello's affidavit does not identify the supervisor to whom she refers. Nevertheless, during his cross-examination of Ms. Brenda Shavers, the Grievants' counsel attempted to convince Ms. Shavers that she had been named in Ms. Bello's affidavit. Tr. (11/7) at 132-33.

298. In fact, Ms. Shavers was not Ms. Bello's first-line supervisor during some of the periods covered by her affidavit. Tr. (11/7) at 135, 149. In any case, Ms. Shavers testified by telephone that she did not know of any of Ms. Bello's claimed after-tour work during 2005. Tr. (11/7) at 34-35, 149. Ms. Shavers also testified that "[U]sually Ms. Bello or my support staff tells me they're leaving. I look over at the clock to see what time it is." Tr. (11/7) at 116.

299. Ms. Bello's affidavit does not provide any basis for her recollection as to the number of occasions and the duration of her over-tour work. For example, she does not say whether she reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

Veronica Batiste

300. Veronica Batiste is a GS-360, grade 12, in the Atlanta office. Union Ex. 54E.

301. Ms. Batiste did not testify in person. She submitted an affidavit (Union Ex. 54E) in which she claims to have worked late, worked through lunch, worked at home, and worked on weekends.

302. Ms. Batiste's affidavit asserts that "During this time my supervisor knew or should have known" of her over-tour work. However, no evidence is provided that would support such a conclusion or explain the basis for her belief about what her supervisor knew or should have known.

303. Ms. Batiste's affidavit does not provide any basis for her recollection as to the number of occasions and the duration of her over-tour work. For example, she does not say whether she reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

304. There are various leave records and tax-related documents attached to Ms. Batiste's affidavit. The purpose of these attachments is not explained in the affidavit or elsewhere in the record and they do not lend any support to Ms. Batiste's claims.

Nannette Locke

305. Nannette Locke is a GS-360, grade 13, in the Denver office. Union Ex. 54F.

306. The FHEO office in Denver is in a building managed by a commercial company called Tramwell. Tr. (11/14) at 135, 137.

307. Ms. Locke did not testify in person. She submitted an affidavit (Union Ex. 54F) in which she claims to have worked late, worked through lunch, worked at home, and worked on weekends.

308. Ms. Locke's affidavit asserts that "During this time my supervisor knew or should have known" of her over-tour work. However, no evidence is provided that would support such a conclusion or explain the basis for her belief about what her supervisor knew or should have known.

309. Ms. Locke's supervisor from approximately 2002 until late 2003 or early 2004 was Gloria Williamson. Tr. (11/14) at 117. Ms. Williamson was not aware of Ms. Locke working late, working through lunch, or taking work home. Tr. (11/14) at 118-19. The only exception was a one-week period in 2002 or 2003 when Ms. Locke and Ms. Williamson served together on a team that worked some over-tour hours. However, everyone on that time received comp-time for those over-tour hours. Tr. (11/14) at 122-28.

310. Ms. Locke's affidavit does not provide any basis for her recollection as to the number of occasions and the duration of her over-tour work. For example, she does not say whether she reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

311. Union Exhibit 75 is an "Addendum to Affidavit" submitted by Ms. Locke. Attached to that addendum are six e-mails. The first of these, sent at 5:22 P.M. on a workday, is soliciting members for a HUD-employee voice and instrument ensemble. This e-mail is not work-related.

312. Another e-mail was sent at 7:58 A.M. on a workday. There is no evidence that Ms. Locke did not leave work within 8.5 hours of her early arrival that day.

313. At most, Union Exhibit 75 establishes that Ms. Locke worked late four times since 2001 and never for longer than 0.8 hours.

314. Employer Exhibit 75 is an affidavit from Ms. Evelyn Meininger, Ms. Locke's supervisor since 2003 or 2004, denying any knowledge that Ms. Locke worked uncompensated over-tour hours. In addition, Ms. Meininger explains that she would not have had the opportunity to prevent overtime work from being performed if she was not informed of it in advance or present to witness it.

Patricia Platt

315. Patricia Platt is a GS-360, grade 12, in the Atlanta office. Union Ex. 54G.

316. Ms. Platt did not testify in person. She submitted an affidavit (Union Ex. 54G) in which she claims to have worked late, worked through lunch, worked at home, worked on weekends and traveled during off-duty hours.

317. Ms. Platt's affidavit asserts that "During this time my supervisor knew or should have known" of her over-tour work. However, no evidence is provided that would support such a conclusion or explain the basis for her belief about what her supervisor knew or should have known. Although Ms. Platt attached some after-hours e-mails to her affidavit, they do not establish any pattern of late work, only a few isolated incidents. In addition, some of the e-mails are not even addressed to Ms. Platt's supervisor, who was Ms. Brenda Shavers. Tr. (11/7) at 17. Some of the e-mails are not even addressed to HUD recipients.

318. Ms. Shavers testified that she was aware of a *total* of three or four times when Ms. Platt worked after hours, averaging 15 minutes each time. Tr. (11/7) at 19, 114. Ms. Platt was directed to submit a comp-time slip on each occasion, but she refused to. Tr. (11/7) at 110-11. Ms. Shavers would regularly walk around the office in the evening and saw that Ms. Platt was not present on other occasions. Tr. (11/7) at 116.

319. Ms. Shavers had no knowledge that Ms. Platt ever worked on a weekend. Tr. (11/7) at 22.

320. Ms. Shavers had no knowledge that Ms. Platt ever worked on her Compressed Work Schedule day-off, except one day in 2006. Tr. (11/7) at 27. Ms. Platt received comp-time for that one day. Tr. (11/7) at 28.

321. Union Exhibit 71 contains two e-mails. The first was sent by Ms. Platt at 10:00 P.M. on a day when she was traveling. There is nothing in the e-mail to suggest she worked straight through until 10:00 P.M. on that day. The second e-mail was sent by Ms. Platt at 8:55 P.M. on the following day, apparently while she was still traveling. Again, there is nothing in the e-mail to suggest she worked straight through until 8:55 P.M. on that day. Each of the e-mails is 1.5 lines long and would have taken a *de minimis* amount of time to compose and send.

322. With the exception of travel and a few late e-mails, Ms. Platt's affidavit does not provide any basis for her recollection as to the number of occasions and the duration of her over-tour work. For example, she does not say whether she reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

Judy Sanchez

323. Judy Sanchez is a GS-360, grade 13, in the Denver office. Union Ex. 54H.

324. Ms. Sanchez did not testify in person. She submitted an affidavit (Union Ex. 54H) in which she claims to have worked early, worked through lunch, and traveled outside of her tour of duty.

325. Ms. Sanchez's affidavit asserts that "During this time my supervisor knew or should have known" of her over-tour work. However, no evidence is provided that

would support such a conclusion or explain the basis for her belief about what her supervisor knew or should have known.

326. Except for ten specific days in the last six years, Ms. Sanchez's affidavit provides no basis for her recollection as to the number of occasions and the duration of her over-tour work. For example, she does not say whether she reviewed any records, kept a diary, etc. The screenshots attached to her affidavit show only ten occasions when documents were modified outside of Ms. Sanchez's tour-of duty: on October 9, 2001; November 13, 2001;[29] September 3, 2002; June 17, 2003; July 21, 2003; August 6, 2003; January 15, 2004;[30] May 4, 2004; September 29, 2004; and September 26, 2005. Of all of these, only two were more than a half-hour outside of Ms. Sanchez's tour-of-duty. This evidence of at most ten occasions of out-of-tour work stands in stark contrast to Ms. Sanchez's claim that she has arrived early nearly 100% of the time since 2001.

327. Ms. Sanchez's supervisor since February 14, 2005 was Gloria Williamson. Tr. (11/14) at 98. Ms. Williamson was not aware of Ms. Sanchez coming into work early during that period. Tr. (11/14) at 103-04. During the same period, Ms. Williamson was not aware of Ms. Sanchez working through lunch. Tr. (11/14) at 105, 109.

Lafayette Lockhart

328. Lafayette Lockhart is a GS-360, grade 11, in the Kansas City office. Union Ex. 54-I.

[29] On this occasion, she apparently modified eight documents within four minutes, a reminder that the "date modified" field is not a reliable indicator that real work was performed.

[30] On this occasion she modified a PowerPoint document entitled "Impossible Pie." A Google search for the term "Impossible Pie" suggests that this is a recipe, and hence not work-related.

329. The Kansas City office is located in a privately-owned building. Tr. (11/15) at 86.

330. Mr. Lockhart did not testify in person. He submitted an affidavit (Union Ex. 54-I) in which he claims to have worked early, worked late, worked through lunch, worked at home, and worked on weekends.

331. Mr. Lockhart's affidavit asserts that "During this time my supervisor knew or should have known" of his over-tour work. However, no evidence is provided that would support such a conclusion or explain the basis for his belief about what his supervisor knew or should have known.

332. One of Mr. Lockhart's supervisors, Ms. Michele Green, testified that Mr. Lockhart usually came in at 9:00 A.M. and "very seldom" was in the office early in the morning. Tr. (11/14) at 173. Mr. Lockhart never told Ms. Green he had come in early. Tr. (11/14) at 176.

333. Ms. Green never saw Mr. Lockhart work past his tour-of-duty. Tr. (11/14) at 179.

334. Ms. Green was never aware that Mr. Lockhart worked on a weekend or took work home. Tr. (11/14) at 187, 189.

335. Mr. Lockhart "regularly" -- at least 90% of the time -- left the office for 1.5 hours at lunch time. Tr. (11/14) at 186; Tr. (11/15) at 149.

336. When asked whether she ever saw Mr. Lockhart work through lunch, Ms. Green responded:

> My recollection is that Mr. Lockhart would sometimes leave for lunch, come back, however long he was gone, and you would see him sitting at his desk eating. Now, if he was gone an hour and he comes back and sits at his desk and eats, is he on lunch or is he on work time? It is not readily distinguishable by anyone watching him.

Tr. (11/14) at 184. For similar reasons, any testimony from any witness that an EOS was seen eating at his or her desk is not *per se* evidence that the employee "worked through lunch."

337. Prior to becoming a supervisor, Ms. Green occupied the workspace next to Mr. Lockhart's workspace. She testified that he was rarely seen in the office before 9:00 A.M. between 2001 and 2004. Tr. (11/14) at 175-76.

338. Mr. Lockhart's affidavit does not provide any basis for his recollection as to the number of occasions and the duration of his over-tour work. For example, he does not say whether he reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

339. Mr. Lockhart previously worked as an investigator in the Enforcement Branch but he was transferred to the Intake Branch as a result of poor performance, violating procedures, and Government credit card abuse. Tr. (11/14) at 165-66, 170. Later, he was terminated by HUD. Tr. (11/14) at 163. These facts cast doubt on the credibility of his affidavit.

Wanda Harmon

340. Wanda Harmon is a GS-360, grade 12, in the Atlanta office. Union Ex. 54J.

341. Ms. Harmon did not testify in person. She submitted an affidavit (Union Ex. 54J) in which she claims to have worked late, worked through lunch, worked at home, and worked on weekends.

342. Ms. Harmon's affidavit asserts that "During this time my supervisor knew or should have known" of her over-tour work. However, no evidence is provided that

would support such a conclusion or explain the basis for her belief about what her supervisor knew or should have known.

343. Ms. Harmon's affidavit does not provide any basis for her recollection as to the number of occasions and the duration of her over-tour work. For example, she does not say whether she reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

Diane Whitfield

344. Diane Whitfield is a GS-360, grade 13, in the Fort Worth office. Union Ex. 54K. Ms. Whitfield worked in the Intake Branch. Tr. (11/7) at 207.

345. Ms. Whitfield did not testify in person. She submitted an affidavit (Union Ex. 54K) in which she claims to have worked early, worked late, worked through lunch, worked at home, and worked on weekends.

346. Ms. Whitfield's affidavit asserts that "During this time my supervisor should have known that I was coming in early and doing work on behalf of the Agency." However, no evidence is provided that would support such a conclusion or explain the basis for her belief about what her supervisor should have known. Significantly, Ms. Whitfield does not assert that her supervisor actually knew she was coming in early.

