IN THE MATTER OF ARBITRATION
BEFORE ARBITRATOR SEAN J. ROGERS

THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 222, AFL-CIO and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1450 Unions, - and - U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Agency.	ISSUE: GS-360s FLSA OVERTIME DAMAGES

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

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

The United States Department of Housing and Urban Development ("Agency" or "HUD"), through counsel, respectfully submits this Reply Brief on the issue of Fair Labor Standards Act ("FLSA") overtime compensation for HUD employees in the GS-360 Equal Opportunity Specialist ("EOS" or "360s") series. For the reasons discussed below and in HUD's initial brief, which is incorporated herein by reference, the Arbitrator must reject the Grievants' claims and deny damages to (1) all of the 360s who put no evidence in the record, (2) the 360s who put in vague and conclusory affidavits, and (3) the few 360s who actually testified.

The Grievants Have In Effect Admitted They Failed to Satisfy Their Burden of Proof

In August, September, November and December 2006, the Arbitrator and the parties held sixteen days of hearings for the express purpose of allowing the Grievants to prove their alleged damages. There was never any misunderstanding as to the purpose of those hearings. On day one of the hearings, the Arbitrator said, "Today we are here about to commence a hearing on the *damages* for GS-360 investigators." Tr. (8/29) at 5 (emphasis added). And, in their opening statement, the Grievants acknowledged this purpose, stating, "We are, therefore, faced with the *damage phase* of this case, for the GS-360 employees." Tr. (8/29) at 21 (emphasis added).

Nor was there ever a misunderstanding as to who bore the burden of proof as to the amount and extent of damages, *i.e.*, the number of hours actually worked but not compensated. In their opening statement, the Grievants' attorney admitted:

> ***It is the Union's burden*** to establish that the employees performed work, and ***to "produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference***."

Tr. (8/29) at 27 (citing *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946)) (emphasis added).[1] The Grievants were correct when they admitted in their opening statement that they had the burden of producing sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. As discussed below, they effectively admit that they have failed to meet that burden.

But, that was not the sum total of the Grievants' burden. As the Court of Federal Claims explained in *Bull v. United States*, 68 Fed. Cl. 212, 221 (2005):

> 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.

In order to demonstrate that "the quantum of time claimed by plaintiffs [is] reasonable in relation to the principal activity," the Grievants obviously were required to provide sufficient detail about their work to permit an inquiry into the actual quantum ***and*** the reasonableness of the claimed over-tour work in relation to their principal activity. It was not sufficient for the Grievants to merely guesstimate the quantity of hours allegedly worked, as the Grievants assert on page 77 of their brief. It certainly was not sufficient for the Grievants to claim they worked overtime "sometimes" or "a lot." *See* Union's Closing Brief at 43, 54. The Grievants had to prove the amount and extent of their overtime as a matter of just and reasonable inference in order to recover even one penny of damages. And the Grievants knew this.

Incredibly, after sixteen days of hearings held over five months, and several more months of brief writing, the Grievants now admit that they have not met, and cannot

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[1] Typographical errors in the transcript have been corrected by comparison to page 6 of the Opening Statement distributed by the Unions and read by their counsel at the hearing.

meet, their burden of proof. Instead of producing sufficient evidence to show the amount and extent of overtime work as a matter of just and reasonable inference, the Grievants state on page 128 of their Closing Brief:

> Because these damages are difficult to determine, the Union requests that the Arbitrator issue an Interim Decision on damages and remand the matter to the parties for discussion and possible resolution on the amount of damages of each claim.

This request turns on its head the purpose of the sixteen days of hearings, which was for the Union to prove the ***amount*** and ***extent*** of overtime work. After sixteen days of hearings, which included the Arbitrator's time and the time of numerous witnesses, attorneys and support staff on both sides, not to mention a court reporter and thousands of pages of exhibits, it is patently unreasonable for the Grievants to now ask the Arbitrator to order the parties to negotiate the quantum of damages. If the Grievants failed to meet their burden of proof -- and they did so fail -- the only possible outcome is for the Grievants' claims to be denied in full.[2]

Since Both Sides Rested After Introducing Their Evidence, It Now Is the Arbitrator's Duty to Decide the Case upon the Existing Record

The Grievants are asking the Arbitrator not to decide the case on the merits. However, the law is clear: ***the Arbitrator has no authority in this case to not issue a***

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[2] HUD is aware that courts and the FLRA have held that: "[W]here an approximate award based on reasonable inferences forms a satisfactory surrogate for unquantified and unrecorded actual times, an approximated award is permissible." *U.S. Dept. of Justice, Federal Bureau of Prisons, U.S. Penitentiary Marion, Illinois and AFGE Local 2343 Council of Prison Locals, Council 33,* 61 FLRA No. 154 (Sept. 13, 2006) (citing *Alvarez v. IBP, Inc.*, 339 F.3d 894, 915 (9th Cir. 2003); *Brock v. Seto*, 790 F.2d 1446, 1449 (9th Cir 1986)). Here, however, the Grievants are not contending that they presented sufficient evidence to permit "an approximate award based on reasonable inferences." Even the Grievants do not have that much confidence in their own evidence. Indeed, the Grievants are admitting that they could not produce such evidence. As noted, the Grievants are unabashedly trying to get by with "guesstimates." Union's Closing Brief at 77.

decision on the merits. The Federal Labor Relations Authority ("FLRA") has held repeatedly that: "Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration." *See, e.g., AFGE, Local 1815 and U.S. Dept. of the Army Aviation Center Fort Rucker, Alabama*, 56 FLRA No. 171 (Dec. 22, 2000) (citing *Sport Air Traffic Controllers Organization*, 51 FLRA 1634, 1638 (1996)). Here, the issue of damages was submitted to arbitration and a sixteen-day-long hearing was held. Thus, the Arbitrator has no authority to not issue a decision. Moreover, for the Arbitrator to decline to issue a decision on the merits -- in this case, a decision that the Grievants' claims fail because they did not meet their burden of proof -- would be "so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to 'manifest an infidelity to the obligation of the arbitrator'," thus rendering the award deficient. *See, e.g., U.S. Dept. of Defense Education Activity, Arlington VA and Fed. Education Assn.*, 56 FLRA No. 125 (Sept. 7, 2000) (citing *U.S. Dept. of Labor (OSHA) and National Council of Field Labor Locals*, 34 FLRA 573, 575 (1990)).

In support of their request for a "remand to negotiations," the Grievants cite three FLRA decisions. However, none of the three cited decisions even remotely supports the notion that the Arbitrator may abdicate his responsibility to issue a decision based on the evidence (or lack of evidence) before him and instead order the parties to negotiate.

In the first case cited by the Grievants, *U.S. Dep't of the Treasury, Bureau of Engraving and Printing, Western Currency Facility, Fort Worth, TX and Graphic Communications International Union, Local 48*, 58 FLRA No. 176 (July 31, 2003), the employer and the union agreed to bifurcate the proceedings, with the first part covering

threshold issues and the second part covering back pay, interest and attorneys fees. After the first part of the hearing, *but before the hearing on damages*, the arbitrator ordered the parties to attempt to resolve the grievance based on his threshold rulings. That is not at all comparable to the situation here, where the Grievants chose to proceed with the second part of a bifurcated hearing and to attempt to present damages evidence, only to realize after 16 days of hearings that they cannot meet their burden of proof. Indeed, here the Agency argued that a hearing on damages was premature, while the Grievants *insisted* that the damages hearing should proceed. Tr. (8/29) at 5, 7. In these circumstances, the Arbitrator has no authority to decline to issue a decision. And, since the Grievants admit that they have not met their burden of proof, the decision must be in favor of the Agency.

The other two FLRA decisions cited by the Union on page 128 are even more disconnected from the present issue. In *AFGE, National Council of EEOC Locals No. 216 and EEOC*, 47 FLRA No. 525 (April 30, 1993), the "interim award" that was appealed dealt with whether the arbitrator had been properly selected as a national arbitrator. In that case, there had been no hearing of any kind, let alone a damages hearing at which the grievant failed to meet his burden of proof. Nor did that decision involve a remand to the parties to negotiate damages. It simply dealt with the appealability of an arbitral decision finding that the arbitrator had been properly selected.

Likewise, in *U.S. Dep't of Health and Human Services, Center for Medicare and Medicaid Services and AFGE, Local 1923*, 57 FLRA No. 194 (July 9, 2002), the issue did not involve a remand to the parties to negotiate damages. Rather, following the first phase of a bifurcated hearing, at which the arbitrator ruled that the agency had violated

an agreement, the agency appealed to the FLRA and the FLRA ruled that the arbitrator's order was interlocutory and not appealable. However, whether the arbitrator had the authority to issue the type of award that the Grievants seek here -- an order to negotiate -- was never an issue in the case.

For all of these reasons, the Arbitrator must decline the Grievants' request that the Arbitrator abdicate his responsibility. Instead, the Arbitrator must issue a decision on the merits. And, for all of the reasons discussed in the Agency's initial brief and below, especially given the Grievants' admission that it did not and cannot meet their burden of proof, the Arbitrator's decision must be that the Grievants are not entitled to back pay or other damages. In addition, the Arbitrator should find that the Grievants are the "losing party" and that the Grievants are not entitled to any attorney fees.

Summary: The Grievants' Red Herrings Cannot Hide Their Failure of Proof

In the remainder of this reply brief, HUD will respond, as appropriate, to the Union's Closing Brief, generally following the order of the Grievants' presentation. As discussed at length in HUD's initial brief and summarized again below,[3] the Grievants have, by and large, failed to show that their supervisors knew or should have known of the Grievants' alleged over-tour work. Much of the alleged over-tour work was supposedly performed at home, out of the office, or in the office when supervisors were not present (either because of staggered shifts or for other reasons). The argument that supervisors must have known that overtime was being worked since the work was getting done in a timely manner is simply a red herring. In fact, the work was *not* getting

[3] In the interest of economy, HUD incorporates its initial brief by reference and will endeavor not to repeat unnecessarily. Because the Grievants have the burden of proof on damages issues, the fact that HUD does not reply to a specific point in the Grievants' brief should not be taken as a concession, especially if that issue was already addressed in HUD's initial brief.

done on time in a significant percentage of cases. In particular, the 100-day aspiration set forth in Title VIII for cases HUD investigated was not being met in the particular Fair Housing & Equal Opportunity ("FHEO") offices from which most of the witnesses were drawn. And, the evidence showed that the Grievants' workloads were not so large that they should not have been able to complete their cases within the 40-hour workweek.[4]

Moreover, to the extent that supervisors knew after-the-fact that uncompensated over-tour work had been performed, the evidence showed that supervisors had not been given an opportunity to *prevent* that work from being done. As discussed below, the Grievants admit the supervisor's having an opportunity to prevent the work from being performed is a prerequisite to the work's being compensable. Sending the supervisor an e-mail early in the morning before the supervisor arrived at work announcing that the Grievant had commenced (or would commence) work early, or late in the evening after the supervisor had gone home, does not give the supervisor an opportunity to prevent the work from being performed during over-tour hours. Thus, nearly all of the e-mails offered by the Grievants as evidence are simply irrelevant -- even assuming that supervisors could be expected to notice the times on the e-mails, which is not a reasonable assumption.

Finally, even if the other elements of "suffered or permitted" had been proven, there simply is not sufficient evidence in the record from which the Arbitrator could arrive at just and reasonable inferences as to the amount and extent of work performed. *See Bankston v. State of Illinois,* 60 F.3d 1249, 1254 (7th cir. 1995) (it is not inconsistent

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[4] In addition, nearly all of the Grievants who testified admitted to being paid for a significant amount of non-working time. Specifically, they took more than the allotted one-half hour for lunch, and thus did not complete eight hours of work in a workday and 40 hours of work in a workweek. Also, in at least some cases, they spent part of their workday doing personal things (including studying for promotions, doing taxes, obtaining recipes, etc.).

for a fact-finder to find that an employee should have been entitled to damages but that he takes nothing because he has not proven his damages). Here, the Grievants' evidence was simply too vague. For example, there was no correlation in most of the testimony, especially in the affidavits, between the number of hours allegedly worked and the needs of specific cases or the witness' total case output. This would be true even if the Arbitrator were to believe all of the evidence.

<u>The Grievants' "Evidence" Is Full of Contradictions and Ambiguities</u>

In fact, however, much of the evidence cannot be believed. As discussed in HUD's initial brief, there are too many contradictions in the Grievants' evidence. For example, Ms. Jessyl Ann Woods claimed to have seen Diane Whitfield arrive before 7 A.M. with some frequency; however, Ms. Woods admitted that she herself regularly arrived at 9:30 A.M. and only "sometimes as early as maybe seven o'clock, 7:15."[5] *See* Proposed Findings of Fact in HUD's initial brief ("PFF") ¶347. While this was the most egregious example of apparently false testimony offered by the Grievants, it was not the only example, as demonstrated in HUD's initial brief. *See* HUD's Brief at 127; *see also* PFF ¶¶252, 273. And, there are other examples of contradictory evidence offered by the Grievants that were not presented in HUD's initial brief.

For example, Mr. Robert Zurowski stated in his affidavit that he "was compensated for 0% of the time that [he] finished work later than [his] tour of duty." Union Ex. 54L at 1. He also said that he was never compensated for weekend travel. *Id.* at 2. In contrast, the NFC Data in Joint Exhibit 2 shows that Mr. Zurowski received credit hours 31 times during the grievance period. *See* page 45 below. The record

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[5] Indeed, Ms. Woods practice of arriving close to or even after 9:30 A.M. was confirmed by the scan-in records. *See* HUD's PFF ¶¶173-178.

does not show the reasons or times that Mr. Zurowski received credit hours. Nevertheless, Mr. Zurowski's affidavit clearly is not correct and it is therefore impossible to make any just and reasonable inference regarding the amount and extent of any uncompensated overtime worked by Mr. Zurowski.