347. Ms. Whitfield's affidavit asserts that Jessyl A. Woods witnessed Ms. Whitfield's early arrivals, and Ms. Woods provided an affidavit to that effect. There is serious doubt as to the veracity of this testimony. Ms. Whitfield's tour of duty began at 7:00 A.M. while Ms. Woods' tour of duty began at 9:30 A.M. *Compare* Union Ex. 54K at 1 *with* Tr. (8/31) at 19. While Ms. Woods did testify that she sometimes arrived before her duty, there is no evidence that she came in early enough to see Ms. Whitfield come in early, *i.e.*, before 7:00 A.M. To the contrary, Ms. Woods testified that "I have been in

sometimes as early as maybe seven o'clock, 7:15" (Tr. (8/31) at 47), implying that it was a rare occurrence for her to come in that early, and certainly not earlier. Moreover, Mr. Sweeney, the director of the Fort Worth office where Ms. Woods works, testified that he sees Ms. Woods come in at "usually around 9:30." Tr. (9/13) at 98.

348. The facts in the previous paragraph require the Arbitrator to find that both Ms. Whitfield and Ms. Woods are not credible witnesses.

349. Ms. Whitfield's affidavit asserts that her supervisor actually knew she was working late, working through lunch, working on weekends and working at home. However, no evidence is provided that would support such a conclusion or to explain the basis for her belief as to what her supervisor knew.

350. Ms. Whitfield's affidavit does not identify the supervisor to whom she refers. From the beginning of the grievance period until March 3, 2006, Ms. Whitfield's supervisor was Lorraine Franklin Stell. Tr. (11/7) at 205. Ms. Whitfield never told Ms. Stell that she was staying late to work, and Ms. Stell never saw Ms. Whitfield stay late. Tr. (11/7) at 209, 212. Likewise, Ms. Stell did not see Ms. Whitfield come in early and did not know or have any reason to believe that Ms. Whitfield was coming in early (if she was). Tr. (11/7) at 210-11.

351. Ms. Stell never observed Ms. Whitfield working through lunch and Ms. Whitfield never told Ms. Stell she worked through lunch. Tr. (11/7) at 212. Ms. Whitfield also never told Ms. Stell that she was taking work home. Tr. (11/7) at 213.

352. After March 2006, Ms. Whitfield's supervisor was Carmelo Melendez. Tr. (11/7) at 167. Mr. Melendez was not aware of Ms. Whitfield coming in early to work, working late, or working through lunch. Tr. (11/7) at 168-69. Mr. Melendez testified emphatically on cross-examination as follows:

> Q. Well, if she swore under oath that she works through lunch in 2006 and that you knew or should have known about it, what would you say about that?
>
> A. It is hogwash.
>
> Q. Okay. And if she swore under oath that she worked late, beyond her tour of duty, and that you knew or should have known about it, what would you say about that?
>
> A. She would have come in -- we have -- Ms. Dianne Whitfield and I, she's like my helper here in the office.
>
> Q. Your what?
>
> A. She would come into my office and say, Carmelo, I would have -- I'm going to have to stay a little extra. She would have told me if she had to work extra or overtime or stay beyond 5:30 because she knows. She's a GS-13 level, so she knows that the procedure is you notify your supervisor in advance when you're going to stay extra, comp -- comp time or credit hour. You have to have approval. You can't do this on your own if you want to get paid.
>
> Now, if you don't tell me and I have no knowledge of what you're doing, I don't -- I don't know how -- what the problem with understanding is.
>
> Q. Well, suppose she had sworn statements from seven coworkers that she was working through lunch and that you knew or should have known about it; would you dispute all seven of those?
>
> A. Yes, I would.

Tr. (11/7) at 184-186. In fact, there are *not* seven affidavits -- or even one affidavit -- in the record that say that *Mr. Melendez* knew or should have known that Ms. Whitfield worked through lunch.

353. Ms. Whitfield's affidavit also does not provide any basis for her recollection as to the number of occasions and the duration of her over-tour work. For example, she does not say whether she reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

354. During the grievance period, Ms. Whitfield had two or three prolonged periods of sick leave lasting four or five months each. Tr. (11/7) at 208-09. She could not have worked any overtime over these occasions. *Id.* These periods are not mentioned in her affidavit, which asserts that she worked the same amount of overtime every month since 2001.

355. For all of the foregoing reasons, Ms. Whitfield's affidavit and her overtime claims must be rejected in their entirety.

Robert Zurowski

356. Robert Zurowski is a GS-360, grade 12, in the Seattle office. Union Ex. 54L.

357. Mr. Zurowski did not testify in person. He submitted an affidavit (Union Ex. 54L) in which he claims to have worked late and traveled on Sundays.

358. Mr. Zurowski's affidavit claims that he worked late twice in 2001, five times in 2002, twice in 2003 and once in 2004. In another paragraph, he claims to have worked late an average of ten times per year since 2001. It appears that he meant to state that he worked late a *total* of ten times (2+5+2+1=10) since 2001.

359. Mr. Zurowki's affidavit was the only affidavit that contained the level of detail referred to in the previous proposed finding. Nevertheless, it still did not provide any basis for his recollection as to the number of occasions and the duration of his over-tour work. For example, he does not say whether he reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

360. Mr. Zurowski's affidavit asserts that his supervisor actually knew he was working late. However, no evidence is provided that would support such a conclusion or to explain the basis for his belief as to what his supervisor knew.

361. There are no corroborating affidavits attached to Mr. Zurowski's affidavit.

Douglas Pearl

362. Douglas Pearl is a GS-360, grade 12, in the Kansas City office. Union Ex. 54M.

363. Mr. Pearl did not testify in person. He submitted an affidavit (Union Ex. 54M) in which he claims to have worked late, worked through lunch, worked at home, and worked on weekends.

364. Mr. Pearl's affidavit asserts that "During this time my supervisor knew or should have known" of his over-tour work. However, no evidence is provided that would support such a conclusion or explain the basis for his belief about what his supervisor knew or should have known.

365. Mr. Pearl's affidavit does not provide any basis for his recollection as to the number of occasions and the duration of his over-tour work. For example, he does not say whether he reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

366. There are no corroborating affidavits attached to Mr. Pearl's affidavit.

367. Employer Exhibit 73 is an affidavit from Ms. Myrtle L. Wilson, Mr. Pearl's supervisor since 2001 or earlier, denying any knowledge that Mr. Pearl worked uncompensated over-tour hours. In addition, Ms. Wilson explains that she would not have had the opportunity to prevent overtime work from being performed if she was not informed of it in advance or present to witness it.

Debra Bizell-Wood

368. Debra Bizell-Wood is a GS-360, grade 11, in the Chicago office. Union Ex. 54N.

369. Ms. Bizell-Wood did not testify in person. She submitted an affidavit (Union Ex. 54N) in which she claims to have worked early, worked late, worked through lunch, worked at home, worked on weekends, and traveled during off-duty hours.

370. Ms. Bizell-Wood's affidavit asserts that "During this time my supervisor knew or should have known" of her over-tour work. However, no evidence is provided that would support such a conclusion or explain the basis for her belief about what her supervisor knew or should have known.

371. Ms. Bizell-Wood's affidavit does not provide any basis for her recollection as to the number of occasions and the duration of her over-tour work. For example, she does not say whether she reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

372. There are no corroborating affidavits attached to Ms. Bizell-Wood's affidavit.

373. Employer Exhibit 71 is an affidavit from Ms. Claudia Nichols, Ms. Bizell-Wood's supervisor, denying any knowledge that Ms. Bizell-Wood worked uncompensated over-tour hours. In addition, Ms. Nichols explains that she would not have had the opportunity to prevent overtime work from being performed if she was not informed of it in advance or was present to witness it.

Annette Fields

374. Annette Fields is a GS-360, grade 12, in the Denver office. Union Ex. 54-O.

375. Ms. Fields did not testify in person. She submitted an affidavit (Union Ex. 54-O) in which she claims to have worked early, worked late, worked through lunch, worked at home, and traveled during off-duty hours.

376. Ms. Fields' affidavit asserts that "During this time my supervisor knew or should have known" of her over-tour work. However, no evidence is provided that would support such a conclusion or explain the basis for her belief about what her supervisor knew or should have known.

377. Ms. Fields' affidavit does not provide any basis for her recollection as to the number of occasions and the duration of her over-tour work. For example, she does not say whether she reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

378. There are no corroborating affidavits attached to Ms. Fields' affidavit.

Julio Rocher

379. Julio Rocher is a GS-360, grade 12, in the Orlando office. Union Ex. 54P.

380. Mr. Rocher did not testify in person. He submitted an affidavit (Union Ex. 54P) in which he claims to have worked late and worked through lunch.

381. Mr. Rocher's affidavit does not assert that his supervisor knew, should have known or even may have known that Mr. Rocher worked late. Thus, no knowledge of this alleged late work can be imputed to HUD.

382. Mr. Rocher's affidavit does assert that his supervisor knew or should have known that Mr. Rocher worked through lunch. However, no evidence is provided that would support such a conclusion or explain the basis for his belief about what his supervisor knew or should have known.

383. Mr. Rocher's affidavit does not provide any basis for his recollection as to the number of occasions and the duration of his over-tour work. For example, he does not say whether he reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

Michelle Roundtree

384. Michelle Roundtree is a GS-360, grade 12, in the Louisville office. Union Ex. 54Q.

385. Ms. Roundtree did not testify in person. She submitted an affidavit (Union Ex. 54Q) in which she claims to have worked early and worked late every single day from May 2003 until September 2004. She admits in her affidavit that no coworkers saw her work before her tour-of-duty.

386. Ms. Roundtree also claims she worked through lunch, worked at home, and traveled during off-duty hours. However, she admits in her affidavit that no coworkers saw her work through lunch.

387. Ms. Roundtree's affidavit asserts that "During this time my supervisor knew or should have known" of her late work and work during lunch. However, no evidence is provided that would support such a conclusion or explain the basis for her belief about what her supervisor knew or should have known. To the contrary, she asserts elsewhere in her affidavit that "My supervisor was removed from her position, and hence could not have observed me work outside of my official tour of duty." Based on this evidence, no knowledge of Ms. Roundtree's alleged over-tour work can be imputed to HUD.

388. There are no corroborating affidavits attached to Ms. Roundtree's affidavit.

389. Employer Exhibit 72 is an affidavit from Ms. Vicki Ray, Ms. Roundtree's supervisor since May 2005, denying any knowledge that Ms. Roundtree worked uncompensated over-tour hours. In addition, Ms. Ray explains that she would not have had the opportunity to prevent overtime work from being performed if she was not informed of it in advance or present to witness it.

Natasha Watson

390. Natasha Watson is a GS-360, grade 13, in the Kansas City office. Union Ex. 54R.

391. Ms. Watson did not testify in person. She submitted an affidavit (Union Ex. 54R) in which she claims to have worked late, worked through lunch, worked at home, worked on weekends, and traveled during off-duty hours.

392. Ms. Watson's affidavit asserts that "During this time my supervisor knew or should have known" of her over-tour work. However, no evidence is provided that would support such a conclusion or explain the basis for her belief about what her supervisor knew or should have known.

393. Ms. Michele Green, who worked in the same office as Ms. Watson, testified that Ms. Watson regularly left the office between 4:30 and 5:00 P.M. and did not work over-tour hours. Tr. (11/14) at 191, 195.

394. Ms. Watson's affidavit does not provide any basis for her recollection as to the number of occasions and the duration of her over-tour work. For example, she does not say whether she reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

395. There are no corroborating affidavits attached to Ms. Watson's affidavit.

Marshall Pendelton

396. Marshall Pendelton is a GS-360, grade 12, in the Columbia, S.C. office. Union Ex. 54S.

397. Mr. Pendelton did not testify in person. He submitted an affidavit (Union Ex. 54N) in which he claims to have worked late in 2001, 2002 and 2005.

398. Mr. Pendelton's affidavit asserts that "During this time my supervisor knew or should have known that I was staying late doing work on behalf of the Agency." However, no evidence is provided that would support such a conclusion or explain the basis for his belief about what his supervisor knew or should have known.

399. Mr. Pendelton's affidavit does not provide any basis for his recollection as to the number of occasions and the duration of his over-tour work. For example, he does not say whether he reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

400. Regarding working through lunch, Mr. Pendelton wrote by hand on his affidavit, "This is hard to say, at times it just done to get a [undecipherable] out." This cryptic statement cannot serve as the basis for any entitlement to additional pay.

401. There are no corroborating affidavits attached to Mr. Pendelton's affidavit.

402. Employer Exhibit 72 is an affidavit from Ms. Vicki Ray, Mr. Pendelton's supervisor since May 2005, denying any knowledge that Mr. Pendelton worked uncompensated over-tour hours. In addition, Ms. Ray explains that she would not have had the opportunity to prevent overtime work from being performed if she was not informed of it in advance or was present to witness it, which she never was because her office is in Louisville, Kentucky and Mr. Pendelton is in Columbia, South Carolina.

<u>David Nelson</u>

403. David Nelson is a GS-360, grade 12, in the Kansas City office. Union Ex. 54T.

404. Mr. Nelson did not testify in person. He submitted an affidavit (Union Ex. 54T) in which he claims to have worked late, worked through lunch, worked at home, and traveled during off-duty hours.

405. Mr. Nelson's affidavit asserts that "During this time my supervisor knew that I was staying late doing work on behalf of the Agency." However, no evidence is provided that would support such a conclusion or explain the basis for Mr. Nelson's belief about what his supervisor knew.

406. Mr. Nelson does not assert that his supervisor knew he worked through lunch, only that the supervisor "should have known." No basis is provided for this conclusion or to explain the basis for his belief about what his supervisor should have known.

407. In contrast, Michele Green testified that Mr. Nelson takes 1.5 hours for lunch almost daily. Tr. (11/15) at 139.

408. Mr. Nelson's affidavit does not provide any basis for his recollection as to the number of occasions and the duration of his over-tour work. For example, he does not say whether he reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

409. There are no corroborating affidavits attached to Mr. Nelson's affidavit.

410. Employer Exhibit 73 is an affidavit from Ms. Myrtle L. Wilson, Mr. Nelson's second-line supervisor since 2002, denying any knowledge that Mr. Nelson worked uncompensated over-tour hours. In addition, Ms. Wilson explains that she would not have had the opportunity to prevent overtime work from being performed if she was not informed of it in advance or present to witness it.

411. The sole corroborating witness for Mr. Nelson, Mr. Curtis Jackson, Jr., admitted that Mr. Nelson does not go to his supervisor before performing over-tour work to give the supervisor the opportunity to say, "Don't do the work." Tr. (12/13) at 79.

Franklin Montgomery

412. Franklin Montgomery is a GS-360, grade 13, in the St. Louis office. Union Ex. 54U.

413. The FHEO office in St. Louis is in a building managed by the General Services Administration, which controls any existing entry/egress records. Tr. (11/14) at 38, 41.

414. Mr. Montgomery did not testify in person. He submitted an affidavit (Union Ex. 54U) in which he claims to have worked late, worked through lunch, worked at home, worked on weekends, and traveled during off-duty hours.

415. Mr. Montgomery's affidavit asserts that "During this time my supervisor knew or should have known" of his over-tour work. However, no evidence is provided that would support such a conclusion or explain the basis for his belief about what his supervisor knew or should have known.

416. Mr. Montgomery's affidavit does not identify his supervisor. Beginning in August 2006, Mr. Montgomery's supervisor was Mr. Eddie Lee Wartts. Tr. (11/14) at 20. From the beginning of the grievance period until becoming a supervisor, Mr. Wartts was Mr. Montgomery's "lead" and acted in an informal supervisory role. Tr. (11/14) at 21, 33.

417. Mr. Wartts was not aware of Mr. Montgomery's alleged late work, working through lunch, working at home, working on weekends, and off-duty travel (except for one Sunday trip). Tr. (11/14) at 21-28, 72, 74-75. On the rare occasions when Mr. Wartts saw Mr. Montgomery working past his tour-of-duty, Mr. Wartts reasonably presumed that Mr. Montgomery had come in late that day because Mr. Montgomery had a flexible schedule. Tr. (11/14) at 21-22. Since Mr. Wartts' tour-of-duty began later

than Mr. Montgomery's tour-of-duty, Mr. Wartts would not observe what time Mr. Montgomery actually arrived. Tr. (11/14) at 22.

418. Regarding late work during "on-sites," Mr. Wartts could not know about it unless the employee told him. Tr. (11/14) at 81.

419. Mr. Montgomery's affidavit does not provide any basis for his recollection as to the number of occasions and the duration of his over-tour work. For example, he does not say whether he reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

420. There are no corroborating affidavits attached to Mr. Montgomery's affidavit.

421. Union Exhibit 79 is four e-mails sent by Mr. Montgomery to Mr. Wartts at 3:45 P.M., 3:54 P.M., 4:03 P.M., and 4:22 P.M. The *longest* of these e-mails has ¾ of a line of text. There also is no evidence showing at what time Mr. Montgomery began work on the four days when he sent these e-mails. Union Exhibit 79 is not probative of Mr. Montgomery's claims.

422. Employer Exhibit 73 is an affidavit from Ms. Myrtle L. Wilson, Mr. Montgomery's supervisor from the time he joined HUD until August 2006, denying any knowledge that Mr. Montgomery worked uncompensated over-tour hours. In addition, Ms. Wilson explains that she would not have had the opportunity to prevent overtime work from being performed if she was not informed of it in advance or present to witness it.

Pam Kosuth

423. Pam Kosuth is a GS-360, grade 12, in the Kansas City office. Union Ex. 54V.

424. Ms. Kosuth did not testify in person. She submitted an affidavit (Union Ex. 54V) in which she claims to have worked late and worked through lunch.

425. Ms. Kosuth's affidavit asserts that "During this time my supervisor knew or should have known" of her over-tour work. However, no evidence is provided that would support such a conclusion or explain the basis for her belief about what her supervisor knew or should have known.

426. Ms. Kosuth's affidavit does not provide any basis for her recollection as to the number of occasions and the duration of her over-tour work. For example, she does not say whether she reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

427. There are no corroborating affidavits attached to Ms. Kosuth's affidavit.

428. The sole corroborating witness for Ms. Kosuth, Mr. Curtis Jackson, Jr., admitted that Ms. Kosuth does not go to her supervisor before performing over-tour work to give the supervisor the opportunity to say, "Don't do the work." Tr. (12/13) at 79.

Bob Thomas

429. Bob Thomas is a GS-360, grade 12, in the Chicago office. Union Ex. 54W.

430. Mr. Thomas did not testify in person. He submitted an affidavit (Union Ex. 54W) in which he claims to have worked late, worked through lunch, and worked on weekends.

431. Mr. Thomas' affidavit asserts that "During this time my supervisor knew or should have known that" Mr. Thomas was working over-tour hours. However, no

evidence is provided that would support such a conclusion or explain the basis for his belief about what his supervisor knew or should have known.

432. Mr. Thomas' supervisor since February 2006 was Gordon Patterson. Tr. (11/1) at 60-62. Mr. Patterson testified that he had no knowledge of Mr. Thomas' working late since February 2006, except on one occasion. Tr. (11/1) at 61-62. Since Mr. Patterson normally leaves no later than 4:30 or 4:45, there is no way he could have seen Mr. Thomas work past the end of his tour of duty, *i.e.*, 6:30 P.M. Tr. (11/1) at 62, 110.

433. Mr. Patterson also testified that he has no direct line of sight to Mr. Thomas' workstation and would not have anyway of knowing if Mr. Thomas worked through lunch. Tr. (11/1) at 63, 111. This statement must be viewed in the context of the fact that HUD has no fixed lunch time.

434. Mr. Thomas' affidavit does not provide any basis for his recollection as to the number of occasions and the duration of his over-tour work. For example, he does not say whether he reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

435. There are no corroborating affidavits attached to Mr. Thomas' affidavit.

436. Employer Exhibit 71 is an affidavit from Ms. Claudia Nichols, Mr. Thomas' supervisor from 2000 through 2004, denying any knowledge that Mr. Thomas worked uncompensated over-tour hours. In addition, Ms. Nichols explains that she would not have had the opportunity to prevent overtime work from being performed if she was not informed of it in advance or was present to witness it.

437. Regarding Mr. Thomas' claim of working through lunch, uncontradicted evidence showed that Mr. Thomas leaves his work station in the middle of the day to

use the gym in the basement of the building where HUD's office is located. Tr. (11/1) at 65.

438. Union Exhibit 81 is a sample of a Final Investigative Report prepared by Mr. Thomas. Although the report does not contain a complete chronology of the investigation, it is clear from the 17th page that the complaint in the case was filed sometime before November 8, 2004. The first page shows that the report is dated August 16, 2005, but was still a draft on September 30, 2005. In short, this case was pending for more than 326 days.

Michelle Ferrell

439. Michelle Ferrell is a GS-360, grade 12, in the Fort Worth office. Union Ex. 54X. Ms. Ferrell worked in the Intake Branch. Tr. (11/7) at 207.

440. Ms. Ferrell did not testify in person. She submitted an affidavit (Union Ex. 54X) in which she claims to have worked late, worked through lunch, worked at home, and worked on weekends.

441. Ms. Ferrell's affidavit asserts that "During the majority of this time my supervisor knew that I was staying late doing work on behalf of the Agency." No evidence is provided that would support such a conclusion or explain the basis for her belief about what her supervisor knew. In any case, it is an admission that for up to half of the claimed late work, Ms. Ferrell's supervisor did not know she was working late.

442. Similarly, Ms. Ferrell's affidavit asserts that "For much of this time my supervisor knew or should have known that I was working through lunch doing work on behalf of the Agency." Again, no evidence is provided that would support such a conclusion or explain the basis for her belief about what her supervisor knew or should have known. And, again, this is an admission that for a substantial percentage of the

time, maybe even more than half, Ms. Ferrell's supervisor did not know Ms. Ferrell was working through lunch.

443. Regarding working at home, Ms. Ferrell's affidavit states that "During all of this time (both weekends and evenings) my supervisor knew or may have known that I was working at home outside of my normal tour of duty on behalf of the Agency." The claim that the supervisor "may have known" does not establish that he knew or should have known.

444. Ms. Ferrell's affidavit does not identify the supervisor to whom she refers. From 2002 until March 3, 2006, Ms. Ferrell's supervisor was Lorraine Franklin Stell. Tr. (11/7) at 206.

445. Ms. Stell did not observe Ms. Ferrell working late, working through lunch, working on weekends, or taking work home, and Ms. Ferrell did not tell Ms. Stell that she was doing so. Tr. (11/7) at 216, 218, 220-22.

446. Ms. Ferrell's affidavit does not provide any basis for her recollection as to the number of occasions and the duration of her over-tour work. For example, she does not say whether she reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

447. There are no corroborating affidavits attached to Ms. Ferrell's affidavit.

448. Union Exhibit 77 is one 1.5 line long e-mail from Ms. Ferrell sent at 5:47 P.M. This one e-mail is not probative of Ms. Ferrell's claims.

Shirley Ann Muniz[31]

449. Shirley Ann Muniz is a GS-360, grade 12, in the Denver office. Union Ex. 54Y.

[31] The cover page to Union Exhibit 54 says "Sharon Muniz."

450. Ms. Muniz did not testify in person. She submitted an affidavit (Union Ex. 54Y) in which she claims to have traveled on Sunday.

451. Ms. Muniz does not claim to have performed any other work outside of her tour-of-duty.

Theresa Williams

452. Theresa Williams is a GS-360, grade 12, in the Kansas City office. Union Ex. 54Z.

453. Ms. Williams did not testify in person. She submitted an affidavit (Union Ex. 54N) in which she claims to have worked late, worked through lunch, worked at home, and worked on weekends.