Similarly, Ms. Michelle Roundtree claimed that she "was not compensated for 100% of the time" that she worked early, late or through lunch. Union Ex. 54Q at 1-2. This statement may contradict other evidence, as shown below, but it is at best vague. One possible interpretation is that Ms. Roundtree claims she was compensated for her over-tour work, but not for 100% of it. If that is what she meant, then she has failed to prove by a just and reasonable inference the amount and extent of the uncompensated overtime that she allegedly worked, since the Arbitrator is not told whether she was compensated for 99% of her alleged over-tour work or some other percentage.

More likely, however, Ms. Roundtree meant that 100% of the time that she allegedly worked over-tour, she was not compensated; in other words, that she was compensated zero percent of the time. If that is what she meant, then it appears not to be a true statement. To the contrary, the NFC Data shows that Ms. Roundtree received credit hours ***77 times*** during the grievance period and she received comp-time nine times during the same period. *See* page 42 *et seq.* below. Ms. Roundtree's affidavit therefore is not credible. At the very least, Ms. Roundtree's evidence is so vague and potentially contradictory that no just and reasonable inferences are possible regarding the amount and extent of any uncompensated overtime she may have worked.

In all, the vagueness and poor quality of the evidence presented by the Grievants' in this case is roughly equivalent to the evidence presented in *Jax Beer Co.*

v. Redfern, 124 F.2d 172 (5th Cir. 1941), where the plaintiffs were found to be entitled to nothing. In that case:

> Neither plaintiff was able to testify as to the number of hours worked each day, but each testified that 'on an average' they worked from seven o'clock in the morning until nine o'clock at night.

124 F.2d at 175. A corroborating witness testified--

> that he worked as night checker for Jax Beer Company; that he always checked the plaintiffs in at night; that they always worked until after nine o'clock, six days per week, and many times as late as ten, eleven, or twelve o'clock . . . .

Id. The appeals court summarized the evidence as "a mass of contradictions" that was "so lacking in credence that the trial judge in summing up the case said:

> As I have said before, there are no records. The matter has been very poorly presented. The burden is on the plaintiffs to make out their case by a preponderance of the testimony; if they have not done so, then they should not receive a verdict. That is the law. That is what I would charge the jury if it were a jury trial, and if the jury went out into the room to figure, I don't know how they would figure."

Id.

Such was the quality of the evidence here as well. Even when their evidence was not contradictory, the Grievants -- especially the affiants, but also the live witnesses -- testified almost exclusively about "averages." They testified vaguely about when they typically arrived at work and when they typically left and how many hours they typically worked at home. If this were a jury trial, "and if the jury went out into the room to figure," there is insufficient credible evidence from which to "figure."

In *Jax Beer*, the trial judge's assessment of the evidence did not stop him from awarding some damages. Significantly, he was reversed by the Fifth Circuit Court of Appeals, which said:

> The evidence as to the material facts in the case is so uncertain and conjectural that we find nothing substantial upon which to predicate a verdict. To uphold the findings and judgment of the lower court we must base decision upon the guess, speculation, and averages made up from the uncertain recollections of these appellees. This we refuse to do.

Id. Here, too, any decision would have to be based on "guess, speculation, and averages made up from the uncertain recollections," and this, the Arbitrator should refuse to do. Rather, the overtime claims of the Equal Opportunity Specialists should be denied.

<u>Many of the "Facts" Asserted by the Grievants Are Not in the Record</u>

To its great dismay, HUD will find it necessary again and again in this reply brief to point out that the Union's Closing Brief is not based on the same record that HUD and the Arbitrator heard and saw during sixteen days of hearings. Indeed, and unfortunately, the Grievants waste no time in their brief getting down to non-facts. Specifically, in their Statement of the Case on page 6 of their brief, the Grievants assert the Ms. Federoff "filed the instant Grievance because informal negotiations between the Union and the Agency to acknowledge and correct related FLSA violations failed and members of the Union felt a Grievance was necessary to resolve the overtime issue." Presumably, the Grievants make this assertion in the hope of strengthening their case for liquidated damages and a longer statute of limitations. However, there simply was no such testimony or evidence at the hearing.

The actual testimony and documentary evidence relating to the history of the Grievance was as follows: HUD's Mr. Mesewicz testified that Ms. Federoff had continuing concerns at Labor-Management Relations ("LMR") meetings about employees being required to travel outside of normal duty hours. However, he was

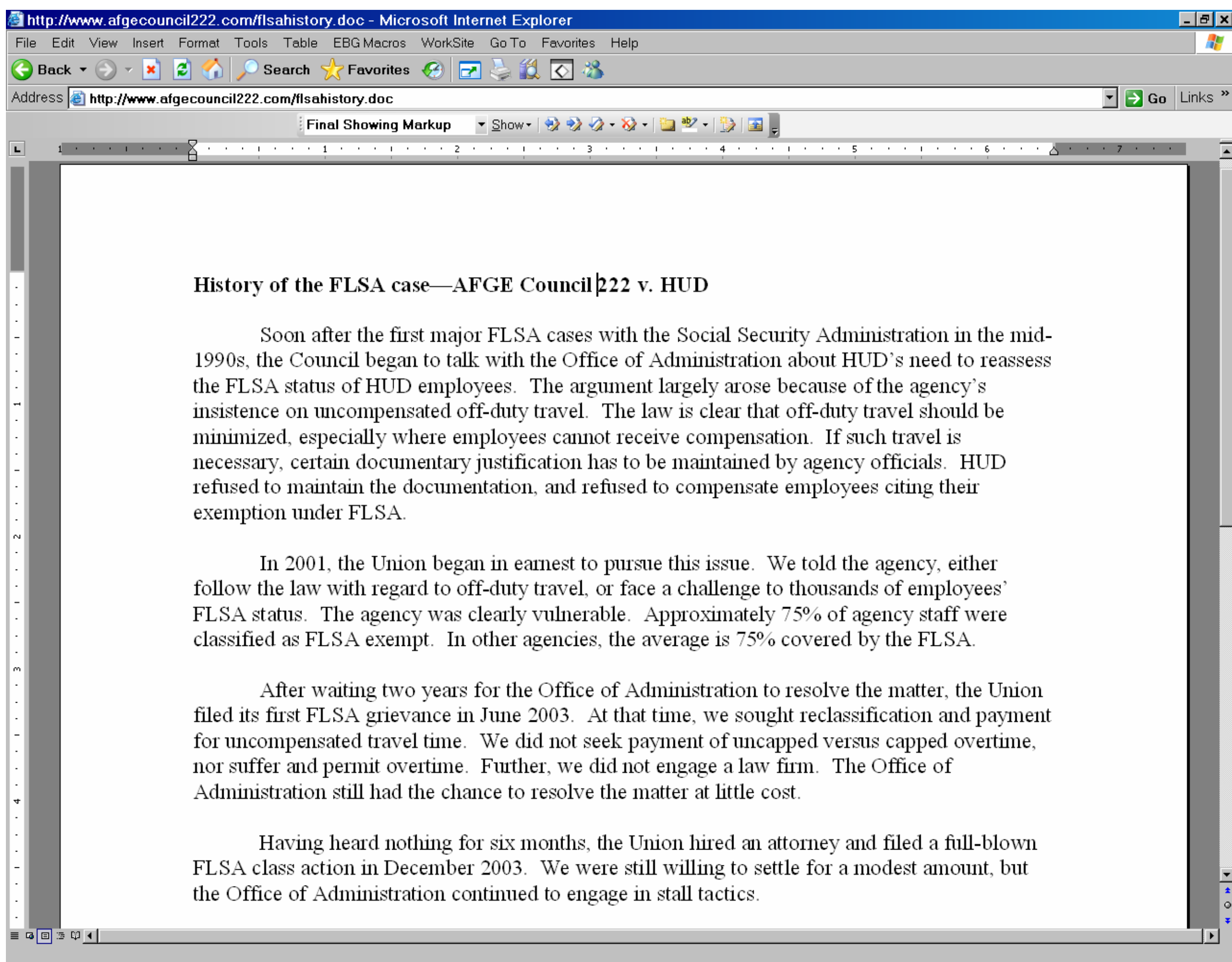
emphatic that he had no recollection of Ms. Federoff's raising concerns about employees' FLSA exemption status. Tr. (9/6) at 140; *see also* Tr. (9/11) at 129. Ms. Federoff's minutes of the LMR meetings make no mention of the FLSA and thus corroborate Mr. Mesewicz's testimony. *See* Union Exs. 35A-F;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

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. Since she said this in the context of complaining about weekend travel, the Agency could not reasonably have been expected to think she was alluding to any other purported "FLSA problem." Certainly, Ms. Federoff's vaguely expressed opinions raised 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 of unspecified job groupings -- for example the GS-360s at issue in this arbitration, which she never mentioned specifically, and which the Agency still maintains are exempt. There was no evidence that Ms. Federoff or anyone else ever complained about the classification of, or alleged overtime work by, GS-360s. Equally clear is that her complaints do not qualify as "informal negotiations between the Union and the Agency to acknowledge and correct related FLSA violations." Ms. Federoff admitted that her main concern was about off-duty travel and she raised the FLSA with HUD only in that context. Tr. (9/11) at 127.

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 and certainly belies the Grievants' claim on page 6 of their brief regarding why the grievance was filed.

The Arbitrator should take arbitral notice of the very concise history of this matter that appears on the ***Union***'s own website, http://www.afgecouncil222.com/flsahistory.doc. The relevant portion of that history is a significant admission against interest which is entirely consistent with HUD's description of events, not the Grievants'. Below is a screenshot of the relevant text on the Union's webpage as of March 20, 2007:



History of the FLSA case—AFGE Council 222 v. HUD

Soon after the first major FLSA cases with the Social Security Administration in the mid-1990s, the Council began to talk with the Office of Administration about HUD's need to reassess the FLSA status of HUD employees. The argument largely arose because of the agency's insistence on uncompensated off-duty travel. The law is clear that off-duty travel should be minimized, especially where employees cannot receive compensation. If such travel is necessary, certain documentary justification has to be maintained by agency officials. HUD refused to maintain the documentation, and refused to compensate employees citing their exemption under FLSA.

In 2001, the Union began in earnest to pursue this issue. We told the agency, either follow the law with regard to off-duty travel, or face a challenge to thousands of employees' FLSA status. The agency was clearly vulnerable. Approximately 75% of agency staff were classified as FLSA exempt. In other agencies, the average is 75% covered by the FLSA.

After waiting two years for the Office of Administration to resolve the matter, the Union filed its first FLSA grievance in June 2003. At that time, we sought reclassification and payment for uncompensated travel time. We did not seek payment of uncapped versus capped overtime, nor suffer and permit overtime. Further, we did not engage a law firm. The Office of Administration still had the chance to resolve the matter at little cost.

Having heard nothing for six months, the Union hired an attorney and filed a full-blown FLSA class action in December 2003. We were still willing to settle for a modest amount, but the Office of Administration continued to engage in stall tactics.

Note that the Union's own description of its case says, "***The argument largely arose because of the agency's insistence on uncompensated off-duty travel.***" The Union's own history further says, "We told the agency, either ***follow the law with***

regard to off-duty travel, or face a challenge to thousands of employees' FLSA status." And, the Union's history says, "At that time, we sought reclassification and payment for uncompensated travel time. ***We did not seek*** payment of uncapped versus capped overtime, nor ***suffer and permit overtime***."

In short, there were ***never*** "informal negotiations between the Union and the Agency to acknowledge and correct related FLSA violations." There were ***never*** discussions about the exempt or nonexempt status of HUD's work force except in the context of travel pay. It certainly seems to be undisputed that Ms. Federoff ***never*** specified GS-360s as a problematic, allegedly nonexempt category. Thus, whatever informal discussions Ms. Federoff may have had with HUD regarding FLSA classifications, if any -- and there is no evidence of any -- is of no relevance to HUD's good-faith vis-à-vis the classification of GS-360s.

The Grievants' Evidence Concerning a Few 360s in a Few FHEO Offices Was Not Representational of Other 360s Performing Different Work, in Different Offices, Under Different Supervisors

Also on page 6 of their brief, the Grievants argues that they presented representational testimony. As a preliminary matter, HUD notes that the Grievants have not filed any opt-in notices from the 360s who did not participate in the hearing. Thus, the non-testifying 360s cannot be represented by the 360s who did participate in the hearing. Section 16(b) of the FLSA states expressly that:

> No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party.

29 U.S.C. §216(b). The term "such action" refers to:

> An action to recover the liability prescribed in either of the preceding sentences[.]

Id. This includes an action against an "employer who violates the provisions of section

6 or section 7 of this Act" in which employees seek "unpaid overtime compensation." *See id.*

HUD submits that the opt-in requirement for FLSA class actions is a substantive part of the FLSA that was adopted by Congress for the express purpose of protecting employers from wildly exaggerated claims brought on behalf of employees who might not even be aware that those claims are being brought. *See Arrington v. National Broadcasting Company, Inc.*, 531 F. Supp. 498, 501 (D.D.C. 1982); *see also Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989).[6] The Arbitrator cannot include in any award in this matter any 360s who did not opt-in and did not present evidence.

Moreover, even if the Arbitrator could accept representational testimony regarding 360s who did not opt-in, it would not be appropriate to do so here. As discussed at length on pages 131-133 of HUD's initial brief, the legal standard for accepting representational evidence was not met here because, among other reasons: this case involves not one job category, but three jobs with different duties -- Intake, Enforcement, and Program Compliance (FHAP); some GS-360s do not perform only one duty, and 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; there are at least three job grades -- 11, 12 and 13; there are office-workers and

[6] The Grievants should not be heard to argue that the opt-in requirement in Section 16(b) specifically refers to actions brought "in the court" and, therefore, does not apply in arbitrations. The provision in Section 16(b) for liquidated damages also refers only to actions brought in Federal or State courts, yet the Grievants are seeking such damages.

To the extent that the FLRA held in *United States Dept. of the Navy Naval Explosive Ordnance Disposal Technology Div., Indian Head, Maryland and AFGE Local 1923*, 57 FLRA No. 60, 2001, that the opt-in requirement does not apply in an arbitration proceeding, the Agency respectfully suggests that the issue was wrongly decided. That case is, in any event, factually distinguishable because of the very small class of 11 employees that it involved.

there are tele-workers; there is a wide variation in the number of cases closed by GS-360s, even those at the same grade level; there is variation in the quality of work performed by GS-360s; there are more than 20 locations where GS-360s work, and 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, the difference being in the level of supervision that employees receive; and some supervisors manage their workers more closely than others.

Because of the above facts, the cases cited by the Grievants on pages 6-7 of their brief are readily distinguishable. In *Reich v. Southern New England Telecommunications Corp.*, 121 F.3d 58 (1st Cir. 1997) ("*SNET*"), the court found that the plaintiffs presented the testimony of 39 workers, representing each of the five job categories at issue. *Id.* at 67. Here, the evidence left numerous FHEO offices completely unrepresented. Moreover, the evidence that was presented showed highly individualized circumstances, including, among others, an employee who was chauffeured to work every day (D. Johnson), an employee who claims to have taken work on golf outings (Cardullo), an employee who was the subject of repeated performance improvement plans (Wood), etc.

Moreover, the court in *SNET* said:

> Ultimately, we are untroubled by the quantum of representational evidence in this case because the testimony covered each clearly defined category of worker; there was actual consistency among those workers' testimony, both within each category and overall; *SNET* offered no contradictory testimony; the abuse arose from an admitted policy that was consistently applied; and the periods at issue were the employees' lunch hours, which are predictable, daily-recurring periods of uniform and predetermined duration.

Id. at 68. Here, each of these elements is missing.

First, as noted, the testimony here did not cover each clearly defined category of worker. There are hundreds of permutations of circumstances that could affect a worker's schedule. These include: grade level; location; Intake vs. Enforcement vs. Program Compliance; region vs. field, office-workers vs. tele-workers; compressed and alternate work schedules vs. regular work schedules; etc.

Second, there was not actual consistency among the workers' testimony, both within each category and overall. Some workers testified to working early and late; some only early; some only late; some only in the office; some only at home; some in the office and at home (or in taxis, boyfriend's houses, golf courses, etc.); some in the presence of supervisors; some before their supervisors came in; some after their supervisors left for the day; some in offices that have no supervisors; some on weekends; some on weeknights; some claimed to have left notes for their supervisors; some did not; etc.

Third, HUD offered a great deal of testimony that contradicted the Grievants' testimony, as detailed in HUD's Proposed Findings of Fact.

Fourth, no "abuse" arose from an "admitted policy"; indeed, HUD does not agree that any "abuse" occurred or that there was an improper policy.

Finally, the overtime claimed here extends well beyond the employees' lunch hours to hours that were not predictable or daily-recurring periods of uniform and predetermined duration. For all of these reasons, *SNET* clearly is distinguishable.[7]

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[7] *SNET* is significant for a another reason, *i.e.*, it reflects the Secretary of Labor's decision not to seek compensation for lunch periods for workers with flexible work schedules. 121 F.3d at 62. For workers, like HUD's GS-360s, who are permitted to take lunch within a window of time rather than at a predetermined time, the reality is that a supervisor can almost never know that an employee is working through lunch. For exactly that reason, work through lunch was also found to be non-compensable in *Fox v. Summit King Mines,* 143 F.2d 926 (9th Cir. 1944).

For the same reasons, *McLaughlin v Ho Fat Seto*, 850 F.2d 586 (9th Cir. 1988), is distinguishable. In that case, all of the workers arrived at 7:00 A.M., punched in at 7:30 A.M., and punched out at 4:30 P.M. All of the workers in that case also worked the same weekend hours. That is not the case here, where claims as to both schedules and total hours were greatly divergent.[8]

In any case, even if representational testimony were appropriate, any award would have to be limited to GS-12s and -13s. On page 6 of their brief, the Grievants refer to the "entire universe of GS-360 employees at the GS-11 level and above[.]" However, no evidence was presented at the hearing regarding the work hours of GS-11s. Also, there was no testimony in the hearing from GS-360s at the 14 and 15 levels except for supervisors. Since Section 1.03 of the AFGE Contract excludes from the bargaining unit "[a]ny management official or supervisor," the Union obviously cannot represent any supervisors. Thus, there was no testimony at the hearings from any GS-14 and -15 level Equal Opportunity Specialists in the bargaining unit and no employees at that level can be included in any award.

<u>The Grievants Assert the Wrong Limitations Period for Their Claims</u>

On page 7 of their brief, the Grievants mistakenly calculate the statute of limitations retroactively from the grievance filing date. As discussed in Part VII of HUD's initial brief, the statute of limitations is a far shorter period -- the lesser of (a) since

[8] The Grievants also cite the decision of an arbitrator that relied on only one witness as "representative" of a larger class. Needless to say, the decision of a different arbitrator relating to a different agency and different facts is not in any way binding on this Arbitrator. In this particular case, the decision is not even persuasive, since it contains no meaningful discussion of the circumstances that led the arbitrator to conclude that one employee (Ms. Mills) was representative. The record also is not clear as to whether the agency in that decision opposed recognizing Ms. Mills as representative of all support staff. It appears from the decision that the agency opposed only treating five investigators (a different job) as representatives.

November 9, 2003 (for AFGE) and since September 19, 2005 (for NFFE), or (b) two years before the Arbitrator's decision is issued.

The "Electronic Evidence" Does Not Prove That Work Was Done or Indicate How Much Time Was Spent or Indicate That the Work Was Uncompensated

On page 8 of their brief, the Grievants summarize the types of documentary evidence they offered and seem to acknowledge the limitations of that evidence. As the Grievants state, screen shots and e-mails "show times employees accessed files or documents." That is all they show. In most cases, they do not show that the document was changed or that other work was done. They certainly do not give any hint as to whether other work was performed in connection with accessing a document. Maybe it was, and maybe it was not. There simply is no evidence. And, to the extent that screenshots or e-mails do themselves show any work, they are not evidence of more than *de minimis* work. The fact that an employee sent a short e-mail at 6:00 P.M., 7:00 P.M. or even 11:00 P.M. says nothing about what the person was doing until that hour.

Also, the e-mails do not show that any over-tour work was uncompensated. In fact, some if not all of the over-tour work associated with emails was compensated. For example, Mr. Richard Anthony attached e-mails to his affidavit (Union Ex. 54B) dated January 31, 2006, February 6, 2006 and February 28, 2006. In each of the pay periods in which those dates fell, Mr. Anthony earned credit hours. *See* page 32 below.

Finally, even if every single screenshot and e-mail represented actual work performed, there is not even a remote relationship between the quantity of alleged work represented by the documentary evidence and the number of over-tour hours claimed. *See, e.g.,* PFF ¶¶65, 226, 321. The Grievants are seeking to generalize from a handful of e-mails relating to a few individuals over a period of five-plus years to create the

impression that over-tour work was rampant among 400-500 employees. This is unjust and not a reasonable inference from the evidence. Also, the documentary evidence does not, in almost all cases, demonstrate supervisor knowledge of alleged work. *See, e.g.,* PFF ¶64, 227.

The Absence of Certain Documents Does Not Prove the Grievants' Case

Also on page 8, the Grievants state that: "The Union discovered during the course of its investigation into the FLSA violations, that the Agency maintained sign-in/sign-out records, scan in/scan out records, and/or log-in/log-out records at every office." This is another unfortunate misstatement of the evidence. While there was evidence that such records existed in some locations at some point in history, there was little or no evidence that HUD "maintained" such records. To the contrary, there was significant testimony that HUD does not control many of the buildings in which the Grievants work. *See, e.g.,* PFF ¶¶167, 218, 306, 329, 413. In reality, the records were largely controlled by third-party landlords -- in some cases, commercial entities -- over which HUD has no control. Nevertheless, HUD did produce the records it was able to, including a palette-load of scan-in and sign-in/sign-out sheets. *See generally* Union Ex. 11. Some of these were actually introduced into evidence by the Grievants. *See, e.g.,* Union Ex. 1.

On a related note, the Grievants make the reprehensible accusation on page 26 of their brief that: "The Agency further continues to destroy evidence including scan records that were not produced for various witnesses." The Grievants offer no citation to the record for this canard, nor can they, since there was no evidence of such destruction. Indeed, the Grievants' counsel made the same accusation near the end of the hearings (Tr. (11/15) at 179-80), and the Agency challenged the Grievants at that

time to put on evidence of such destruction, if any existed. *Id.* at 181. No such evidence was ever offered. Allegations advanced in a brief are not converted into facts by their vigorous assertion, and, since the Grievants have failed to provide even one concrete instance supporting their generalized, conclusory and unsupported opinions and assertions, their allegations should be ignored. Perhaps the Grievants subscribe to the view that "success in the marketplace of ideas may go to the advocate who can shout loudest or most often."[9] HUD respectfully suggests that the Grievants' accusations are nothing more than a sign of desperation by complainants who recognize the lack of merit in their own case. In any event, they are unfounded.

The Grievants further assert that: "The Arbitrator must draw an adverse inference against the Agency for not producing documents that would otherwise prove its case. The only reasonable explanation is that the documents would contribute to proof of the Union's claims." Union's Closing Brief at 8-9. Not surprisingly, that is not the only reasonable explanation. First, as just noted, there was significant testimony that HUD does not control many of the buildings in which the Grievants work. 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 (were there evidence of 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

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[9] *Banzhaf v. F.C.C.*, 405 F.2d 1082, 1102 (D.C. Cir. 1968).

¶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 one-and-one-half (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 that otherwise might have been preserved. If there is any blame to be assigned for the missing records, that blame must be shared by the Grievants. For all of these reasons, an adverse inference is not appropriate.

In contrast, an adverse inference ***is*** appropriate against the Grievants based on their failure to produce documents expressly requested by the Arbitrator. For example, 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.

The Agency's Decision That the Grievants' Affidavit Evidence Was So Weak As to Not Require Significant Rebuttal Testimony Does Not Cause the Grievants to Have Satisfied Their Burden of Proof

On page 9 of their brief, the Grievants request that an adverse inference be drawn from HUD's "failure" to call supervisors as witnesses with respect to some of the affiants who guesstimated their alleged over-tour work. The Grievants appear to forget that they had the burden of proof in this case. Lack of knowledge is not an affirmative defense to be proven by the employer. *Davis v. Food Lion*, 792 F.2d 1274, 1276 (4th Cir. 1986). The employer's only burden is to "negative [sic] the reasonableness of the inference to be drawn from the employee's evidence." *SNET,* 121 F.3d at 67 (citing *Mt. Clemens*, 328 U.S. at 687-88). The employer may satisfy this burden in any number of

ways -- by calling rebuttal witnesses, by documentary evidence, or by cross-examination of the employees themselves. Thus, if HUD had chosen to put on no rebuttal case at all and simply rest on the weaknesses in the Grievants' case -- which were many -- that would have been HUD's prerogative.[10] By the Grievants' logic, if a defendant moves for a directed verdict at the close of a plaintiff's case in chief, the judge should draw an adverse inference from the defendant's desire to present no rebuttal evidence. That is obviously not the law.

The Grievants Again Misstate The Record

Also on page 9, the Grievants allege that HUD "ignored the Union's repeated warnings that similar policies have been declared violations of the law." Once again, the Agency must respectfully suggest that the Grievants are not briefing the same record that HUD and the Arbitrator have before them. There simply was no evidence to support the Grievants' assertion; indeed, it is not even apparent what "similar policies" the Grievants are referring to in this sentence.

The Union Concedes that There is No Liability if Agency Supervisors Did Not Have an Opportunity Before Over-Tour Work Was Performed to Prevent the Employee from Performing the Over-Tour Work

On page 10 of their brief, the Grievants make both a significant admission and a significant misstatement. The significant admission is on the very bottom of the page, where the Grievants acknowledge that an activity is not "suffered or permitted" work under the Office of Personnel Management ("OPM") standard applicable to this case

[10] The Grievants' counsel observed during the hearing (Tr. (8/30) at 96), "I don't plan on doing our case the way the Agency wants us to." Nor was HUD obligated to put on its case the way the Grievants wanted HUD to.

unless the supervisor "has an opportunity to prevent the work from being performed."[11] As shown repeatedly in HUD's initial brief, the overwhelming majority of the claimed over-tour activities in this case do not qualify as suffered or permitted work because the Grievants consistently failed to give supervisors the opportunity to prevent those activities from being performed. *See* HUD's Brief at 123-25, as well as throughout HUD's proposed findings of fact.[12]

<u>The Union Misstates What it Must Prove</u>

The significant misstatement on page 10 of the Grievants' brief is in the heading at the top of the page, which incorrectly states the applicable burden of proof. It is not true that "[t]he Union must only present evidence sufficient to prove that overtime was worked as a matter of just and reasonable inference." Union's Closing Brief at 10. Rather, as the Union has already admitted and as it recognizes again on page 11, and as the U.S. Supreme Court has made very clear, the Grievants must produce sufficient evidence to show ***the amount and extent*** of that work as a matter of just and reasonable inference. This burden the Grievants have failed to meet, as they seem to recognize. Union's Closing Brief at 128 *and see* the introduction to this reply brief.

<u>The Union Failed to Prove the Alleged Over-Tour Work Was for the Agency's Benefit</u>

Also on page 10, the Grievants cite *Holzapfel v. Town of Newburgh,* 145 F.3d 516, 523-24 (2nd Cir. 1998), a significant case in which the court noted that:

> If, however, the employer did not require the expenditure of the contested time, the jury should then consider whether

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[11] The citation to 5 C.F.R. §551.102(e) is, however, incorrect. The correct citation is 5 C.F.R. §551.104.