454. Ms. Williams' affidavit asserts that "During this time my supervisor knew or should have known" of her over-tour work. However, no evidence is provided that would support such a conclusion or explain the basis for her belief about what her supervisor knew or should have known.

455. One of Ms. Williams' supervisors, Ms. Michele Green, testified that Ms. Williams only worked late when she came in late. Tr. (11/14) at 199. Indeed, based on her experience, Ms. Green found the claim that Ms. Williams worked over-tour hours to be laughable. Tr. (11/14) at 198; *see also* Tr. (11/15) at 126-27.

456. Ms. Green testified that Ms. Williams takes a full hour to 1.5 hours for lunch almost daily. Tr. (11/14) at 202; Tr. (11/15) at 137, 139-40. When told that Ms. Williams claimed to have worked through lunch six times a month, Ms. Green responded emphatically, "It's not so." Tr. (11/14) at 201.

457. Ms. Green also testified that she had no reason to know that Ms. Williams worked on weekends and, based on Ms. Green's experience, she did not believe that Ms. Williams did work on weekends. Tr. (11/14) at 202.

458. Ms. Williams' affidavit does not provide any basis for her recollection as to the number of occasions and the duration of her over-tour work. For example, she does not say whether she reviewed any records, kept a diary, etc. This diminishes or negates the credibility of the affidavit.

459. There are no corroborating affidavits attached to Ms. Williams' affidavit.

460. The sole corroborating witness for Ms. Williams, Mr. Curtis Jackson, Jr., admitted that Ms. Williams does not go to her supervisor before performing over-tour work to give the supervisor the opportunity to say, "Don't do the work." Tr. (12/13) at 79.

Supervisor's Access to Employees' E-mail Accounts

461. At various times during the hearing, Grievants' Counsel asked questions of witnesses that apparently were intended to prove that supervisors "should have known" of EOSs overtime because the supervisors had access to all of the EOSs e-mails.

462. In fact, the premise of those questions was false, as the AFGE Council president Ms. Federoff admitted. She testified that "I do not believe as a general rule that supervisors have the power to go into an employee's e-mail system." Tr. (12/11) at 7; *see also id.* at 11 ("As a general rule, supervisors do not have access to employees' e-mail."). In fact, a supplement to the AFGE Contract requires HUD to establish cause before monitoring employee e-mail. Tr. (12/11) at 8; Employer Ex. 74.

HUD's Knowledge of Alleged FLSA Violations

463. Ms. Carolyn Federoff is president of the AFGE Council of HUD Locals that filed the AFGE Travel Grievance and the AFGE FLSA Overtime Grievance. Tr. (9/11) at 114.

464. Before and during the grievance period, Ms. Federoff's primary contact regarding FLSA matters was Mr. Norman Mesewicz, originally a labor relations specialist and, at the time of the hearing, Deputy Director of the Labor-Employee Relations Division at HUD Headquarters. Tr. (9/6) at 134.

465. Mr. Mesewicz was a regular participant in LMR meetings held pursuant to Section 6.02 of the AFGE Contract. Tr. (9/6) at 137.

466. Mr. Mesewicz testified that Ms. Federoff had continuing concerns at LMR meetings about employees being required to travel outside of normal duty hours, but he had no recollection of Ms. Federoff's raising concerns about employees' FLSA exemption status. Tr. (9/6) at 140; *see also* Tr. (9/11) at 129. Ms. Federoff's minutes of the LMR meetings make no mention of the FLSA and thus corroborate Mr. Mesewicz's testimony. *See* Union Exs. 35A-F; Tr. (9/11) at 165, 169.

467. By her own admission, the most Ms. Federoff said to Mr. Mesewicz about the FLSA before December 2003 was her opinion that "I think you have a Fair Labor Standards Act problem." Tr. (9/11) at 130; *see also id.* at 124, 138. Ms. Federoff's vaguely expressed opinions, which were raised each time in the context of a discussion about Sunday travel, were not the type of information that could reasonably have required HUD to undertake an FLSA reclassification. Ms. Federoff admitted that her main concern was about off-duty travel and she raised the FLSA with HUD in that

context. Tr. (9/11) at 127. Again, this would not have been a basis for HUD to undertake a full-scale review of its FLSA classifications.

468. The only exception -- *i.e.*, the only time Ms. Federoff claims to have raised the FLSA generally prior to December 2003 -- was in May of 2002, when she claims she threatened to file an FLSA grievance as a tool to force a resolution of the Sunday travel issue. Tr. (9/11), 161-62. Ms. Federoff's admission that she made this threat calls into question AFGE's good faith in filing the present grievance.

469. Ms. Federoff also admitted that "I also understood that [the FLSA] is a very complex area of the law." Tr. (9/11) at 135.

470. The first time that Ms. Federoff raised any general FLSA classification concerns with Mr. Mesewicz was when the FLSA Overtime Grievance was filed in December 2003. Tr. (9/11) at 29.

471. After the AFGE FLSA Overtime Grievance was filed in December 2003, HUD promptly began to review the exempt status of its employees. Tr. (9/6) at 167-69; Tr. (9/11) at 29-30. HUD reasonably selected the most numerous job series to review first. Tr. (9/11) at 68. Some of those reviews resulted in classifiers classifying some positions as non-exempt; however, those were nothing more than the opinions of individual Agency employees, not findings by the Agency. *See* Tr. (9/6) at 181; Tr. (9/11) at 54-55.

472. During the winter of 2003 and/or the spring of 2004, Mr. Mesewicz called other federal agencies to inquire about their FLSA exemption practices. Tr. (9/6) at 152.

473. Mr. Mesewicz spoke to an official at OPM, but that official did not mention that OPM had reclassified large numbers of employees as a result of a grievance. Tr. (9/6) at 163; Tr. (9/11) at 37-38. In any case, even if OPM had done so, and even if Mr.

Mesewicz had learned about it, that would not have obligated HUD to take any particular action. *See* Tr. (9/20) at 157 (Arbitrator's ruling that "I can't judge HUD's conduct by what other agencies do. I can only judge it by their conduct measured against the law.")

474. Union Exhibits 66, 67 and 68 are GS-360-12/13 job descriptions from the Department of Labor ("DOL") that were classified as non-exempt. These exhibits are not material to HUD's good faith or willfulness because they describe different duties than a HUD GS-360-12/13 performs. *Compare* Union Exs. 66, 67, 68 *with* Union Exs. 49, 50, 51. Indeed, the Grievants *admitted* in the liability phase of the 360s hearing that DOL's 360s perform different work than do HUD 360s; specifically, DOL's 360s are not investigators. Tr. (11/4/2005) at 14. Moreover, the Union offered no evidence that would allow the Arbitrator to conclude that DOL's classification decisions are *per se* more correct than HUD's classification decisions.

475. Another agency, the Equal Employment Opportunity Commission, currently classifies GS-360s as exempt. Tr. (12/11) at 69, 78-79.

476. Based on the actions it took, HUD made a good faith and reasonable determination that it was in compliance with the FLSA. Tr. (9/11) at 33-34.

477. During this arbitration, when HUD voluntarily reclassified GS-10 and below and some other positions as non-exempt, the Grievants filed summary judgment motions asserting that HUD's voluntary actions were admissions of wrongdoing. These filings by the Union understandably chilled HUD from taking any further voluntary actions to correct potential FLSA violations, if any existed.

478. In light of HUD's lack of knowledge of, and its lack of opportunity to prevent, the over-tour work that the Grievants allege they performed, and in light of

HUD's reasonable response to the Grievances that were filed, the Grievants have not met their burden of showing that HUD knew or showed reckless disregard for whether its conduct was prohibited by the FLSA.

## Proposed Conclusions of Law

### I. The Grievants bear the burden of proof on all elements of their claims

The Grievants conceded in their Opening Statement that "[I]t is the employee's burden -- through the Union -- to establish that he/she has 'performed work' for which appropriate compensation was not provided and to 'produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.' *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688 (1946)." Union's Opening Statement, at 6; *see also* Tr. (8/29) at 27 ("It is the Union's burden to establish that the employees performed work . . ."). The Grievants also have the burden of proof on all other elements of their claims, as the U.S. Court of Federal Claims, which has jurisdiction over FLSA claims by federal employees, recently explained at length:

> To prevail on a FLSA claim for an overtime activity suffered or permitted to be performed, plaintiffs must carry their burden of proof on all of the elements of the particular claim. First, plaintiffs must establish that each activity for which overtime compensation is sought constitutes "work." For an activity to constitute work, plaintiffs must prove that the activity was (1) undertaken for the benefit of the employer; (2) known or reasonably should have been known by the employer to have been performed; and (3) controlled or required by the employer.
>
> Second, plaintiffs must establish that the hours of work performed are actually, rather than theoretically, compensable. For work to be compensable, the quantum of time claimed by plaintiffs must not be *de minimis*, and must be reasonable in relation to the principal activity. If an employer has kept accurate records, a plaintiff's burden of establishing the reasonableness of the time claimed is easily discharged; where . . . the employer's records are inaccurate or inadequate, the employee need only produce

> "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." . . . [32]
>
> When analyzing a FLSA claim, the court generally utilizes a two-year statute of limitations. However, the statute of limitations may be extended by one year if plaintiffs demonstrate that the employer's violation of the FLSA was "willful."

*Bull v. United States*, 68 Fed. Cl. 212, 220-21 (2005) ("*Bull I*") (citations omitted; footnote added).

In addition, if the Grievants intend their claims to be treated as representative of the alleged claims of all GS-360s, the Grievants bear the burden of proving that their witnesses were indeed representational. *See generally Secretary of Labor v. DeSisto*, 929 F.2d 789 (1st Cir. 1991).

As discussed below, the Grievants have not met their burden of proof on any of the foregoing issues.

## II. The Grievants have failed to meet their burden to show that Equal Opportunity Specialists were "suffered or permitted" to work overtime

The threshold question for the Arbitrator is whether the Grievants have met their burden to "establish that each activity for which overtime compensation is sought constitutes 'work'." *Bull I,* 68 Fed. Cl. at 220. If the Grievants have not met that burden, then they recover nothing, and all of the other issues in this brief are moot.

"Work" is defined in the FLSA regulations of the Office of Personnel Management ("OPM"), which state, in relevant part:

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[32] Even where an employer's recordkeeping is deemed deficient, "the employer's failure to keep accurate records of hours worked by the employee does not affect the initial burden of the employee to establish by a preponderance of the evidence that he in fact performed work for which he was not compensated." *Summerfield v. Photo-Electronics, Inc.*, 26 W.H. Cases 608, 612 (E.D. Pa. 1983).

> All time spent by an employee performing an activity for the benefit of an Agency and under the control or direction of the Agency is "hours of work." Such time includes: . . .
>
> (2) Time during which an employee is suffered or permitted to work.

5 C.F.R. §551.401(a). The regulations further state:

> Suffered or permitted work means any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed.

5 C.F.R. § 551.104. Applying these regulations, the Grievants in the present case have not met their burden to show that they were suffered or permitted to work.

### A. The Grievants did not meet their burden to show that their claimed over-tour hours were undertaken for the benefit of the Agency.

"To benefit the employer, an activity need not be 'productive'--rather, it must be necessary to the accomplishment of the employee's principal duties to the employer." *Bull I*, 68 Fed. Cl. at 223 (citing *Tenn. Coal, Iron, & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 599 (1944)). Time spent in personal pursuits obviously does not benefit the Agency. However, even time that was ostensibly devoted to HUD matters, but which was in reality wasteful, is not compensable because it is not "necessary to the accomplishment of the employee's principal duties to the employer."[33]

In the present case, employees liberally included personal time in their claims. For example, Dr. Johnson freely admitted that he would sometimes arrive at HUD early in order to use his office computer to browse the internet for personal purposes, including reading the local news. PFF ¶117. Likewise, when he stayed late, he made personal phone calls and browsed the internet. PFF ¶130. Most significantly, Dr.