[12] This requirement is separate from the Grievants' burden to show actual or constructive knowledge on the part of supervisors, a requirement that the Grievants also have not met.

> the employee expended this time primarily for the benefit of the employer. If the employee was motivated primarily by his or her own pleasure, then the time was not expended primarily for the employer's benefit and it is not compensable; similarly, if the time was expended primarily to inflate the employee's earnings, then the time was not primarily for the employer's benefit and is not compensable.

145 F.3d at 523. Here, there was significant evidence that employees remained in the office after hours for their own pleasure, whether to study for promotions or to work on taxes, resumes, and recipes. Other employees were apparently trying to inflate their earnings, while actually accomplishing little or no work. Thus, for example, a supervisor testified 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.

As further noted in *Holzapfel*, "[A]n employee is not working for the employer's benefit if the employer has no knowledge of it." 145 F.3d at 524. As shown at length in HUD's initial brief, there was little to no evidence that HUD's supervisors knew of the large amounts of overtime work now being claimed.

The Union Failed to Prove that the Agency Time and Attendance Records Were Inaccurate; Only the Grievants Knew When They Worked and They Not Only Certified Their Hours But Also Received Compensatory Time-Off, Overtime, or Credit Hours Whenever They Reported They Worked Over-Tour Hours

On page 11 of their brief, the Grievants allege that the Agency's time and attendance records are not reliable and accurate. It was, of course, the Grievants who provided the information that the Grievants now claim is unreliable and inaccurate. For its part, HUD has not been persuaded by any evidence in this record that its time and attendance records were either unreliable or inaccurate.

On page 13, the Grievants attempt to make new law by suggesting that HUD had a heightened record-keeping obligation in light of the "on-going grievance." The Grievants of course cite no legal precedent for such a proposition, as none exists. Ironically, the existence of an on-going grievance and the possibility of collecting overtime pay does not seem to have inspired a single one of the Grievants' witnesses to make a record of their alleged actual hours worked. Is that because those most or all of those alleged hours of work never actually occurred?

The Grievants admit on page 12 of their brief that the FLSA requires no particular form for the time and attendance records. Yet, on page 13, the Grievants allege that HUD's time-keeping forms were "a tool that the Agency used to conceal overtour work by only recording 8 hours per day." It should be noted that the Unions have never filed any grievances against HUD's use of these time-keeping forms. Perhaps the reason for this is that the forms never concealed anything, except when the employees chose not to report their over-tour work.

More importantly, the statement that the time-keeping forms record only eight hours per day is blatantly not true. The Time and Attendance Records of the Grievants' live witnesses are in the record and clearly show numerous occasions of more than eight hours in a day being recorded. Also, on November 1, 2006, the parties entered into a stipulation stating that: "The Time and Attendance Records for the 26 GS-360 Affiants (UX 54) are consistent with the NFC [National Finance Center] Data." As the NFC Data in Joint Exhibit 2 makes clear, both the Grievants' live witnesses and the affiants frequently recorded more than eight hours for a day, thus earning compensatory time-off, credit hours, and overtime.

Even one such occurrence would be sufficient to rebut the Grievants' assertion that HUD's time-keeping forms were "a tool that the Agency used to conceal overtour work by only recording 8 hours per day." However, lest anyone think that the occasions of recording more than eight hours for a day were rare, HUD offers the following extracts from Joint Exhibit 2 showing that the Grievants for whom evidence was introduced recorded more than eight hours in a day approximately 1,000 times during the grievance period.

NAME - PAY PERIOD	Overtime (Pos-Neg) (TC 21)	Credit Hours Earned (Pos-Neg) (TC 29)	Comp Time Earned (Pos-Neg) (TC 32)
BELL, PHYLLIS - 200012		$74.35	
BELL, PHYLLIS - 200013		$59.48	
BELL, PHYLLIS - 200014		$29.74	
BELL, PHYLLIS - 200015		$37.18	
BELL, PHYLLIS - 200016		$74.35	
BELL, PHYLLIS - 200017		$59.48	
BELL, PHYLLIS - 200018		$81.79	
BELL, PHYLLIS - 200019		$82.65	
BELL, PHYLLIS - 200020		$41.33	
BELL, PHYLLIS - 200021		$33.06	
BELL, PHYLLIS - 200022		$24.80	
BELL, PHYLLIS - 200023		$82.65	
BELL, PHYLLIS - 200024		$66.12	
BELL, PHYLLIS - 200025	$198.40	$37.19	
BELL, PHYLLIS - 200026		$24.80	
BELL, PHYLLIS - 200103		$102.90	
BELL, PHYLLIS - 200104		$137.20	
BELL, PHYLLIS - 200105		$102.90	
BELL, PHYLLIS - 200107		$162.92	
BELL, PHYLLIS - 200108		$137.22	
BELL, PHYLLIS - 200109		$34.30	
BELL, PHYLLIS - 200110		$128.63	
BELL, PHYLLIS - 200111		$25.73	
BELL, PHYLLIS - 200113		$60.03	
BELL, PHYLLIS - 200114		$51.45	
BELL, PHYLLIS - 200116		$42.88	
BELL, PHYLLIS - 200117		$51.45	
BELL, PHYLLIS - 200118		$34.31	
BELL, PHYLLIS - 200119		$68.60	
BELL, PHYLLIS - 200120		$34.30	
BELL, PHYLLIS - 200121		$8.58	
BELL, PHYLLIS - 200122		$102.90	

BELL, PHYLLIS - 200123		$51.46	
BELL, PHYLLIS - 200124		$51.45	
BELL, PHYLLIS - 200201		$71.84	
BELL, PHYLLIS - 200202		$35.92	
BELL, PHYLLIS - 200207		$71.84	
BELL, PHYLLIS - 200209		$89.80	
BELL, PHYLLIS - 200211		$107.76	
BELL, PHYLLIS - 200212	$255.93	$71.84	
BELL, PHYLLIS - 200213		$53.88	
BELL, PHYLLIS - 200218		$143.68	
BELL, PHYLLIS - 200314		$193.33	
BUCHANAN, PHOEBE - 200012		$187.62	
BUCHANAN, PHOEBE - 200013		$130.52	
BUCHANAN, PHOEBE - 200014		$32.63	$1,551.20
BUCHANAN, PHOEBE - 200015		$97.90	$0.00
BUCHANAN, PHOEBE - 200016		$138.68	
BUCHANAN, PHOEBE - 200017		$114.21	
BUCHANAN, PHOEBE - 200018		$228.41	
BUCHANAN, PHOEBE - 200019		$163.16	
BUCHANAN, PHOEBE - 200020		$187.62	
BUCHANAN, PHOEBE - 200021		$301.83	
BUCHANAN, PHOEBE - 200022		$89.73	
BUCHANAN, PHOEBE - 200023		$203.94	
BUCHANAN, PHOEBE - 200024		$32.63	
BUCHANAN, PHOEBE - 200201			$179.22
BUCHANAN, PHOEBE - 200204			$477.92
BUCHANAN, PHOEBE - 200419			$647.68
BUCHANAN, PHOEBE - 200420			$728.64
BUCHANAN, PHOEBE - 200421			$344.08
BUCHANAN, PHOEBE - 200501			$209.20
CARDULLO, VIVIENNE - 200104		$50.24	
CARDULLO, VIVIENNE - 200106		$83.72	
CARDULLO, VIVIENNE - 200110		$16.75	
CARDULLO, VIVIENNE - 200111		$33.49	
CARDULLO, VIVIENNE - 200114		$117.22	
CARDULLO, VIVIENNE - 200310			$79.73
CARDULLO, VIVIENNE - 200412			$118.17
CARDULLO, VIVIENNE - 200415		$19.70	
CARDULLO, VIVIENNE - 200417			$78.78
CARDULLO, VIVIENNE - 200418			$502.23
CARDULLO, VIVIENNE - 200419			$78.78
CARDULLO, VIVIENNE - 200420		$19.70	$177.26
CARDULLO, VIVIENNE - 200422			$68.93
CARDULLO, VIVIENNE - 200424		$39.39	
CARDULLO, VIVIENNE - 200505		$42.05	
CARDULLO, VIVIENNE - 200511			$336.40
CARDULLO, VIVIENNE - 200514			$546.65
CARDULLO, VIVIENNE - 200515			$473.06
CARDULLO, VIVIENNE - 200603			$347.52

CARDULLO, VIVIENNE - 200605			$130.32
CARDULLO, VIVIENNE - 200606		$65.16	
CARDULLO, VIVIENNE - 200607		$43.44	$738.48
CARDULLO, VIVIENNE - 200614		$86.88	
CARDULLO, VIVIENNE - 200615		$108.60	
CARDULLO, VIVIENNE - 200618			$86.88
CARDULLO, VIVIENNE - 200619			$21.72
DURBIN DODD, DELORAH - 200402			$439.30
DURBIN DODD, DELORAH - 200403			$175.72
DURBIN DODD, DELORAH - 200404			$702.88
DURBIN DODD, DELORAH - 200407			$29.70
DURBIN DODD, DELORAH - 200409			$965.78
DURBIN DODD, DELORAH - 200411			$134.76
DURBIN DODD, DELORAH - 200415			$224.60
DURBIN DODD, DELORAH - 200417			$134.76
DURBIN DODD, DELORAH - 200501			$931.60
DURBIN DODD, DELORAH - 200505			$465.80
DURBIN DODD, DELORAH - 200510			$256.19
DURBIN DODD, DELORAH - 200512			$209.61
DURBIN DODD, DELORAH - 200603			$963.60
DURBIN DODD, DELORAH - 200607			$963.60
DURBIN DODD, DELORAH - 200611			$1,503.20
DURBIN, DELORAH - 200014			$447.20
DURBIN, DELORAH - 200015			$447.20
DURBIN, DELORAH - 200017			$391.30
DURBIN, DELORAH - 200022			$447.20
DURBIN, DELORAH - 200116			$464.16
DURBIN, DELORAH - 200208			$486.56
DURBIN, DELORAH - 200209			$486.56
DURBIN, DELORAH - 200211			$364.92
DURBIN, DELORAH - 200213			$364.92
DURBIN, DELORAH - 200214			$364.92
DURBIN, DELORAH - 200216		$577.50	
DURBIN, DELORAH - 200301			$908.86
DURBIN, DELORAH - 200309			$250.72
DURBIN, DELORAH - 200310			$13.32
DURBIN, DELORAH - 200314			$760.80
JACKSON JR, CURTIS - 200102		$467.20	$456.32
JACKSON JR, CURTIS - 200103		$175.20	
JACKSON JR, CURTIS - 200218			$208.67
JACKSON JR, CURTIS - 200219			$305.55
JACKSON JR, CURTIS - 200315		$391.92	
JACKSON JR, CURTIS - 200402		$249.68	
JACKSON JR, CURTIS - 200407		$4.80	
JACKSON JR, CURTIS - 200526		$229.08	
JACKSON JR, CURTIS - 200601		$234.24	
JACKSON JR, CURTIS - 200602		$195.20	
JACKSON JR, CURTIS - 200604		$361.12	
JACKSON JR, CURTIS - 200605		$234.24	

JACKSON JR, CURTIS - 200606		$253.76	
JACKSON JR, CURTIS - 200607		$234.24	
JACKSON JR, CURTIS - 200612		$429.44	
JACKSON JR, CURTIS - 200614		$146.40	
JACKSON JR, CURTIS - 200615		-$146.40	
JACKSON JR, CURTIS - 200616		$507.52	
JACKSON JR, CURTIS - 200617		$126.88	
JACKSON JR, CURTIS - 200618		$546.56	
JACKSON JR, CURTIS - 200621		$741.76	
JOHNSON JR, DONALD - 200027			$142.90
JOHNSON JR, DONALD - 200101		$407.30	$0.00
JOHNSON JR, DONALD - 200102		$438.64	$416.50
JOHNSON JR, DONALD - 200104			$297.50
JOHNSON JR, DONALD - 200105		$360.30	
JOHNSON JR, DONALD - 200108			$267.76
JOHNSON JR, DONALD - 200110			$59.50
JOHNSON JR, DONALD - 200111			$59.50
JOHNSON JR, DONALD - 200112		$391.63	$59.50
JOHNSON JR, DONALD - 200113			$119.00
JOHNSON JR, DONALD - 200114			$371.88
JOHNSON JR, DONALD - 200115		$313.30	
JOHNSON JR, DONALD - 200116		$140.99	
JOHNSON JR, DONALD - 200117		$462.12	
JOHNSON JR, DONALD - 200122			$29.75
JOHNSON JR, DONALD - 200618		$40.70	
WOODS, JESSYL - 200013		$33.06	
WOODS, JESSYL - 200014		$181.83	
WOODS, JESSYL - 200015		$8.27	
WOODS, JESSYL - 200016		$82.65	
WOODS, JESSYL - 200017		$66.12	
WOODS, JESSYL - 200108		$445.90	
WOODS, JESSYL - 200109		$137.20	
WOODS, JESSYL - 200110		$70.48	
WOODS, JESSYL - 200111		$158.58	
WOODS, JESSYL - 200112		$158.58	
WOODS, JESSYL - 200113		$202.63	
WOODS, JESSYL - 200115		$140.96	
WOODS, JESSYL - 200116		$88.10	
WOODS, JESSYL - 200117		$123.34	
WOODS, JESSYL - 200118		$193.82	
WOODS, JESSYL - 200119		$140.96	
WOODS, JESSYL - 200120		$17.62	
WOODS, JESSYL - 200121		$52.86	
WOODS, JESSYL - 200122		$35.24	
WOODS, JESSYL - 200123		$140.96	
WOODS, JESSYL - 200124		$52.86	
WOODS, JESSYL - 200202		$92.30	
WOODS, JESSYL - 200203		$73.84	
WOODS, JESSYL - 200204		$55.38	

WOODS, JESSYL - 200205		$110.76	
WOODS, JESSYL - 200209		$119.99	
WOODS, JESSYL - 200211			$276.90
WOODS, JESSYL - 200213		$129.22	
WOODS, JESSYL - 200214		$92.30	
WOODS, JESSYL - 200215		$147.68	
WOODS, JESSYL - 200216		$138.45	
WOODS, JESSYL - 200304		$100.65	
WOODS, JESSYL - 200305		$120.78	
WOODS, JESSYL - 200310		$104.17	
WOODS, JESSYL - 200311		$162.80	
WOODS, JESSYL - 200312		$162.80	
WOODS, JESSYL - 200313		$142.45	
WOODS, JESSYL - 200314		$40.70	
WOODS, JESSYL - 200315		$101.75	
WOODS, JESSYL - 200318		$61.05	
WOODS, JESSYL - 200319		$162.80	
WOODS, JESSYL - 200320		$188.91	
WOODS, JESSYL - 200323		$184.64	
WOODS, JESSYL - 200402		$200.26	
WOODS, JESSYL - 200404		$235.60	
WOODS, JESSYL - 200406		$282.72	
WOODS, JESSYL - 200407		$232.58	
WOODS, JESSYL - 200408		$168.56	
WOODS, JESSYL - 200409		$120.40	
WOODS, JESSYL - 200412			$295.83
WOODS, JESSYL - 200413		$216.72	-$295.83
WOODS, JESSYL - 200414		$216.72	
WOODS, JESSYL - 200415		$120.40	
WOODS, JESSYL - 200416		$96.32	
WOODS, JESSYL - 200419		$216.72	
WOODS, JESSYL - 200421		$259.74	
WOODS, JESSYL - 200422		$173.16	
WOODS, JESSYL - 200501		$119.60	
WOODS, JESSYL - 200518			$783.15
ANTHONY, RICHARD - 200011	$449.28		
ANTHONY, RICHARD - 200012	$224.64		
ANTHONY, RICHARD - 200016			$140.40
ANTHONY, RICHARD - 200020	$407.16		
ANTHONY, RICHARD - 200021	$238.68		$533.52
ANTHONY, RICHARD - 200025	$86.49		
ANTHONY, RICHARD - 200102		$42.72	
ANTHONY, RICHARD - 200107	$933.12		
ANTHONY, RICHARD - 200108	$102.06		
ANTHONY, RICHARD - 200109	$1,122.66		
ANTHONY, RICHARD - 200113	$0.00		
ANTHONY, RICHARD - 200505			$354.30
ANTHONY, RICHARD - 200602			$457.50
ANTHONY, RICHARD - 200603			$512.40

ANTHONY, RICHARD - 200604			$457.50
ANTHONY, RICHARD - 200605			$640.50
ANTHONY, RICHARD - 200607			$0.00
BATISTE, VERONICA - 200308	$259.19		
BATISTE, VERONICA - 200310	$2.68	$169.84	
BATISTE, VERONICA - 200311		$396.28	
BATISTE, VERONICA - 200312		$212.29	
BATISTE, VERONICA - 200313		$113.22	
BATISTE, VERONICA - 200314		$198.14	
BATISTE, VERONICA - 200401			$612.54
BATISTE, VERONICA - 200402			$143.19
BATISTE, VERONICA - 200407			$16.62
BATISTE, VERONICA - 200410			$325.20
BELLO, VALECIA - 200015			$1,783.20
BELLO, VALECIA - 200017			$269.00
BELLO, VALECIA - 200102		$231.38	
BELLO, VALECIA - 200212			$1,047.55
BELLO, VALECIA - 200308			$648.06
BELLO, VALECIA - 200310			$6.51
BELLO, VALECIA - 200401			$401.94
BELLO, VALECIA - 200402			$511.56
BELLO, VALECIA - 200407			$20.00
BELLO, VALECIA - 200408			$153.88
BELLO, VALECIA - 200418		$269.29	
BELLO, VALECIA - 200419			$692.46
BELLO, VALECIA - 200420			$365.46
BELLO, VALECIA - 200421			$605.90
BELLO, VALECIA - 200422			$327.00
BELLO, VALECIA - 200423			$365.46
BELLO, VALECIA - 200424			$509.73
BELLO, VALECIA - 200510		$368.80	
BELLO, VALECIA - 200511		$588.09	
BELLO, VALECIA - 200512		$388.74	
BELLO, VALECIA - 200513		$478.44	
BELLO, VALECIA - 200514		$488.41	
BELLO, VALECIA - 200515		$69.77	
BELLO, VALECIA - 200518			$767.50
BELLO, VALECIA - 200519			$1,096.43
BELLO, VALECIA - 200520			$1,694.48
BELLO, VALECIA - 200521			$179.42
BELLO, VALECIA - 200602		$442.36	
BELLO, VALECIA - 200603		$195.46	$390.93
BELLO, VALECIA - 200604		$318.92	
BELLO, VALECIA - 200605		-$318.92	$740.70
BELLO, VALECIA - 200607			$1,368.24
BELLO, VALECIA - 200608			$804.84
BELLO, VALECIA - 200609		$656.58	
BELLO, VALECIA - 200610		$63.54	$635.40
BELLO, VALECIA - 200611		$635.40	

BELLO, VALECIA - 200612			$709.53
BELLO, VALECIA - 200613			$211.80
BELLO, VALECIA - 200614			$497.73
BELLO, VALECIA - 200615			$423.60
BELLO, VALECIA - 200616			$762.48
BELLO, VALECIA - 200617			$741.30
BELLO, VALECIA - 200618			$900.15
BIZZELL WOOD, DEBRA - 200218		$87.36	
BIZZELL WOOD, DEBRA - 200221	$149.76		
BIZZELL WOOD, DEBRA - 200222			$234.00
BIZZELL WOOD, DEBRA - 200223			$121.68
BIZZELL WOOD, DEBRA - 200224	$299.52		
BIZZELL WOOD, DEBRA - 200226	$468.00		
BIZZELL WOOD, DEBRA - 200301	$482.75		
BIZZELL WOOD, DEBRA - 200302	$193.10		
BIZZELL WOOD, DEBRA - 200303	$193.10		
BIZZELL WOOD, DEBRA - 200310	$12.15		
BIZZELL WOOD, DEBRA - 200619			$292.80
FERRELL, MICHELLE - 200221	$185.52	$170.06	
FERRELL, MICHELLE - 200222		$139.14	
FERRELL, MICHELLE - 200223		$92.76	
FERRELL, MICHELLE - 200224	$371.04	$77.30	
FERRELL, MICHELLE - 200225		$46.38	
FERRELL, MICHELLE - 200226	$510.18		
FERRELL, MICHELLE - 200301	$358.65		
FERRELL, MICHELLE - 200302	$239.11	$47.82	
FERRELL, MICHELLE - 200303	$239.10	$31.88	
FERRELL, MICHELLE - 200304		$159.40	
FERRELL, MICHELLE - 200305		$95.64	
FERRELL, MICHELLE - 200306		$63.76	
FERRELL, MICHELLE - 200307		$47.82	
FERRELL, MICHELLE - 200308		$111.58	
FERRELL, MICHELLE - 200309		$207.22	$191.28
FERRELL, MICHELLE - 200310	$11.54	$10.56	$99.60
FERRELL, MICHELLE - 200311		$129.28	
FERRELL, MICHELLE - 200312		$193.92	
FERRELL, MICHELLE - 200314			$412.08
FERRELL, MICHELLE - 200315		$129.28	
FERRELL, MICHELLE - 200317		$129.28	
FERRELL, MICHELLE - 200318		$129.28	
FERRELL, MICHELLE - 200321		$171.72	
FERRELL, MICHELLE - 200322		$190.80	
FERRELL, MICHELLE - 200323		$171.72	
FERRELL, MICHELLE - 200324		$152.64	
FERRELL, MICHELLE - 200325		$95.40	
FERRELL, MICHELLE - 200402	$262.98	$175.32	
FERRELL, MICHELLE - 200403		$194.80	
FERRELL, MICHELLE - 200406		$155.84	
FERRELL, MICHELLE - 200407		$233.76	

FERRELL, MICHELLE - 200408	$5.67	$275.08	
FERRELL, MICHELLE - 200409		$39.80	$805.95
FERRELL, MICHELLE - 200410	$0.00	$179.10	$0.00
FERRELL, MICHELLE - 200411		$159.20	
FERRELL, MICHELLE - 200412		$139.30	
FERRELL, MICHELLE - 200413		$79.60	
FERRELL, MICHELLE - 200414		$218.90	
FERRELL, MICHELLE - 200415		$238.80	
FERRELL, MICHELLE - 200417		$378.10	
FERRELL, MICHELLE - 200418		$218.90	$149.25
FERRELL, MICHELLE - 200419			$427.31
FERRELL, MICHELLE - 200420		$192.64	
FERRELL, MICHELLE - 200421		$216.72	
FERRELL, MICHELLE - 200423		$168.56	
FERRELL, MICHELLE - 200424		$337.12	
FERRELL, MICHELLE - 200425		$144.48	
FERRELL, MICHELLE - 200426		$240.80	
FERRELL, MICHELLE - 200501		$124.70	
FERRELL, MICHELLE - 200502		$99.76	
FERRELL, MICHELLE - 200503		$74.82	
FERRELL, MICHELLE - 200504		$99.76	
FERRELL, MICHELLE - 200505		$224.46	
FERRELL, MICHELLE - 200506		$124.70	
FERRELL, MICHELLE - 200507		$99.76	
FERRELL, MICHELLE - 200508		$49.88	
FERRELL, MICHELLE - 200509		$174.58	
FERRELL, MICHELLE - 200510		$74.82	
FERRELL, MICHELLE - 200511		$124.70	
FERRELL, MICHELLE - 200512		$199.52	
FERRELL, MICHELLE - 200513		$174.58	
FERRELL, MICHELLE - 200514		$74.82	
FERRELL, MICHELLE - 200515		$149.64	
FERRELL, MICHELLE - 200518		$49.88	$136.20
FERRELL, MICHELLE - 200519		$149.50	
FERRELL, MICHELLE - 200520		$119.60	
FERRELL, MICHELLE - 200521		$179.40	
FERRELL, MICHELLE - 200522		$89.70	
FERRELL, MICHELLE - 200523		$194.35	
FERRELL, MICHELLE - 200524		$179.40	
FERRELL, MICHELLE - 200525		$328.90	
FERRELL, MICHELLE - 200526		$59.80	
FERRELL, MICHELLE - 200601		$216.09	
FERRELL, MICHELLE - 200602		$216.10	
FERRELL, MICHELLE - 200603		$339.57	
FERRELL, MICHELLE - 200604		$277.84	
FERRELL, MICHELLE - 200605		$463.05	
FERRELL, MICHELLE - 200606		$432.19	$70.36
FERRELL, MICHELLE - 200607		$246.97	$105.54
FERRELL, MICHELLE - 200608			$105.54

FERRELL, MICHELLE - 200609		$15.44	
FERRELL, MICHELLE - 200610		$92.61	
FERRELL, MICHELLE - 200611		$246.97	
FERRELL, MICHELLE - 200612		$185.22	
FERRELL, MICHELLE - 200613		$30.87	
FERRELL, MICHELLE - 200614		$246.96	$105.54
FERRELL, MICHELLE - 200615		$185.23	$140.72
FERRELL, MICHELLE - 200616		$77.18	
FERRELL, MICHELLE - 200617		$15.44	
FERRELL, MICHELLE - 200618		$46.31	$87.95
FERRELL, MICHELLE - 200621		$143.55	
FIELDS, ANNETTE - 200224		$19.88	
FIELDS, ANNETTE - 200312			$155.70
FIELDS, ANNETTE - 200315	$404.82		
FIELDS, ANNETTE - 200506			$995.80
FIELDS, ANNETTE - 200513			$52.41
FIELDS, ANNETTE - 200518			$0.00
FIELDS, ANNETTE - 200618			$0.00
FIELDS, ANNETTE - 200619			$0.00
GRIER, ALBERT - 200012		$202.23	
GRIER, ALBERT - 200014		$422.05	
GRIER, ALBERT - 200015		$61.55	
GRIER, ALBERT - 200016		$79.13	
GRIER, ALBERT - 200017		$184.65	
GRIER, ALBERT - 200018		$149.47	
GRIER, ALBERT - 200019		$105.51	
GRIER, ALBERT - 200020		$237.40	
GRIER, ALBERT - 200021		$325.33	
GRIER, ALBERT - 200022		$123.10	
GRIER, ALBERT - 200023		$52.76	
GRIER, ALBERT - 200025		$79.13	
GRIER, ALBERT - 200101		$182.70	
GRIER, ALBERT - 200103		$127.90	
GRIER, ALBERT - 200104		$182.70	
GRIER, ALBERT - 200105		$420.22	
GRIER, ALBERT - 200106		$401.94	
GRIER, ALBERT - 200108		$621.20	
GRIER, ALBERT - 200111		$401.94	
GRIER, ALBERT - 200112		$173.57	
GRIER, ALBERT - 200113		$73.08	
GRIER, ALBERT - 200114		$127.90	
GRIER, ALBERT - 200115		$109.62	
GRIER, ALBERT - 200116		$283.19	
GRIER, ALBERT - 200117		$255.78	
GRIER, ALBERT - 200119		$91.35	
GRIER, ALBERT - 200121		$109.62	
GRIER, ALBERT - 200201		$251.05	
GRIER, ALBERT - 200204		$226.32	
GRIER, ALBERT - 200205		$177.12	