[33] Also, as discussed below, such time is not "reasonable."

Johnson also claimed as "hours of work" time that he stayed in the office late, not to work, but to study materials that he felt would advance his career. PFF ¶129. He admitted:

> I saw myself as a possible next supervisor for program operation. . . . I [had] taken [materials] off the Internet, taken them home with me, reading them at home, reading them at work. And I still have them on my desktop if anyone wants to call me up for that job.

*Id.* These personal activities did not benefit the agency and are not compensable as "work." More importantly, because Dr. Johnson's testimony made no differentiation between these personal activities and his alleged work, he has provided the Arbitrator with no basis to determine whether he devoted more than a *de minimis* amount of over-tour time to HUD work. As discussed below, *de minimis* time is not compensable.

Likewise, Ms. Buchanan admitted to working on a host of personal items on HUD premises both during and after her tour of duty. These included:

- her daughter's resume;
- her tax return;
- a dispute over her personal telephone bill;
- a letter for her sister regarding employment;
- an unspecified letter on her daughter's behalf;
- a letter to a doctor;
- a letter to Duquesne University about an unspecified matter;
- a general power of attorney;
- her last will and testament;
- correspondence relating to her life insurance; and
- a pound cake recipe.

PFF ¶223. These are not activities that benefited the Agency, and they are not compensable. Again, because Ms. Buchanan's testimony made no differentiation

between these personal activities and her alleged work, there is no way for the Arbitrator to determine whether she devoted more than a *de minimis* amount of over-tour time to HUD work.

While Dr. Johnson and Ms. Buchanan at least admitted to engaging in personal activities at work, other employees were less truthful. For example, Ms. Cardullo is seeking payment for time she spent with her boyfriend, both on the golf course and watching TV at his home. PFF ¶¶81-82. Ms. Sanchez appears to be seeking compensation for time she spent working on a recipe for "Impossible Pie." *See* PFF ¶326. And, Ms. Burton is seeking payment for time when she was away from her duty station without permission and was found by her managers to have performed no work at all. PFF ¶284 and subsequent paragraphs. None of this time benefited the Agency, and it is not compensable.

Besides personal activities, some of the claimants engaged in activities which were wasteful, and which are not compensable because they were not "necessary to the accomplishment of the employee's principal duties to the employer." For example, Ms. Bell testified that she sometimes traveled with another investigator and they worked on each others cases without having been instructed to do so. PFF ¶213. Ms. Cardullo's supervisor testified that he has counseled her to include *less* detail in her reports. PFF ¶103. He explained that an investigative report is supposed to contain a summary of pertinent documents but "Ms. Cardullo describes every document she gathers in an investigation and not all of those documents are pertinent." *Id.* And he added:

> So a lot of the work that she's complaining about it's impossible to do, it is possible to do if she would follow the instructions. I've talked to her about that in the past.

*Id.* At the opposite extreme, Mr. McGough testified that Dr. Johnson works slowly, yet is not thorough. PFF ¶155. In either case, the employees in question cannot be said to have been engaged in activities that provided a benefit to HUD.[34]

### B. The Grievants did not meet their burden to show that their supervisors knew or should have known of their alleged over-tour work.

The supervisors who testified either in person or by affidavit uniformly agreed that they were not aware of the over-tour work claimed by the Grievants. PFF ¶92 (Cardullo);[35] ¶115 (Johnson); ¶172 (Woods); ¶244 (Buchanan); ¶265 (Grier); ¶¶284, 291 (Thompson-Burton); ¶298 (Bello); ¶¶309, 314 (Locke); ¶¶318-320 (Platt); ¶327 (Sanchez); ¶¶333-337 (Lockhart); ¶¶350-352 (Whitfield); ¶367 (Pearl); ¶373 (Bizell-Wood); ¶ 389 (Roundtree); ¶402 (Pendelton); ¶410 (Nelson); ¶¶417-418, 422 (Montgomery); ¶¶432, 436 (Thomas); ¶445 (Ferrell); and ¶455 (Williams). The Grievants have offered no meaningful evidence that could rebut these firm denials. In particular, no weight can be given to claims in affidavits that supervisors "knew or should have known" or "knew or may have known" when no facts are adduced to establish the basis for the affiants' belief that their supervisors actually knew. Likewise, much of the Grievants' evidence must be discounted or ignored because the Grievants simply were not credible, as discussed in the Findings of Fact.

The Grievants offer two types of documentary evidence in their attempt to prove that a pervasive pattern of overtime existed and that supervisors actually knew about it. The first category consists of screenshots of EOS' G-drives showing documents that

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[34] Even if the Arbitrator were to assume that they engaged in some compensable activities, the Union has not met its burden to show how much of their time was compensable. *See* Part III below.

[35] The name in parentheses is the Grievant to whom the cited supervisors' testimony relates.

were modified on the computer outside of the EOS' tour-of-duty. However, there is not a shred of evidence that supervisors ever looked or had reason to look at their subordinates' G-drives. Moreover, even if supervisors had looked at these G-drives, they would see at most a few isolated examples of late work -- nothing that would suggest the pattern of out-of-tour work claimed by the Grievants. For example, the screenshots attached to Ms. Sanchez's affidavit show only ten occasions when documents were modified outside of her tour-of duty. PFF ¶326. Of all of these, only two were more than a half-hour outside of Ms. Sanchez's tour-of-duty. *Id.* This evidence of at most ten occasions of out-of-tour work stands in stark contrast to Ms. Sanchez's claim that she has arrived early nearly 100% of the time since 2001. Moreover, one EOS admitted in her testimony that the "date modified" field on a screenshot is not evidence of work being performed. She said:

> I could go in and change the date on something and it's been modified, or I could go in and work on 12 different paragraphs in the document and it's modified. So I have no idea.

PFF ¶71. For all of these reasons, the screenshots do not support the Grievants' claims either that uncompensated overtime was worked or that supervisors knew about such work.

The second category of documentary evidence that the Grievants offered as proof that supervisors knew about out-of-tour work consists of e-mails. There are numerous fallacies to the "e-mail argument," all of which can be demonstrated by discussing the e-mails offered by two sample Grievants -- Ms. Cardullo and Ms. Buchanan. The same issues raised below regarding Ms. Cardullo's and Ms. Buchanan's e-mails exist regarding other Grievants' e-mails.

First, Ms. Cardullo testified that "If I knew I had to work extra hours, I would begin at seven o'clock, but I would write an e-mail to my supervisor to let him know I was starting at seven o'clock." PFF ¶61. However, only two "early start" e-mails were introduced into evidence, and these covered two days in September 2004. *Id.* Such a sparse number of e-mails clearly does not establish a pattern that would have caused Ms. Cardullo's supervisor to know of an alleged pattern of early work. Moreover, those e-mails were never sent in sufficient time for Ms. Cardullo's supervisor, who began work at 9:30 A.M. -- to prevent the early work from being done, and Ms. Cardullo knew that was the case. PFF ¶62.

Similarly, Ms. Cardullo's e-mails establish at most nine occasions of late work over a 4.5-year period of telecommuting. PFF ¶76. This equates to two e-mails *per year.* Clearly, this also does not establish a pattern that would have put Ms. Cardullo's supervisor on notice that she was routinely working late and performing over-tour work. Indeed, on March 1, 2006, Mr. Rucker expressed surprise that Ms. Cardullo was still working at 6:16 P.M. (*id.*), clearly indicating that he was not aware of any pattern.

In addition, some of the e-mails that Ms. Cardullo offered as evidence of working out-of-tour were not sent to her supervisor at all, but rather to herself, coworkers, third-parties or higher-level officials such as Wanda Nieves who had no reason to know what Ms. Cardullo's tour-of-duty was. PFF ¶64; *see also* PFF ¶77. Such e-mails prove nothing.

Also, some of Ms. Cardullo's e-mails were so short that they reflect no more than a *de minimis* amount of work -- sometimes less than one minute. None of these e-mails would alert a supervisor to a pattern of more than a *de minimis* amount of work being performed. PFF ¶65.

Finally, Ms. Cardullo assumed that her supervisor knew she was working late because she sent him e-mails from her computer in the evening. PFF ¶74. However, her supervisor would have viewed such e-mails only during the next business day and he testified that he did not routinely notice the times on e-mails. *Id.* Thus, he would not have realized that the e-mail was sent after-hours the previous evening. In short, Ms. Cardullo's e-mails do not impute knowledge to her supervisor regarding her alleged pattern of over-tour work.

The same is true of Ms. Buchanan's e-mail arguments. Union Exhibit 28 purports to contain *every* e-mail message sent by Ms. Buchanan after 6:00 P.M. during the grievance period. That exhibit establishes that she sent e-mails after the end of her tour-of-duty only four times in 2003, eight times in 2004, twice in 2005, and once in 2006. Many of the Buchanan e-mails reproduced in Union Exhibit 28 show times well before 6:00 P.M. or so close to 6:00 P.M. (before or after) that they reflect at most *de minimis* time in the office past Ms. Buchanan's tour-of-duty. PFF ¶226. This would not have alerted her supervisor to any pattern of uncompensated overtime.

Furthermore, of the 15 Buchanan e-mails that arguably evidence after-tour work, only twelve show a supervisor or lead as a recipient. Thus, even if Ms. Buchanan's supervisors could be charged with noticing the time stamp on e-mails she sent them, which itself is unreasonable, they would have been put on notice only of an average of three occasions *per year* of over-tour work. PFF ¶227. Again, this is not a sufficient number of events to put HUD supervisors on notice of a pervasive pattern of overtime work.

Finally, there is no evidence that Ms. Buchanan's supervisor, Ms. Carter, was in the office when after-tour e-mails were received. PFF ¶229. Thus, she would not see

them until the next day. And. Ms. Carter, like Mr. Rucker, said that she would not ordinarily pay attention to the time stamp on an e-mail she received. PFF ¶230.

Numerous Grievants claimed that their supervisors knew of over-tour work because the supervisors saw the Grievants work through lunch. However, as discussed at length in the Findings of Fact, HUD does not have a lunch "hour" but rather a lunch "window" that lasts from 2 to 2.5 hours, depending on the office. Thus, the mere fact that a supervisor saw a Grievant at his or her desk at some point in the lunch period is not evidence that the Grievant did not leave his or her desk for lunch or that the supervisor knew that the Grievant did not leave his or her desk for lunch. In any case, many of the supervisors directly contradicted claims that they knew their subordinates were working through lunch.

Some Grievants testified that their coworkers knew of their overtime work -- indeed that it was common knowledge. Even if true, this is irrelevant because actual or constructive knowledge of overtime work must be attributable to someone with the authority to bind the government. *Bull I*, 68 Fed. Cl. at 224 (citing *OPM v. Richmond*, 496 U.S. 414, 420 (1990)). Claims that other coworkers were aware of an employee's over-tour work do not create any liability for the Agency. For the same reason, Grievants such as Ms. Buchanan who worked at sites where no member of management was stationed -- only a "lead" who is a member of the bargaining unit (*see* PFF ¶220) -- are precluded from claiming that their supervisors actually knew of their alleged over-tour work.

For all of the above reasons, there is no evidence that supervisors actually knew of the overwhelming majority of the over-tour work being claimed or of a pervasive

pattern of over-tour work. The real question, therefore, is whether supervisors "*should have*" known of the alleged work, if in fact it took place.

The Grievants' primary argument that supervisors should have known of their overtime claims appears to revolve around the Grievants' allegedly heavy workloads and the purported 100-day deadline for completing cases. As shown below, however, there is no merit to this argument.