GRIER, ALBERT - 200206		$403.44	
GRIER, ALBERT - 200207		$186.96	
GRIER, ALBERT - 200210		$68.88	
GRIER, ALBERT - 200211		$285.36	
GRIER, ALBERT - 200212		$147.60	
GRIER, ALBERT - 200214		$196.80	
GRIER, ALBERT - 200219		$137.76	
GRIER, ALBERT - 200223		$216.48	
GRIER, ALBERT - 200303		$71.02	
GRIER, ALBERT - 200310		$0.84	
GRIER, ALBERT - 200314		$112.92	
GRIER, ALBERT - 200323		$61.59	
GRIER, ALBERT - 200324		$277.16	
GRIER, ALBERT - 200403		$241.10	
GRIER, ALBERT - 200404		$146.76	
GRIER, ALBERT - 200405		$167.72	
GRIER, ALBERT - 200407		$12.46	
GRIER, ALBERT - 200410		$96.46	
GRIER, ALBERT - 200412		$310.81	
GRIER, ALBERT - 200415		$300.10	
GRIER, ALBERT - 200417		$150.05	
GRIER, ALBERT - 200421		$321.53	
GRIER, ALBERT - 200422		$225.07	
GRIER, ALBERT - 200423		$160.77	
GRIER, ALBERT - 200425		$171.48	
GRIER, ALBERT - 200506		$125.57	
GRIER, ALBERT - 200519		$194.06	
GRIER, ALBERT - 200520		$285.38	
GRIER, ALBERT - 200521		$547.93	
GRIER, ALBERT - 200522		$148.40	
GRIER, ALBERT - 200524		$239.72	
GRIER, ALBERT - 200525		$216.89	
GRIER, ALBERT - 200601		$330.12	
GRIER, ALBERT - 200604		$188.64	
GRIER, ALBERT - 200605		$224.01	
GRIER, ALBERT - 200606		$176.85	
GRIER, ALBERT - 200607		$176.85	
GRIER, ALBERT - 200608		$389.07	
GRIER, ALBERT - 200609		$271.17	
GRIER, ALBERT - 200610		$94.32	
GRIER, ALBERT - 200611		$94.32	
GRIER, ALBERT - 200612		$377.28	
GRIER, ALBERT - 200613		$35.37	
GRIER, ALBERT - 200614		$129.69	
GRIER, ALBERT - 200616		$412.65	
GRIER, ALBERT - 200617		$94.32	
GRIER, ALBERT - 200618		$212.22	
GRIER, ALBERT - 200619		$188.64	
GRIER, ALBERT - 200621		$247.59	

HARMON, WANDA - 200013			$104.45
HARMON, WANDA - 200022	$507.88		$101.58
HARMON, WANDA - 200023	$197.18		$89.63
HARMON, WANDA - 200217	$224.64		
HARMON, WANDA - 200218	$512.46		
HARMON, WANDA - 200219	$336.96		
HARMON, WANDA - 200420	$56.91		
HARMON, WANDA - 200615			$52.19
HARMON, WANDA - 200616			$0.00
HARMON, WANDA - 200617			$34.79
HARMON, WANDA - 200618			$426.18
KOSUTH, PAM - 200101		$135.72	
KOSUTH, PAM - 200114		$52.20	
KOSUTH, PAM - 200116		$15.66	
KOSUTH, PAM - 200218		$52.32	
KOSUTH, PAM - 200219		$65.40	
KOSUTH, PAM - 200511		$225.77	
KOSUTH, PAM - 200512		$0.00	
KOSUTH, PAM - 200514			$232.82
KOSUTH, PAM - 200518			$0.00
KOSUTH, PAM - 200519		$32.11	
KOSUTH, PAM - 200604		$98.49	
KOSUTH, PAM - 200605		$213.40	
KOSUTH, PAM - 200611		$98.49	
KOSUTH, PAM - 200612		$57.45	
KOSUTH, PAM - 200613		$106.70	
KOSUTH, PAM - 200614		$98.50	
KOSUTH, PAM - 200615		$164.16	
KOSUTH, PAM - 200616		$32.83	
KOSUTH, PAM - 200617		$172.36	
KOSUTH, PAM - 200619		$90.28	
KOSUTH, PAM - 200621		$172.36	
LOCKE, NANNETTE - 200111			$58.92
LOCKE, NANNETTE - 200114			$58.92
LOCKE, NANNETTE - 200219		$83.88	
LOCKE, NANNETTE - 200222			$123.60
LOCKE, NANNETTE - 200223			$0.00
LOCKE, NANNETTE - 200313			$129.08
LOCKE, NANNETTE - 200314			$605.06
LOCKE, NANNETTE - 200318			$387.24
LOCKE, NANNETTE - 200409			$365.68
LOCKE, NANNETTE - 200412			$365.68
LOCKE, NANNETTE - 200413			$0.00
LOCKE, NANNETTE - 200415			$502.81
LOCKE, NANNETTE - 200420			$182.84
LOCKE, NANNETTE - 200509			$474.20
LOCKE, NANNETTE - 200513			$948.40
LOCKE, NANNETTE - 200609			$196.00
LOCKE, NANNETTE - 200611			$343.00

LOCKE, NANNETTE - 200616			$343.00
LOCKE, NANNETTE - 200620			$392.00
LOCKHART, LAFAYETTE - 200013			$123.89
LOCKHART, LAFAYETTE - 200019			$165.18
LOCKHART, LAFAYETTE - 200513		$63.00	
LOCKHART, LAFAYETTE - 200606		$61.42	
LOCKHART, LAFAYETTE - 200608		$46.07	
LOCKHART, LAFAYETTE - 200614		$138.20	
LOCKHART, LAFAYETTE - 200615		$145.87	
LOCKHART, LAFAYETTE - 200616		$153.55	
LOCKHART, LAFAYETTE - 200617		$168.91	
MONTGOMERY, FRANKLIN - 200101		$111.86	$85.30
MONTGOMERY, FRANKLIN - 200105		$67.12	
MONTGOMERY, FRANKLIN - 200112		$89.48	
MONTGOMERY, FRANKLIN - 200113			$85.29
MONTGOMERY, FRANKLIN - 200121			$113.72
MONTGOMERY, FRANKLIN - 200219		$49.34	
MONTGOMERY, FRANKLIN - 200224		$53.92	$74.30
MONTGOMERY, FRANKLIN - 200226			$89.16
MONTGOMERY, FRANKLIN - 200315			$154.60
MONTGOMERY, FRANKLIN - 200322		$42.08	
MONTGOMERY, FRANKLIN - 200403		$59.04	$63.04
MONTGOMERY, FRANKLIN - 200404		$59.04	
MONTGOMERY, FRANKLIN - 200407		$2.24	$1.22
MONTGOMERY, FRANKLIN - 200409			$192.78
MONTGOMERY, FRANKLIN - 200411			$160.65
MONTGOMERY, FRANKLIN - 200416			$128.52
MONTGOMERY, FRANKLIN - 200419			$128.52
MONTGOMERY, FRANKLIN - 200422			$128.52
MONTGOMERY, FRANKLIN - 200425			$48.20
MONTGOMERY, FRANKLIN - 200501		$64.06	
MONTGOMERY, FRANKLIN - 200504		$32.03	
MONTGOMERY, FRANKLIN - 200507		$224.21	
MONTGOMERY, FRANKLIN - 200508		$40.04	
MONTGOMERY, FRANKLIN - 200515		$256.24	
MONTGOMERY, FRANKLIN - 200520	$1,549.28		$1,511.73
MONTGOMERY, FRANKLIN - 200524		$86.58	
MONTGOMERY, FRANKLIN - 200525		$69.26	
MONTGOMERY, FRANKLIN - 200601		$35.49	
MONTGOMERY, FRANKLIN - 200605		$53.24	
MONTGOMERY, FRANKLIN - 200610		$88.73	
MONTGOMERY, FRANKLIN - 200618			$88.73
MONTGOMERY, FRANKLIN - 200619		$88.73	$0.00
MONTGOMERY, FRANKLIN - 200621		$110.04	
MUNIZ, SHIRLEY - 200025			$116.40
MUNIZ, SHIRLEY - 200201		$276.76	
MUNIZ, SHIRLEY - 200202		$369.00	
MUNIZ, SHIRLEY - 200203		$276.75	
MUNIZ, SHIRLEY - 200204		$230.63	

MUNIZ, SHIRLEY - 200205		$184.50	
MUNIZ, SHIRLEY - 200206		$276.75	
MUNIZ, SHIRLEY - 200207		$146.07	
MUNIZ, SHIRLEY - 200208		$284.44	
MUNIZ, SHIRLEY - 200209		$284.44	
MUNIZ, SHIRLEY - 200210		$138.38	
MUNIZ, SHIRLEY - 200211		$161.44	
MUNIZ, SHIRLEY - 200212		$115.31	
MUNIZ, SHIRLEY - 200213		$99.94	
MUNIZ, SHIRLEY - 200214		$115.31	
MUNIZ, SHIRLEY - 200215		$215.25	
MUNIZ, SHIRLEY - 200216		$169.13	
MUNIZ, SHIRLEY - 200217		$115.32	
MUNIZ, SHIRLEY - 200218		$123.01	$123.60
MUNIZ, SHIRLEY - 200219		$269.06	
MUNIZ, SHIRLEY - 200220		$23.06	
MUNIZ, SHIRLEY - 200221		$276.75	
MUNIZ, SHIRLEY - 200222		$146.06	
MUNIZ, SHIRLEY - 200223		$130.69	
MUNIZ, SHIRLEY - 200224		$276.75	
MUNIZ, SHIRLEY - 200225		$169.13	
MUNIZ, SHIRLEY - 200226		$99.94	
MUNIZ, SHIRLEY - 200301		$229.83	
MUNIZ, SHIRLEY - 200302		$198.13	
MUNIZ, SHIRLEY - 200303		$134.73	
MUNIZ, SHIRLEY - 200304		$245.68	
MUNIZ, SHIRLEY - 200305		$324.93	$254.88
MUNIZ, SHIRLEY - 200306		$142.66	
MUNIZ, SHIRLEY - 200307		$158.51	
MUNIZ, SHIRLEY - 200308		$190.21	
MUNIZ, SHIRLEY - 200309		$163.15	
MUNIZ, SHIRLEY - 200310		$204.38	$3.28
MUNIZ, SHIRLEY - 200311		$181.78	
MUNIZ, SHIRLEY - 200312		$206.57	
MUNIZ, SHIRLEY - 200313		$181.77	
MUNIZ, SHIRLEY - 200314		$132.20	
MUNIZ, SHIRLEY - 200315		$123.94	
MUNIZ, SHIRLEY - 200316		$247.87	
MUNIZ, SHIRLEY - 200318		$256.14	
MUNIZ, SHIRLEY - 200319		$239.61	
MUNIZ, SHIRLEY - 200320		$231.35	
MUNIZ, SHIRLEY - 200321		$140.46	
MUNIZ, SHIRLEY - 200323		$280.92	
MUNIZ, SHIRLEY - 200324		$313.97	
MUNIZ, SHIRLEY - 200325		$16.53	
MUNIZ, SHIRLEY - 200326		$198.30	
MUNIZ, SHIRLEY - 200401		$143.44	
MUNIZ, SHIRLEY - 200402		$143.44	
MUNIZ, SHIRLEY - 200403		$219.38	

MUNIZ, SHIRLEY - 200404		$244.69	
MUNIZ, SHIRLEY - 200405		$210.94	
MUNIZ, SHIRLEY - 200406		$0.00	
MUNIZ, SHIRLEY - 200407		$176.64	
MUNIZ, SHIRLEY - 200408		$310.51	$138.00
MUNIZ, SHIRLEY - 200409		$138.00	
MUNIZ, SHIRLEY - 200411		$396.76	
MUNIZ, SHIRLEY - 200412		$207.01	
MUNIZ, SHIRLEY - 200413		$51.75	
MUNIZ, SHIRLEY - 200414		$224.26	
MUNIZ, SHIRLEY - 200415		$172.51	
MUNIZ, SHIRLEY - 200416		$241.50	
MUNIZ, SHIRLEY - 200417		$207.00	
MUNIZ, SHIRLEY - 200418		$241.51	
MUNIZ, SHIRLEY - 200419		$207.00	
MUNIZ, SHIRLEY - 200420		$155.26	
MUNIZ, SHIRLEY - 200421		$103.50	
MUNIZ, SHIRLEY - 200422		$241.50	
MUNIZ, SHIRLEY - 200424		$293.26	
MUNIZ, SHIRLEY - 200425		$224.26	
MUNIZ, SHIRLEY - 200502		$187.85	
MUNIZ, SHIRLEY - 200503		$232.58	
MUNIZ, SHIRLEY - 200504		$134.18	
MUNIZ, SHIRLEY - 200505		$205.74	
MUNIZ, SHIRLEY - 200506		$107.34	
MUNIZ, SHIRLEY - 200507		$35.78	
MUNIZ, SHIRLEY - 200508		$161.01	
MUNIZ, SHIRLEY - 200509		$147.24	
MUNIZ, SHIRLEY - 200510		$193.25	
MUNIZ, SHIRLEY - 200511		$220.86	
MUNIZ, SHIRLEY - 200512		$276.08	
MUNIZ, SHIRLEY - 200513		$92.03	
MUNIZ, SHIRLEY - 200514		$55.21	
MUNIZ, SHIRLEY - 200515		$64.42	$0.00
MUNIZ, SHIRLEY - 200518		-$128.84	
MUNIZ, SHIRLEY - 200519		$257.67	
MUNIZ, SHIRLEY - 200520		-$257.67	$73.62
MUNIZ, SHIRLEY - 200522		$294.48	
MUNIZ, SHIRLEY - 200523		$110.43	
MUNIZ, SHIRLEY - 200524		$257.68	
MUNIZ, SHIRLEY - 200525		$202.46	
MUNIZ, SHIRLEY - 200526		$110.43	
MUNIZ, SHIRLEY - 200601		$247.20	
MUNIZ, SHIRLEY - 200602		$171.14	
MUNIZ, SHIRLEY - 200603		$266.22	
MUNIZ, SHIRLEY - 200604		$171.14	
MUNIZ, SHIRLEY - 200605		$266.22	$95.08
MUNIZ, SHIRLEY - 200606		$209.17	
MUNIZ, SHIRLEY - 200607		$171.14	

MUNIZ, SHIRLEY - 200608		$133.10	
MUNIZ, SHIRLEY - 200609		$152.12	
MUNIZ, SHIRLEY - 200610		$190.15	
MUNIZ, SHIRLEY - 200611		$171.14	
MUNIZ, SHIRLEY - 200612		$190.15	
MUNIZ, SHIRLEY - 200613		$57.05	
MUNIZ, SHIRLEY - 200614		$190.15	
MUNIZ, SHIRLEY - 200615		$133.11	
MUNIZ, SHIRLEY - 200616		$228.18	
MUNIZ, SHIRLEY - 200617		$95.08	
MUNIZ, SHIRLEY - 200618		$266.21	
MUNIZ, SHIRLEY - 200619			$0.00
MUNIZ, SHIRLEY - 200620		$114.09	
MUNIZ, SHIRLEY - 200621		$190.15	
NELSON, DAVID - 200620		$169.62	
PEARL, DOUGLAS - 200307		$305.70	
PEARL, DOUGLAS - 200310		$2.70	
PENDELTON, MARSHALL - 200017		$47.33	
PENDELTON, MARSHALL - 200019		$110.43	
PENDELTON, MARSHALL - 200023		$136.94	
PENDELTON, MARSHALL - 200024		$60.86	
PENDELTON, MARSHALL - 200025		$167.37	
PENDELTON, MARSHALL - 200026		$121.72	
PENDELTON, MARSHALL - 200101		$126.04	
PENDELTON, MARSHALL - 200204		$131.76	
PENDELTON, MARSHALL - 200205		$98.82	
PENDELTON, MARSHALL - 200206		$65.88	
PENDELTON, MARSHALL - 200207		$123.53	
PENDELTON, MARSHALL - 200208		$98.82	
PENDELTON, MARSHALL - 200209		$118.34	
PENDELTON, MARSHALL - 200210		$101.44	
PENDELTON, MARSHALL - 200212		$152.15	
PENDELTON, MARSHALL - 200213		$67.62	
PENDELTON, MARSHALL - 200214		$236.67	
PENDELTON, MARSHALL - 200215		$169.05	
PENDELTON, MARSHALL - 200216		$253.58	
PENDELTON, MARSHALL - 200217		$202.87	
PENDELTON, MARSHALL - 200218		$50.72	
PENDELTON, MARSHALL - 200220		$135.25	
PENDELTON, MARSHALL - 200221		$202.86	
PENDELTON, MARSHALL - 200222		$84.53	
PENDELTON, MARSHALL - 200223		$67.62	
PENDELTON, MARSHALL - 200224		$118.34	
PENDELTON, MARSHALL - 200302		$174.30	
PENDELTON, MARSHALL - 200303		$69.72	
PENDELTON, MARSHALL - 200304		$52.29	
PENDELTON, MARSHALL - 200307		$34.86	
PENDELTON, MARSHALL - 200309		$69.72	
PENDELTON, MARSHALL - 200310		$3.57	

PENDELTON, MARSHALL - 200311		$211.02	
PENDELTON, MARSHALL - 200312		$70.34	
PENDELTON, MARSHALL - 200318		$105.52	
PENDELTON, MARSHALL - 200319		$87.92	
PENDELTON, MARSHALL - 200321		$105.51	
PENDELTON, MARSHALL - 200324		$123.10	
PENDELTON, MARSHALL - 200325		$131.89	
PENDELTON, MARSHALL - 200326		$184.64	
PENDELTON, MARSHALL - 200401		$107.55	
PENDELTON, MARSHALL - 200402		$313.69	
PENDELTON, MARSHALL - 200403		$170.29	
PENDELTON, MARSHALL - 200404		$143.41	
PENDELTON, MARSHALL - 200407		$105.49	
PENDELTON, MARSHALL - 200408		$146.16	
PENDELTON, MARSHALL - 200409		$54.81	
PENDELTON, MARSHALL - 200410		$36.54	
PENDELTON, MARSHALL - 200414		$219.24	
PENDELTON, MARSHALL - 200415		$36.54	
PENDELTON, MARSHALL - 200506		$113.19	
PENDELTON, MARSHALL - 200507		$56.60	
PENDELTON, MARSHALL - 200523		$80.54	
PENDELTON, MARSHALL - 200615		$196.70	
PENDELTON, MARSHALL - 200616		$238.11	
PENDELTON, MARSHALL - 200617		$144.94	
PLATT, PATRICIA - 200308	$347.18		
PLATT, PATRICIA - 200310	$3.48		
PLATT, PATRICIA - 200619			$191.35
ROCHER, JULIO - 200211	$251.86		
ROCHER, JULIO - 200512			$143.24
ROUNDTREE, MICHELE - 200011		$42.80	
ROUNDTREE, MICHELE - 200014		$136.96	
ROUNDTREE, MICHELE - 200016		$158.36	
ROUNDTREE, MICHELE - 200017		$12.84	$539.28
ROUNDTREE, MICHELE - 200018		$29.96	$166.92
ROUNDTREE, MICHELE - 200019		$77.04	
ROUNDTREE, MICHELE - 200020		$111.28	
ROUNDTREE, MICHELE - 200021		$102.72	
ROUNDTREE, MICHELE - 200022		$72.76	
ROUNDTREE, MICHELE - 200023		$17.12	$166.92
ROUNDTREE, MICHELE - 200024		$34.24	
ROUNDTREE, MICHELE - 200025		$64.20	$154.08
ROUNDTREE, MICHELE - 200027		$47.08	
ROUNDTREE, MICHELE - 200101		$274.82	$119.70
ROUNDTREE, MICHELE - 200102		$124.12	
ROUNDTREE, MICHELE - 200103		$203.90	
ROUNDTREE, MICHELE - 200104		$53.20	
ROUNDTREE, MICHELE - 200105		$79.80	
ROUNDTREE, MICHELE - 200106		$53.18	
ROUNDTREE, MICHELE - 200107		$44.32	

ROUNDTREE, MICHELE - 200108		$197.22	
ROUNDTREE, MICHELE - 200109		$134.94	
ROUNDTREE, MICHELE - 200110		$41.52	
ROUNDTREE, MICHELE - 200111		$83.04	
ROUNDTREE, MICHELE - 200112		$129.75	
ROUNDTREE, MICHELE - 200113		$46.71	
ROUNDTREE, MICHELE - 200114		$62.28	
ROUNDTREE, MICHELE - 200115		$31.14	
ROUNDTREE, MICHELE - 200116		$62.28	$255.06
ROUNDTREE, MICHELE - 200117		$67.47	
ROUNDTREE, MICHELE - 200120		$134.94	
ROUNDTREE, MICHELE - 200121		$150.51	
ROUNDTREE, MICHELE - 200122		$129.75	$141.70
ROUNDTREE, MICHELE - 200123		$103.80	
ROUNDTREE, MICHELE - 200124		$160.89	
ROUNDTREE, MICHELE - 200126		$98.61	
ROUNDTREE, MICHELE - 200201		$130.21	
ROUNDTREE, MICHELE - 200202		$103.08	
ROUNDTREE, MICHELE - 200203		$92.23	
ROUNDTREE, MICHELE - 200204		$32.55	
ROUNDTREE, MICHELE - 200205		$97.65	
ROUNDTREE, MICHELE - 200206		$43.40	
ROUNDTREE, MICHELE - 200211		$169.07	
ROUNDTREE, MICHELE - 200212		$136.55	
ROUNDTREE, MICHELE - 200213		$78.04	
ROUNDTREE, MICHELE - 200214		$156.06	
ROUNDTREE, MICHELE - 200215		$266.60	
ROUNDTREE, MICHELE - 200216		$104.04	
ROUNDTREE, MICHELE - 200217		$201.58	
ROUNDTREE, MICHELE - 200218		$247.10	
ROUNDTREE, MICHELE - 200219		$195.07	
ROUNDTREE, MICHELE - 200220		$162.56	
ROUNDTREE, MICHELE - 200221		$13.01	
ROUNDTREE, MICHELE - 200222		$78.03	
ROUNDTREE, MICHELE - 200223		$201.58	
ROUNDTREE, MICHELE - 200224		$32.51	
ROUNDTREE, MICHELE - 200225		$71.53	
ROUNDTREE, MICHELE - 200226		$182.07	
ROUNDTREE, MICHELE - 200301		$53.62	
ROUNDTREE, MICHELE - 200302		$80.43	
ROUNDTREE, MICHELE - 200303		$174.27	
ROUNDTREE, MICHELE - 200304		$33.52	
ROUNDTREE, MICHELE - 200305		$174.27	
ROUNDTREE, MICHELE - 200306		$140.75	
ROUNDTREE, MICHELE - 200307		$100.54	
ROUNDTREE, MICHELE - 200310		$6.78	
ROUNDTREE, MICHELE - 200311		$111.84	
ROUNDTREE, MICHELE - 200312		$83.88	
ROUNDTREE, MICHELE - 200313		$188.73	

ROUNDTREE, MICHELE - 200314		$118.83	
ROUNDTREE, MICHELE - 200315		$55.92	
ROUNDTREE, MICHELE - 200316		$55.92	
ROUNDTREE, MICHELE - 200410		$152.51	
ROUNDTREE, MICHELE - 200416			$296.28
ROUNDTREE, MICHELE - 200417			$328.31
ROUNDTREE, MICHELE - 200615		$262.64	
ROUNDTREE, MICHELE - 200616		$172.36	
ROUNDTREE, MICHELE - 200617		$98.49	
ROUNDTREE, MICHELE - 200618		$16.42	
ROUNDTREE, MICHELE - 200621		$98.49	
THOMAS, BOB - 200119			$297.50
THOMPSON BURTON, CATHY - 200012		$44.81	
THOMPSON BURTON, CATHY - 200020			$110.36
THOMPSON BURTON, CATHY - 200103		$247.68	
THOMPSON BURTON, CATHY - 200104			$171.68
THOMPSON BURTON, CATHY - 200308			$308.60
THOMPSON BURTON, CATHY - 200309			$663.49
THOMPSON BURTON, CATHY - 200310			$9.77
THOMPSON BURTON, CATHY - 200401			$707.60
THOMPSON BURTON, CATHY - 200402			$353.80
THOMPSON BURTON, CATHY - 200405			$849.12
THOMPSON BURTON, CATHY - 200407			$41.58
THOMPSON BURTON, CATHY - 200410			$723.00
THOMPSON BURTON, CATHY - 200415			$1,120.65
THOMPSON BURTON, CATHY - 200416			$1,446.00
THOMPSON BURTON, CATHY - 200420			$0.00
THOMPSON BURTON, CATHY - 200519			$153.84
THOMPSON BURTON, CATHY - 200607			$158.76
THOMPSON BURTON, CATHY - 200608			$476.28
THOMPSON BURTON, CATHY - 200609			$119.07
THOMPSON BURTON, CATHY - 200618			$714.42
WATSON, NATASHA - 200012			$110.12
WATSON, NATASHA - 200013			$220.24
WATSON, NATASHA - 200015			$247.77
WATSON, NATASHA - 200023			$123.89
WATSON, NATASHA - 200112			$128.34
WATSON, NATASHA - 200415		$115.43	
WATSON, NATASHA - 200419		$84.83	
WATSON, NATASHA - 200508		$385.33	
WATSON, NATASHA - 200509		$437.88	
WATSON, NATASHA - 200510		$227.70	
WATSON, NATASHA - 200511		$245.22	
WATSON, NATASHA - 200520		$280.24	
WATSON, NATASHA - 200522		$148.12	
WATSON, NATASHA - 200526		$111.09	
WATSON, NATASHA - 200601		$151.44	
WATSON, NATASHA - 200602		$435.39	
WATSON, NATASHA - 200605		$407.00	

WATSON, NATASHA - 200608		$302.88	
WATSON, NATASHA - 200609		$265.02	
WATSON, NATASHA - 200611		$208.23	
WATSON, NATASHA - 200613		$321.81	
WATSON, NATASHA - 200614		$586.83	
WATSON, NATASHA - 200615		$397.53	
WATSON, NATASHA - 200616		$170.37	
WATSON, NATASHA - 200617		$359.67	
WATSON, NATASHA - 200619		$302.88	
WATSON, NATASHA - 200620		$189.30	
WATSON, NATASHA - 200621		$293.42	
WHITFIELD, DIANE - 200013			$250.47
WHITFIELD, DIANE - 200418			$494.16
WHITFIELD, DIANE - 200421			$41.18
WILLIAMS, THERESA - 200012	$200.08	$50.01	
WILLIAMS, THERESA - 200014		$183.37	
WILLIAMS, THERESA - 200019		$50.01	
WILLIAMS, THERESA - 200020	$525.21		
WILLIAMS, THERESA - 200023	$612.75		
WILLIAMS, THERESA - 200024	$687.78		
WILLIAMS, THERESA - 200025	$562.73		
WILLIAMS, THERESA - 200101	$1,284.02		
WILLIAMS, THERESA - 200102		$276.36	
WILLIAMS, THERESA - 200103	$1,926.02		
WILLIAMS, THERESA - 200105		$249.64	
WILLIAMS, THERESA - 200109		$146.16	
WILLIAMS, THERESA - 200114		$114.84	
WILLIAMS, THERESA - 200115		$187.92	
WILLIAMS, THERESA - 200116		$177.48	$42.78
WILLIAMS, THERESA - 200120	$456.32		
WILLIAMS, THERESA - 200121	$456.32		
WILLIAMS, THERESA - 200124	$142.60		
WILLIAMS, THERESA - 200207			$89.43
WILLIAMS, THERESA - 200214			$89.43
WILLIAMS, THERESA - 200218		$26.16	$208.67
WILLIAMS, THERESA - 200306		$121.37	
WILLIAMS, THERESA - 200310		$1.08	
WILLIAMS, THERESA - 200514		$128.44	
WILLIAMS, THERESA - 200519		$168.58	
WILLIAMS, THERESA - 200520		$32.11	
WILLIAMS, THERESA - 200523		$80.28	
WILLIAMS, THERESA - 200524		$80.28	
WILLIAMS, THERESA - 200604		$49.25	
WILLIAMS, THERESA - 200606		$24.62	
WILLIAMS, THERESA - 200608		$49.25	
WILLIAMS, THERESA - 200611		$16.42	
WILLIAMS, THERESA - 200612		$49.25	
ZUROWSKI, ROBERT - 200012		$13.13	
ZUROWSKI, ROBERT - 200015		$85.31	