First, even if the Grievants' assertions regarding their workloads were factual, which they are not, they would be legally incorrect; indeed, the Court of Federal Claims has expressly rejected such an interpretation of OPM's regulations. In *Bull I, supra*, canine enforcement officers employed by the Department of Homeland Security brought suit against their agency seeking unpaid overtime compensation and wages under the FLSA. Regarding one plaintiff's claim of that her supervisor had "constructive knowledge" of her work, the court said:

> As to bathing and drying her dog, Ms. Monistrol also does not make a sufficient case for constructive knowledge. Ms. Monistrol testified that, while she did not know if her supervisors realized she was grooming off-the-clock, they should have known that she bathed and dried her dog because such an activity must happen and "takes time." The court finds this to be insufficient evidence to support constructive knowledge.

*Bull I*, 68 Fed. Cl. at 270. Here, too, the claim that EOS' supervisors knew that closing cases "must happen and takes time" is insufficient to establish the supervisors' constructive knowledge of over-tour work.

In any case, the facts do not support the Grievants' claims that they had heavy workloads and were under pressure to close cases. Rather, the testimony showed that:

- The 100-day period does not even come into play for EOSs who work in the Intake and FHAP areas, only for those in Enforcement. PFF ¶¶30, 35.

- The 100-day deadline is routinely not met. For example, the Philadelphia region closed only 55% of cases in 100 days in Fiscal Year 2004. PFF ¶37.
- In Chicago, the office's goal has decreased every year from closing 75% of cases in 100 days to a goal of 65% and currently to 60%. *Id.*
- Almost any case that is going to result in a determination of reasonable cause is going to go over 100 days. PFF ¶38.
- In practice, EOSs do not work under any firm deadlines and therefore have no need to work more than 40 hours in a workweek. PFF ¶40.
- Supervisors do not view it as part of an investigator's job to work more than 40 hours in a week. *Id.*
- The fact that someone doesn't complete a case within a hundred days, would not prevent that individual from getting an "outstanding" rating. *Id.*
- Nearly all of the Grievants in this arbitration for whom evidence was submitted in this arbitration came from the FHEO offices with the worst records for closing cases within 100 days, at least in Fiscal Year 2004 -- Philadelphia, Atlanta, Chicago, Fort Worth, and Seattle. There were no overtime claims from the three best performing offices -- New York, Boston and San Francisco. PFF ¶41.

Thus, Mr. McGough from the Chicago office explained that performance appraisals are based more on balancing the case load than on meeting the 100 day goal in individual cases. PFF ¶137. Indeed, one of the Grievants commented about her supervisor's expectations as follows: "There's no specific time frame in which I have to get back with him to discuss or work on with him. It's just -- I just work on the case load that I have." PFF ¶196. Clearly, the 100-day argument is a red-herring.

In addition, several supervisors unambiguously rejected the notion that their subordinates had heavy workloads. For example, Ms. Shavers testified about Ms. Catherine Thompson-Burton:

> Cathy Burton did not produce a sufficient amount of work that would suggest that she worked 40 hours a week, let alone overtime.

PFF ¶291.

Likewise, Mr. Rucker testified about Mr. Grier:

> He did not have that much of a caseload to be working the amount of time that he's saying that he worked beyond his tour of duty.

PFF ¶266.

And, regarding Ms. Cardullo, Mr. Rucker said:

> [A] lot of the work that she's complaining about it's impossible to do, it is possible to do if she would follow the instructions. I've talked to her about that in the past.

PFF ¶103.

Significantly, even if all of the supervisors misjudged their subordinates' workloads -- which is highly unlikely -- the supervisors' testimony nevertheless demonstrates their state of mind about their employees' workloads and thus negates any argument that they "should have" known that overtime was necessary.

Another claim that was heard was that supervisors should have known that work was being done on the weekends because of work that was not completed on Friday, but was finished by Monday. However, at least one Grievant agreed that her supervisor would have had no reason to know that she had worked over the weekend, if she had, because she did not interact closely with her supervisors in the course of her work and her supervisors did not necessarily know what work activities she was engaged in.

PFF ¶196.

There is another reason why a "should have known" standard cannot be applied to weekend work, work at home, after-hours work on travel, and even some work in the office. OPM has held that a supervisor cannot be held to know that a worker comes in early when "claimant and his supervisors were not usually visible to each [other] in that

their work sites were distant from each other." OPM Decision No. F-6907-05-01 (August 6, 1998) at xi. Thus, to the extent that any work was being performed in a location or at a time that was not visible to the supervisor, no constructive knowledge of that work can be imputed to the supervisor. Indeed, one EOS agreed on cross-examination that "[I]t's possible that employees are working many more hours and the supervisor just doesn't know." PFF ¶203.

### C. The Grievants did not meet their burden to show that supervisors had an opportunity to prevent the alleged work from being performed.

Even if supervisors knew or should have known about over-tour work, it would not be compensable under OPM's regulations unless the supervisors had an opportunity to prevent the work from being performed. Needless to say, supervisors have no opportunity to prevent work from being performed when the work is allegedly being done in the employee's home or other off-site locations with no advance notice to the supervisors. Likewise, because OPM regulations and the AFGE and NFFE contracts allow employees to work different hours than their supervisors and to take lunch during a long window rather than at a fixed time, employees have a great deal of flexibility to work at hours when their supervisors are not expected to be present and cannot prevent the work.

The "opportunity to prevent" prong of the suffered or permitted test is sometimes explained to mean that the hours in question were "controlled or required by the employer." *Bull I, supra* 68 Fed. Cl. at 220. For the reasons explained in the previous paragraph, alleged over-tour work could not have been "controlled" by supervisors if the supervisors were not even present when the work was being performed. And,

significantly, not a single Grievant who testified either in person or by affidavit asserted that their supervisors "required" them to work overtime.

Moreover, not only did supervisors have no opportunity to prevent over-tour work from being performed when it was performed outside of their presence, the Grievants actually took actions that prevented supervisors from knowing about the supposed pervasiveness of employees' alleged over-tour work in sufficient time to do anything about it. HUD's timekeeping procedures require each employee to certify that the entries on his or her T&A records (Form HUD-25012) are "correct and accurate." *See, e.g,* PFF ¶¶14, 105, 162, 201, 242. The Grievants who introduced evidence are now, in effect, claiming they falsely certified to working only 40 hours in a workweek during nearly every workweek in the grievance period, except for some of the workweeks in which they recorded and certified that they worked over tour hours and received compensatory time or credit hours. The certifications in evidence almost uniformly account for only 40 hours in a workweek; thus, they do not account for the extra time now claimed by the Grievants who presented evidence.

Likewise, the Grievants readily admitted that they were familiar with the procedures for notifying their supervisors of over-tour work (PFF ¶¶91, 95, 146, 199, 210, 235, 254, 274), but they did not follow those procedures. The fact that the Grievants concealed the extent of their claims from supervisors for so long goes to whether supervisors knew or should have known of the work and whether they had the opportunity to prevent it. Without these prerequisites, the time is, as a matter of law, not compensable.

Even when Grievants ostensibly notified supervisors of plans to work outside of their tour of duty, they did so in a way that provided no opportunity for the supervisor to

object. As already noted, Union Exhibit 6, page 31 of 109, shows that Ms. Cardullo e-mailed her supervisor at his work e-mail address at 7:10 A.M., as follows:

> Subject: Early Start
>
> Wayman: I am starting work early this morning.
>
> Viv

PFF ¶62. On another occasion, she e-mailed her supervisor at 7:13 A.M. to say she was starting work two minutes later at 7:15 A.M. *Id.* But, Ms. Cardullo *knew* that her supervisor, Mr. Rucker, did not arrive at work until 9:30 A.M. *Id.* Thus, Ms. Cardullo had no expectation that her supervisor would see the e-mails on time to prevent her from working, nor is there evidence that he did see the e-mails in time to have an opportunity to prevent the before-tour work from being performed or to control the work. Moreover, even if he had known, he had no reason to object to Ms. Cardullo's early start since, except regarding one day in the entire grievance period, Ms. Cardullo did not present any evidence that she told her supervisor that she was beginning work one hour early and *not* ending work one hour early.

For all of the above reasons, the Arbitrator should find that the Grievants did not meet their burden to show that they were "suffered or permitted" to work overtime, *i.e.*, that they performed over-tour work for the benefit of an agency, their supervisors knew or had reason to believe that the work was being performed, and the supervisors had an opportunity to prevent the work from being performed.

## III. Even if any overtime work was suffered or permitted, the Grievants have failed to produce sufficient evidence to show the amount and extent of the overtime work as a matter of just and reasonable inference

Where overtime was worked, but an employer has not kept proper and accurate records of that overtime work, the employees must approximate the number of overtime

hours they worked and have the burden to "produce sufficient evidence to show the amount and extent of hours worked as a matter of just and reasonable inference." *Bull v. U.S.*, 68 Fed. Cl. 276, 279 (2005) ("*Bull II*") (citing *Mt. Clemens Pottery, supra* 328 U.S. at 688). In addition, or as part of proving their hours worked by just and reasonable, the Grievants must establish that the hours of work performed are actually, rather than theoretically, compensable. *Bull I*, 68 Fed. Cl. at 220. For work to be compensable, the quantum of time claimed by plaintiffs must not be *de minimis*, and must be reasonable in relation to the principal activity.

Regarding nearly all of the claimed overtime, the Grievants have failed to show the amount and extent of hours worked as a matter of just and reasonable inference. In particular, there is no evidence in the record from which the Arbitrator could draw any just or reasonable inference as to how much of the alleged over-tour work was actually known, or should have been known, to supervisors.

The weakness of the Grievants' evidence is particularly obvious with regard to the 26 affidavits, which make general assertions that, in most cases, are not backed up by any documentary evidence or details or even by an explanation of how over-tour time dating back as far as five years ago was reconstructed. *See, e.g.,* PPF ¶¶267, 287, 299, 303, 310, 322, 326, 338, 343, 353, 359, 365, 371, 377, 383, 394, 399, 408, 419, 426, 434, 446, 458. More than half of the affidavits had no corroborating affidavits (*see, e.g.,* PFF ¶¶269, 361, 366, 372, 378, 388, 395, 401, 409, 420, 427, 435, 447, 459), and, when there were corroborating affidavits, those affidavits were nearly always from other Grievants who have a direct economic interest in the outcome of this arbitration. Also, as already discussed, many of the affidavits were contradicted by the affiants' supervisors.

Furthermore, some of the affidavits contain what appear to be outright fabrications. For example, Ms. Whitfield's affidavit asserts that Jessyl A. Woods saw Ms. Whitfield's early arrivals, and Ms. Woods provided an affidavit to that effect. There is real doubt as to the veracity of this testimony. Ms. Whitfield's tour of duty began at 7:00 A.M., while Ms. Woods' tour of duty began at 9:30. While Ms. Woods did testify that she sometimes arrived before her duty, there is no evidence that she came in early enough to see Ms. Whitfield come in early, *i.e.*, before 7:00 A.M. To the contrary, Ms. Woods testified that "I have been in sometimes as early as maybe seven o'clock, 7:15," implying that it was a rare occurrence for her to come in that early, and certainly not earlier. Indeed, Mr. Sweeney, the director of the Fort Worth office where Ms. Woods works, testified that he sees Ms. Woods come in at "usually around 9:30." PFF ¶347.

Similarly, Mr. Anthony testified by telephone that he arrives on time 50% of the time and 30-45 minutes early the rest of the time. Then, in he submitted an affidavit in which he swore "under the penalties of perjury" that in each and every year since 2001, he has "come in early on average, 5 times per week." PFF ¶273. For all of these reasons, little or no credibility can be attached to the affidavits. At a minimum, no just and reasonable inferences can be drawn from them regarding the extent of claimed overtime that meets the definition of "suffered or permitted."

Even the testimony of the live witnesses was not adequate to allow a just and reasonable inference as to the amount of time worked and whether it was more than *de minimis*. Ms. Cardullo introduced numerous e-mails as purported proof that she performed work. As already discussed, many of those e-mails were so short that they

reflect no more than a *de minimis* amount of work -- sometimes less than one minute.[36]

There also was no proof that the amount of time claimed was reasonable. The law is clear that employees are not necessarily entitled to payment for all of the time they each spent working, but only for that amount of time reasonably required to accomplish their tasks. *Bull I*, 68 Fed. Cl. at 227 (citing *Amos v. United States*, 13 Cl.Ct. 442, 450 (1987)). To rule otherwise would run the risk of rewarding the Grievants for their lack of diligence. *Id.*; *see also Reich v. IBP,* 820 F. Supp. 1315, 1324 (D.Kan. 1993) ("Employees are entitled to compensation for reasonable time (rather than actual time) required."), *aff'd and remanded,* 38 F.3d 1123, 1127 (10th Cir. 1994) ("[T]he district court concluded that the workers should be paid on the basis of a reasonable time to conduct these activities . . . rather than the actual time taken. We believe reasonable time is an appropriate measure in this case.") (citation omitted); *Albanese v. Bergen County, N.J.,* 991 F.Supp. 410, 424 (D.N.J. 1998) ("[E]mployees must show that the overtime hours they worked [are] reasonable in order for those hours to be compensable.") These courts have found that the reasonableness requirement articulated in Amos "makes intuitive sense." *Hellmers v. Town of Vestal,* 969 F.Supp. 837, 844 (N.D.N.Y. 1997). Indeed,

> [i]n situations where the claim for overtime compensation involves off[-]the [-]clock time, the reasonableness requirement ensures that plaintiffs are actually serving their employers' benefit rather than padding their hours or shirking their responsibilities. Moreover, if the Court does not adopt the reasonableness standard, it will have to adopt plaintiffs' guess of how many hours they worked because they do not

[36] A list of e-mails with no text or with only one or two lines of text that were offered by the Ms. Cardullo as "proof" of her over-tour work is as follows: Union Ex. 6, at 8, 9, 16, 41, 83 (two lines each); *id.* at 14, 17, 21, 23, 26, 45, 71, 75, 78, 80, 81 (one line each); and *id.* at 38, 57, 67, 72, 76, 77, 79, 86, 97, 99 (no text in e-mail). Each of these e-mails reflects *de minimis* work at most and not compensable working time.

> know the exact number of hours that they worked. Thus, although the Court recognizes that plaintiffs have worked overtime hours for which they have not received compensation, they will not receive compensation for hours that are unreasonable.

*Albanese,* 991 F.Supp. at 424; *see also Holzapfel v. Town of Newburgh,* 145 F.3d 516, 523-24 (2nd Cir. 1998)*, rev'd in part on other grounds,* 145 F.3d 516 (1998) ("[I]f time was expended primarily to inflate the employee's earnings, then the time . . . is not compensable.").

As discussed above, some Grievants claimed that they were under tremendous pressure to do whatever was necessary to close cases in 100 days, but the evidence shows that is not the case. For example, Dr. Johnson testified that he worked over-tour hours to complete his cases in 100 days and earn a promotion. PFF ¶135. Later he testified that this over-tour time enabled him to complete many cases in "*under* the hundred days." *Id.* Even if Dr. Johnson had been required to close his cases in 100 days, and the overwhelming evidence shows that he was not so required, it clearly was not reasonable for him to work overtime to close his cases in *less than* 100 days.

Moreover, several supervisors testified that the Grievants under their supervision were inefficient and took an unreasonable amount of time to accomplish assigned tasks, or they accomplished nothing at all. As already noted, Ms. Shavers stated about Ms. Catherine Thompson-Burton that:

> Cathy Burton did not produce a sufficient amount of work that would suggest that she worked 40 hours a week, let alone overtime.

PFF ¶¶291.

Likewise, Mr. Rucker testified about Mr. Grier:

> He did not have that much of a caseload to be working the amount of time that he's saying that he worked beyond his tour of duty.

PFF ¶266.

And, regarding Ms. Cardullo, Mr. Rucker said:

> [A] lot [sic] of the work that she's complaining about it's impossible to do, it is possible to do if she would follow the instructions. I've talked to her about that in the past.

PFF ¶103.

All of the extra time worked by these individuals cannot be considered "reasonable." That time also provided no benefit to the Agency.

One additional point regarding the Grievants' failure to produce sufficient evidence to show the amount and extent of the overtime work as a matter of just and reasonable inference. The Grievants have argued that they are entitled to an adverse inference from HUD's alleged failure to produce various building security records that allegedly would show when employees entered and exited their workspaces. The Grievants are not entitled to such an adverse inference for three reasons:

First, there was significant testimony that HUD does not control many of the buildings in which the Grievants work. PFF ¶¶167, 218, 306, 329, 413.

Second, it would be incorrect to assume that the records would be adverse to HUD if they could be produced. Indeed, Dr. Johnson admitted the records would show he often left on time. PFF ¶120. Likewise, the existing scan-in records relating to Ms. Woods do not support her claims; they actually refute her claims. PFF ¶¶174-178.

Finally, HUD cannot be blamed for the loss or destruction of the records sought by the Grievants. Under the AFGE Contract, the party receiving a grievance is required to render a decision thereon within 30 days. PFF ¶10. In this case, HUD did not render

a decision on the AFGE Overtime Grievance within the 30-day time frame contemplated by the AFGE Contract (*i.e.*, by January 23, 2004); nevertheless, AFGE did not invoke arbitration for almost 1.5 years. PFF ¶3. While it is true that this delay resulted from the parties' attempt to reach a settlement, the fact remains that the long delay allowed documents to be lost or destroyed that otherwise might have been preserved.

For all of the foregoing reasons, the Arbitrator should find that the Grievants have not met their burden to show that overtime work was suffered or permitted or -- if any overtime work was suffered or permitted -- the amount and extent of the overtime work as a matter of just and reasonable inference. Accordingly, the Grievants should recover nothing.

## IV. The Grievants have failed to meet their burden to show that the testimony of Equal Opportunity Specialists regarding overtime hours they allegedly worked represents an adequate sample upon which to award overtime compensation under FLSA to the entire group of Equal Opportunity Specialists

Even if individual Grievants have proven all or part of their claims, any award must be limited to those individual Grievants. For the reasons discussed below, this is not an appropriate case in which to accept the testimony of the Grievants who testified as representational of all GS-360s.

The Court in *Secretary of Labor v. DeSisto*, *supra*, explained that standard for accepting representational testimony as follows:

> Usually, an employee can only represent other employees only if all perform substantially similar work. *See McLaughlin v. Ho Fat Seto*, 850 F.2d 586 (9th Cir. 1988) (garment factory workers), *cert. denied*, 488 U.S. 1040, 109 S.Ct. 864, 102 L. Ed. 2d 988 (1989); *McLaughlin v. DialAmerica Marketing, Inc.*, 716 F. Supp. 812 (D.N.J. 1989) (home telephone number researchers). In *Dole v. Snell*, 875 F.2d 802 (10th Cir. 1989), for example, the DOL offered the testimony of one employee and the compliance officer to support an award to 32 employees. But in that case, unlike

> this one, all 32 employees held identical positions as cake decorators. Moreover, in *Dole v. Snell* the parties stipulated that the testifying employee was representative. *Id.* at 811. Where the employees fall into several job categories, it seems to us that, at a minimum, the testimony of a representative employee from, or a person with first-hand knowledge of, each of the categories is essential to support a back pay award.

929 F.2d at 793.

In the present case, the standard for accepting representational evidence is not met because, among other reasons:

- There is not one job category, but three jobs with different duties -- Intake, Enforcement, and Program Compliance (FHAP). PFF ¶21.
- In the Washington, D.C. office, some EOSs have additional responsibilities for Congressional inquiries. PFF ¶31.
- Some EOSs do not perform only one duty; one EOS may perform 90% of one duty and 10% of another duty, while a second EOS -- even in the same office -- performs 50% of one duty and 50% of another duty. Tr. (9/29/2005) (liability phase) at 110, 113.
- There are at least three job grades -- 11, 12 and 13. PFF ¶46, 107, 166.
- There are office-workers and there are tele-workers. PFF ¶¶107, 264.
- There is a wide variation in the number of cases closed by GS-360s, even those at the same grade level. PFF ¶42.
- There is variation in the quality of work performed by GS-360s. Tr. (11/4/2005) (liability phase) at 44-45, 55.
- There are more than 20 locations where EOSs work: Albuquerque; Atlanta; Boston; Chicago; Columbia, S.C.; Denver; Fort Worth; Houston; Jackson; Kansas City; Knoxville; Little Rock; Louisville; Miami; New Orleans; New York; Oklahoma City; Orlando; Philadelphia; Pittsburgh; San Antonio; Seattle; and Washington, D.C. PFF ¶22. Evidence of over-tour work was introduced only regarding fewer than half of these offices.
- Some of the above locations are Regional Offices and some are Field Offices. *See* Union Ex. 38; Tr. (10/11/2005) (liability phase) at 102.
- Some offices have onsite supervisors, and some do not. PFF ¶221.

- Some supervisors manage their workers more closely than others. Tr. (9/29/2005) (liability phase) at 132-33; Tr. (10/11/2005) (liability phase) at 43.

In short, there are hundreds of individual circumstances that could affect the work patterns of GS-360s, and this is reflected in the evidence presented by the Union showing widely divergent claims regarding the number of over-tour hours allegedly worked. Thus, for example, a union witness in the liability phase of the GS-360s hearing testified that although there were three GS-360s employed in the Miami FHEO office at grade 12, one of them performed very different duties from the other two. Tr. (9/29/2005) at 112-13. Even the Grievants' counsel admitted at the liability hearing, when comparing a GS-13 at headquarters with GS-12s in the field: "They do different things." Tr. (9/29/2005) at 207. Also, there was no testimony from even one EOS represented by NFFE.

For all of these reasons, the Grievants have failed to meet their burden to show that the testimony of EOSs regarding overtime hours they allegedly worked represents an adequate sample upon which to award overtime compensation under FLSA to the entire group of EOSs.

## V. Even if the Agency did violate the FLSA, HUD is entitled to certain offsets and overtime pay would be due only if the Grievants have not already received compensation equal to or greater than the amount derived through application of the half-time formula.

Nearly all of the Grievants who testified admitted receiving some compensation for over-tour hours worked, whether in the form of credit hours, comp-time or informal arrangements such as "wink-time." It is HUD's understanding that the Grievants do not dispute that all such compensation must be offset against any overtime pay that is found to be due. HUD's right to such an offset is well-established in the law. *See, e.g., Roman v. Maietta Constr., Inc.*, 147 F.3d 71, 76-77 (1st Cir. 1998) (affirming trial court's

calculation of back pay that was offset by compensatory time already paid to employee at regular rate); *Lupien v. City of Marlborough*, 387 F. 3d 83, 89 (1st Cir. 2004) (affirming the offset of the defendant's liability under FLSA for used compensatory time); *Dunlop v. New Jersey*, 522 F. 2d 504, 517 n.23 (3rd Cir. 1975); *D'Camera v. District of Columbia*, 722 F. Supp. 799, 803 (D.D.C. 1989).

In addition, as discussed at length in HUD's motion in limine regarding damages (Motion No. 9), the Grievants' damages must be capped at half-time. Thus, to the extent that EOSs already received compensation in any form in excess of half-time, HUD would have no additional liability. HUD hereby renews Motion No. 9 and incorporates it by reference into this post-hearing brief.

## VI. Even if the Agency did violate the FLSA, the Agency acted in good faith and had reasonable grounds for believing that its actions and omissions were not violations of the FLSA, such that no liquidated damages would be payable

The only issue on which the Agency bears the burden of proof in this proceeding is to prove that it should not be subject to liquidated damages because it acted in good faith and had reasonable grounds for believing that its actions and omissions were not violations of the FLSA. Of course, to the extent that no damages are awarded, this is a non-issue.

The Court of Federal Claims has explained the "good faith" and "reasonable grounds" necessary to avoid liquidated damages as follows:

> The "good faith" referred to in [29 U.S.C.] section 260 means an honest intention to ascertain what the [FLSA] requires and to act in accordance with it. Whether an honest intention existed involves a subjective inquiry. The "reasonable grounds" requirement in section 260 calls for a determination as to whether the employer had reasonable grounds for believing that his act or omission was in compliance with the Act, and this is a requirement that involves an objective standard. Proof that the law is

> uncertain, ambiguous or complex may provide reasonable grounds for an employer's belief that he is in conformity with the Act, even though his belief is erroneous.

*Bull I*, 68 Fed. Cl. at 229 (citations and internal quotation marks omitted). Here, HUD has met both of these conditions.

The first time that anyone suggested that HUD was improperly classifying any employees was in May of 2002. PFF ¶468. At that time, Ms. Federoff threatened to file an FLSA grievance regarding the exemption issue -- not because she believed that any employees were improperly classified, but, by her own admission, as a tool to force a resolution of the Sunday travel issue. *Id.* After that threat in May 2002, Ms. Federoff did not raise any general FLSA classification concerns with HUD again until she filed the FLSA Overtime Grievance in December 2003. PFF ¶470.

HUD's prompt actions to confirm its compliance with the FLSA after the AFGE FLSA Overtime Grievance was filed in December 2003 demonstrate its honest intention to ascertain what the FLSA requires and to act in accordance with it. For example, HUD promptly began to review the exempt status of its employees, reasonably selecting the most numerous job series to review first. PFF ¶471. During the winter of 2003 and/or the spring of 2004, HUD's Mr. Mesewicz called other federal agencies to inquire about their FLSA exemption practices. PFF ¶472. In particular, Mr. Mesewicz spoke to an official at OPM. PFF ¶473.

HUD's honest intentions to comply with the law also are demonstrated by the fact that, where HUD's review suggested that its classification decisions were subject to reasonable challenge -- *i.e.*, in the case of GS-10s and below -- HUD promptly agreed to reclassify them. HUD also has agreed to reclassify the GS-950 series. In contrast, HUD believes that the GS-360s series is exempt. HUD is not obligated to reclassify

those positions just because a grievance was filed.[37] These facts satisfy the first requirement of 29 U.S.C. §260.

Regarding the second requirements, proof that the law is uncertain, ambiguous or complex provide reasonable grounds for an employer's belief that he is in conformity with the Act, even though his belief is erroneous. Here, Ms. Federoff herself admitted that the FLSA "is a very complex area of the law." PFF ¶469. And, the law vis-à-vis GS-360s is uncertain or ambiguous. Although the Grievants presented evidence that GS-360s in some agencies are treated as non-exempt, at least one other agency, the Equal Employment Opportunity Commission, currently classifies GS-360s as exempt. PFF ¶475. Thus, the second requirement is met as well.

For all of these reasons, HUD acted in good faith and had reasonable grounds for believing that its actions and omissions were not violations of the FLSA, such that no liquidated damages would be payable.

## VII. Even if the Agency did violate the FLSA, Equal Opportunity Specialists represented by AFGE would be entitled to overtime compensation only for work performed on or after November 9, 2003, and Equal Opportunity Specialists represented by the National Federation of Federal Employees would be entitled to overtime compensation only for work performed on or after September 19, 2005, *or*, for both Unions, two years before the Arbitrator's decision is issued, whichever is *later*

During the hearing, the Grievants asserted that damages should be awarded going back to June of 2000. Tr. (8/29) at 31. There is no basis for such an award, which is more than three years before the first FLSA overtime grievance was filed on

[37] It also should be noted that, during this arbitration, when HUD voluntarily reclassified GS-10 and below and some other positions as non-exempt, the Grievants filed summary judgment motions asserting that HUD's voluntary actions were admissions of wrongdoing. These filings by the Union understandably chilled HUD from taking any further voluntary actions to correct potential FLSA violations, if any existed.

December 24, 2003. *See* PFF ¶2 and see discussion below.[38] More importantly, as also discussed below, the law is clear that filing a grievance does not toll the FLSA statute of limitations; thus, the statute of limitations must be determined by the date of the Arbitrator's decision. Finally, and most importantly, the two Unions involved in this arbitration are limited by their respective contracts in their ability to be the agent to collect damages for FLSA violations occurring before November 9, 2003 (for AFGE) and September 19, 2005 (for NFFE).

We begin with the third point. Section 22.15 of the AFGE Contract states:

> Should either party have a grievance over any matter covered by this procedure, it shall inform the designated representative of the other party of the specific nature of the complaint in writing within forty-five (45) days of the date when the party became aware or should have become aware of the matter being grieved. . . .

PFF ¶10. And, Section 9.12 of the NFFE Contract states:

> If either Party has a Grievance over any matter covered by this Agreement, it shall inform the Union President or Regional Director (or equivalent successor position) or the designated representative of the other Party of the specific nature of the complaint, in writing, within 30 days of the date when the Party became aware or should have become aware of the matter being grieved.

PFF ¶11. In order to give these provisions effect, they must be interpreted to preclude a party from receiving any relief for a wrong that occurred more than 45 or 30 days, respectively, before a grievance was filed. Here, the AFGE FLSA Overtime Grievance was filed on December 24, 2003. PFF ¶2. The NFFE Grievance was filed on October 19, 2005. PFF ¶4. Accordingly, even if the Agency were found to have violated the FLSA, EOSs represented by AFGE would be entitled to overtime compensation only for

[38] Indeed, in the liability phase of the 360s hearing, the Grievants' counsel admitted: "This grievance goes back to, at the earliest, December 24th 2000." Tr. (9/29/2005) (liability phase) at 179.

work performed on or after November 9, 2003, and EOSs represented by the National Federation of Federal Employees would be entitled to overtime compensation only for work performed on or after September 19, 2005.

However, even the dates just mentioned are dependent on the timing of the Arbitrator's decision. The reason for this is as follows:

In an ordinary case, the statute of limitations for bringing an FLSA claim is governed by the Portal-to-Portal Act, 29 U.S.C. § 255. "Generally, the statute of limitations for a FLSA action is two years." *Bull I,* 68 Fed. Cl. at 228. If a plaintiff's claim arises out of an employer's "willful" violation of FLSA, a three-year statute of limitations applies. Pursuant to 29 U.S.C. § 256, these two statutes of limitations are tolled when a lawsuit is filed; in other words, a plaintiff collects FLSA damages dating two years before his lawsuit was filed regardless of when the judge or jury renders a decision. However, the Supreme Court has squarely rejected the argument that an action is commenced when *administrative* proceedings are initiated. The Court said:

> It is argued that the issuance of a formal complaint in the administrative proceedings … is the commencement of an action in the statutory sense. Congress, however, when it wrote [29 U.S.C. § 256], was addressing itself to lawsuits in the conventional sense. Commencement of an action by the filing of a complaint has too familiar a history and the purpose of [29 U.S.C. §§ 255 and 256] was too obvious for us to assume that Congress did not mean to use the words in their ordinary sense.

*Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 66 (1953).[39] Thus, courts have held that in cases involving claims for overtime by federal employees that the filing of grievances did not toll the statute of limitations.

[39] Although *Unexcelled Chemical* involved the Walsh-Healey Act, the FLSA is also governed by the statute of limitations period set forth in the Portal to Portal Act and therefore *Unexcelled Chemical* is equally applicable to FLSA claims.

For example, in *Abbott v. United States*, 144 F.3d 1 (1st Cir. 1998), certain Unuion-represented professional and technical federal employees at the Portsmouth Naval Shipyard were classified as exempt from the overtime provisions of the FLSA pursuant to OPM regulations which, at one time, presumed exempt status for all federal employees at the GS-11 level and above. The OPM regulations were invalidated in 1987, but the exempt status of the employees was not changed. In September of 1990, the union filed a grievance challenging the Shipyard's classification of the unit employees. In November 1993, the union and the United States entered into a settlement agreement which classified the listed grievants as non-exempt and awarded them back pay for overtime for up to six years. The agreement further provided that employees not listed in the grievance would be classified as non-exempt from November 12, 1993 and would receive overtime from that date forward. In May of 1994, the plaintiffs filed unfair labor practice claims with the FLRA against the Shipyard and the union. The FLRA upheld the grievance settlement. Subsequently, in March 1996, plaintiffs filed suit against the union and the United States seeking declaratory relief that the November 1993 agreement was illegal and invalid to the extent that it precluded them from seeking overtime back pay under the FLSA and the Back Pay Act. Against the United States, the plaintiffs also sought monetary relief, including overtime back pay with interest, statutory liquidated damages, and attorney's fees. The district court dismissed the action against the United States because the statute of limitations had run. The First Circuit affirmed the dismissal "on the grounds that the claim was not brought within the FLSA's two-year statute of limitations." 144 F.3d at 6. The court observed, "the FLSA's statute of limitations is not subject to tolling on the basis of pending administrative proceedings." *Id*.

Similarly, in *Aguilar v. Clayton*, 452 F. Supp. 896 (E.D. Okla. 1978), 160 federal employees of the McAlester Naval Ammunition Depot and their union, AFGE Local 2815, filed an action in December 1977 to recover overtime wages under the FLSA for overtime work allegedly performed from May through July of 1974. Plaintiffs alleged in their complaint that they first filed a request for overtime compensation with their commanding officer on October 7, 1974. They asserted that they were notified by letter on February 3, 1975 that their claim had been denied. On March 21, 1975, plaintiffs filed their claim with the Civil Service Commission's Bureau of Personnel Management Evaluation, which eventually denied plaintiffs' claim on June 1, 1976. The court held that the plaintiffs' action was barred by the statute of limitations because "the filing of an administrative claim does not in any way toll or otherwise affect the two year limitation imposed by § 255(a) on seeking judicial relief for violations of the Fair Labor Standards Act." *Aguilar,* 452 F. Supp. at 898. The court also observed:

> This is not to say that in instituting a Fair Labor Standards Act claim, a litigant must choose between pursuing either administrative or judicial relief; an aggrieved employee seeking overtime compensation can immediately file a court action and then apply for a stay pending the outcome of his administrative remedies. By so doing, the requirements of the statute of limitations are satisfied.

*Id*. at 899.

Here, likewise, the filing of AFGE's and NFFE's grievances did not toll the statute of limitations. Thus, the Arbitrator may award FLSA damages dating back *at most* two years before his decision (or three years before the Arbitrator's decision if the Grievants meet their burden of proof regarding willfulness).

Regarding the potential three-year statute of limitations, the courts have determined that "the employee bears the burden of proving the willfulness of the

employer's FLSA violations." *Bull I*, 68 Fed. Cl. at 228 (citing *Bankston v. Illinois*, 60 F.3d 1249, 1253 (7th Cir. 1995). To determine whether an employer committed a willful violation of the FLSA, the court examines whether "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Bull I*, 68 Fed. Cl. at 228 (citing *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)).

As discussed in the proposed findings of fact above, there is no evidence that HUD knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA. *See also* Part VI above. Because the Union bears the burden of proof on this issue, HUD will reserve further discussion on this issue until its reply brief.[40]

[40] HUD also reserves for its reply brief other issues on which the Grievants bear the burden of proof, including whether the AFGE Grievants have met their burden of proof with respect to their Sunday travel grievance; whether HUD is a "losing party" within the meaning of the applicable collective bargaining agreements; and whether the Grievants are entitled to attorney fees.

## Conclusion

For the foregoing reasons, the Grievants' overtime claims should be denied.

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Respectfully submitted,

EPSTEIN BECKER & GREEN P.C.

/s/

Peter M. Panken
Daniel B. Abrahams
Shlomo D. Katz
1227 25th Street, N.W.
Washington, D.C. 20037
(202) 861-0900
Facsimile (202) 296-2882
skatz@ebglaw.com

Counsel to the Agency

**Certificate of Service**

I hereby certify that a copy of this United States Department of Housing and Urban Development's Post-Hearing Brief on GS-360 Damages was sent to Michael J. Snider, Esquire on February 28, 2007 by e-mail to mike@sniderlaw.com, carolyn_federoff@hud.gov and elizabeth_mcdargh@hud.gov.

/s/ Shlomo D. Katz
Shlomo D. Katz