ZUROWSKI, ROBERT - 200019		$164.07	
ZUROWSKI, ROBERT - 200102		$29.78	
ZUROWSKI, ROBERT - 200107		$89.32	
ZUROWSKI, ROBERT - 200224		$96.34	
ZUROWSKI, ROBERT - 200225		$64.22	
ZUROWSKI, ROBERT - 200302		$148.96	
ZUROWSKI, ROBERT - 200303		$99.30	
ZUROWSKI, ROBERT - 200310		$3.00	
ZUROWSKI, ROBERT - 200323		$100.50	
ZUROWSKI, ROBERT - 200407		$35.01	
ZUROWSKI, ROBERT - 200408		$52.52	
ZUROWSKI, ROBERT - 200409		$52.52	
ZUROWSKI, ROBERT - 200410		$35.02	$52.52
ZUROWSKI, ROBERT - 200501		$46.68	
ZUROWSKI, ROBERT - 200510		$18.67	
ZUROWSKI, ROBERT - 200511		$37.34	
ZUROWSKI, ROBERT - 200512		$0.00	
ZUROWSKI, ROBERT - 200513		$56.01	
ZUROWSKI, ROBERT - 200519		$18.67	
ZUROWSKI, ROBERT - 200520		$37.34	
ZUROWSKI, ROBERT - 200522		$112.02	
ZUROWSKI, ROBERT - 200602		$57.87	
ZUROWSKI, ROBERT - 200604		$9.65	
ZUROWSKI, ROBERT - 200605		$19.29	
ZUROWSKI, ROBERT - 200611		$19.29	
ZUROWSKI, ROBERT - 200612		$19.29	
ZUROWSKI, ROBERT - 200618		$19.29	
ZUROWSKI, ROBERT - 200620		$19.29	
ZUROWSKI, ROBERT - 200621		$38.58	

On each of the approximately 1,000 occasions listed above when a Grievant for whom the Union presented evidence reported more than eight hours in a day, the Grievant in question was compensated in money or with time off in the amount listed.[13] And the NFC Data in Joint Exhibit 2 reveals that HUD provided compensation for over-tour hours worked by ***all*** 360s totaling one million seven hundred twenty one thousand two hundred forty dollars and eighty nine cents ($1,721,240.89) between pay period 27

[13] HUD acknowledges that ***one*** Grievant testified that she was forced to forfeit a small amount of credit hours or comp-time because of a mix-up with her supervisor.

of 2000 and pay period 21 of 2006. This includes overtime pay, compensatory time-off and credit hours.

The above facts not only demonstrates the incorrectness of the Grievants assertion that HUD's time-keeping forms were designed to conceal anything, they also demonstrate that each of the Grievants' was intimately familiar with the proper procedure for reporting, and being paid for, over-tour work. As Dr. Johnson so aptly testified, "Obviously, if I got 200 credit hours or 190 credit hours, I would have to have requested it." Tr. (8/30) at 209.[14]

Of course, if Grievants chose to work over-tour hours at home or at other locations, as they allege, or even to work beyond their tours in the office without informing their supervisors, or certifying that they worked those hours, such time will not show up in the NFC data. And, employees made conscious decisions not to report their time. Citing Dr. Johnson again, he 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. In any event, such time is not compensable because it is not suffered or permitted overtime having been worked without the supervisors' knowledge and without the supervisors having the opportunity to prevent it. As noted in *Davis v. Food Lion,* 792 F.2d at 1277:

> This element of constructive of [sic] actual knowledge is especially significant in a case such as this one, in which an employee deliberately acted in such a way to prevent his employer from acquiring knowledge of his alleged uncompensated overtime.

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[14] As the NFC data, including the above extracts, also show, 360s chose credit hours on the vast majority of occasions when they worked overtime. Unlike capped overtime and compensatory time-off, employees who were wrongly classified, if any, are not entitled to an additional overtime premium on top of credit hours. *See* AFGE Contract ¶17.02(5).

Similarly, in *Forrester v. Roth's I.G.A. Foodliner, Inc.,* 646 F.2d 413 (9th Cir. 1981), the Ninth Circuit affirmed the district court's grant of summary judgment for the employer because the employee deliberately omitted the alleged uncompensated overtime hours from his time sheet even though the employee knew that the employer regularly paid for such reported overtime. Here, too, HUD regularly compensated employees for over-tour work that was properly reported. Indeed, the testimony showed that supervisors frequently allowed 360s to earn credit hours and compensatory time off even when the employees reported their extra work only after the fact, in violation of procedures. However, the court said in *Forrester v. Roth's I.G.A. Foodliner*, "Where the acts of an employee prevent an employer from acquiring knowledge, here of alleged uncompensated overtime hours, the employer cannot be said to have suffered or permitted the employee to work in violation of §207(a) [of the FLSA]." 646 F.2d at 414-15. In the present case, the deliberate concealment of over-tour work occurred not only when the 360s falsified their time sheets, it occurred also when the Grievants sent late night or early morning e-mails to supervisors notifying them of over-tour work, knowing full well that the supervisors would never see the e-mails on time to prevent the extra work from being performed. Such defective notices cannot convert the activity that was performed into compensable suffered or permitted work.

On page 14 of their brief, the Grievants assert that "[t]he supervisor actually certifies the correctness of the timesheet, not the employee."[15] Ms. Woods did so testify, though she contradicted that testimony a moment later, as the Arbitrator himself

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[15] The Grievants cite page 144 of the August 31, 2006 18-line transcript, which corresponds to page 124 of the 21-line transcript used consistently used by HUD in its initial brief and this reply brief. The existence of two separate page numbering systems in the briefs was brought to the Arbitrator's attention in an e-mail from HUD's counsel to the Arbitrator and the Unions' counsel dated March 9, 2007.

noted. Tr. (8/31) at 126 ("I think it has been asked and answered, albeit you got two different answers."). Significantly, the witnesses for the Grievants (including Ms. Woods) admitted that the ***employee*** certifies the correctness of the timesheet. PFF ¶14, 96, 161, 199, 209, 241.

Also on page 14, the Grievants quote the testimony of Ms. Woods to the effect that the handbook used by Equal Opportunity Specialists states that they must "contact clients in non-working or non-duty hours to get the work done." In fact, the HUD handbook for 360s actually states that investigators should--

> attempt to reach the complainant by phone, making attempts (at home and business numbers) during regular ***business hours and non-business hours***.

Union Ex. 42 at 4. Note that the handbook does not use the phrases "non-working" or "non-duty" hours, and this language does not require 360s 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 360s have tours-of-duty that begin as early as 6:00 A.M. Tr. (9/13) at 175. Others have tours of duty that end later in the evening. Moreover, an EOS can request comp-time (or credit hours) to make a late night phone call, and some do make such requests. Tr. (9/13) at 176; Tr. (11/7) at 7. Indeed, the handbook expressly requires the investigators to make only "reasonable efforts" to reach complainants. Union Ex. 42 at 1. As noted in the table on the preceding pages, HUD has paid the Grievants in this case hundreds of thousands of dollars in comp-time, credit hours and overtime when appropriate requests have been made. Thus, the fact that the handbook may require calls to be made outside of business hours is another red herring.

Also on page 14, the Grievants cite testimony regarding the manner in which Mr. Patterson, a supervisor, completed his own time sheets. HUD is unsure of the relevance of this testimony. If Mr. Patterson ever makes a claim for overtime pay, Mr. Patterson's admission will cause HUD to have the same defenses against him that it has against the Grievants in this case -- *i.e.*, the failure to accurately report time has deprived the Agency of an opportunity to know of, and prevent, alleged over-tour work. It also should be noted that Mr. Patterson makes no claim of being nonexempt, unlike the Grievants in this case who failed to accurately record or memorialize their alleged over-tour work despite their claim that they were nonexempt. More to the point, Mr. Patterson's claim that he did not report all of his hours does not put him (or HUD) on notice that Mr. Patterson's subordinates were working at home, in taxis, etc., if in fact they were. In an analogous situation in *Davis v. Food Lion,* 792 F.2d at 1278, the court noted that:

> Indeed, although several of Davis' supervisors testified that as market managers in the past that had occasionally worked off the clock to make themselves look better, they also testified that off-the-clock work was not necessary to meet Effective Scheduling Standards.

Here, too, whether Mr. Patterson did or did not work over-tour is completely irrelevant to whether his subordinates had a reasonable need to, and did, work overtime to accomplish their jobs, and whether any such work meets the legal test for compensability. The Arbitrator should not lose sight of the Grievants' burden in this case, which is to demonstrate that the Grievants (not Mr. Patterson) 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.

On page 15, the Grievants make certain arguments from a Department of Defense document ***that was not accepted into evidence***. Tr. (9/20) at 158. Once again, HUD must express its dismay over the tactics being employed by the Grievants. It is undisputed that HUD's timesheets are different than DOD's timesheets. Tr. (9/20) at 157-58. However, as the Arbitrator noted in ***rejecting*** Union Exhibit 53, "I can't judge HUD's conduct by what other agencies do. I can only judge it by their conduct measured against the law." Tr. (9/20) at 158.[16]

On page 16 of their brief, the Grievants state: "When the supervisor is aware that an employee is performing work outside of his/her scheduled tour of duty and does nothing to prevent it from occurring, he/she has suffered or permitted the employee to work." This is true, but irrelevant, since the Union has failed to show that the supervisors were aware of the vast majority of the time being claimed. This has already been discussed at length in HUD's proposed findings of fact and, in the interest of economy, will not be repeated.

Also on page 16, the Grievants argue that: "The burden should not be placed on the employee to maintain records of overtime performed[.]" It should be noted that this is not a typical case in which employees who were treated as exempt were not required by their employer to keep any timesheets at all. Here, if the Union is to be believed, the employees knowingly submitted incorrect and incomplete timesheets which did not record the additional time that they now claim to have worked out of the view of their

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[16] The adequacy of HUD's timesheets is not an issue in this grievance/arbitration.

supervisors, even though they did record similar over-tour time on other occasions and received compensation, credit hours and/or compensatory time-off for their efforts. Thus, it simply is not true (as claimed on page 16 of the Grievants' brief) that "the Agency was in the best position to accurately and properly record the actual time worked." In addition, it is not true (as claimed on the same page) that "[e]mployees could not reasonably foresee this proceeding so as to maintain the evidence." *See also Forrester v. Roth's I.G.A. Foodliner, Inc.* discussed on page 48 above. The Grievants have known for more than three years that they would one day be submitting claims for overtime.[17] Is it not curious that not a single one of them kept a diary of the hours he or she worked? Is the Arbitrator not surprised after witnessing the testimony of the extremely fastidious Dr. Donald Johnson that Dr. Johnson did not keep a diary that recorded, to the second, all of the overtime he worked? Is the Arbitrator not left wondering why Union official Ms. Jessyl Ann Woods, who knows very well how to challenge a perceived wrong,[18] never kept a record of her alleged over-tour work? This is not necessarily to suggest that Dr. Johnson, Ms. Woods, or any other Grievant had a legal duty to keep such records. However, the complete absence of any such records does call into question the credibility of the Grievants' testimony that they worked numerous hours of over-tour work which they failed to report on their Time and Attendance records.

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[17] The grievances are posted on the AFGE Council 222 website at http://www.afgecouncil222.com/grievances.html. Thus, the Grievants had access to them.

[18] *See, e.g.,* Tr. (9/13) at 117, 157; *see also Jessyl Ann Woods v. Andrew Cuomo, Secretary, Department Of Housing And Urban Development, Agency*., No. APL 01954851, 1997 WL 332926 (E.E.O.C., Jun 10, 1997); *Jessyl A. Woods v. Mel R. Martinez, Secretary, Department Of Housing And Urban Development*, No. No. APL 01994060, 2001 WL 1691866 (E.E.O.C., Dec 18, 2001); *Jessyl A. Woods v. Mel R. Martinez, Secretary, Department Of Housing And Urban Development*, No. APL 01995629, 2001 WL 1691855 (E.E.O.C., Dec 27, 2001).

Moreover, there is precedent supporting the proposition that the Grievants' submission of incorrect timesheets is a complete bar to their claims. For example, in *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 725 (2nd Cir. 2001), cited on page 94 of the Grievants' brief, the court stated:

> The doctrine of equitable estoppel is properly invoked where the enforcement of the rights of one party would work an injustice upon the other party due to the latter's justifiable reliance upon the former's words or conduct. Under federal law, a party may be estopped from pursuing a claim or defense where: 1) the party to be estopped makes a misrepresentation of fact to the other party with reason to believe that the other party will rely upon it; 2) and the other party reasonably relies upon it; 3) to her detriment.

Here, the Grievants' failure to accurately report their alleged over-tour work, despite their clear understanding of the proper procedure, was relied upon by HUD in its budgeting and other decisions, and it clearly worked to HUD's detriment in that HUD was unable to control overtime. It is important to emphasize that the misrepresentation that triggers equitable estoppel may even be one that was made honestly and in good faith, as the court said:

> The Restatement, while requiring a "definite misrepresentation," does not require any intent to deceive by the party to be estopped. Restatement (Second) of Torts at §894(1). In the Comment section, the Restatement makes clear that estoppel is appropriate even where "the one making the representation believes that his statement is true," and, moreover, "it is immaterial whether the person making the representation exercised due care in making the statement."

274 F.3d at 726. Applying this rule, the Grievants' claims would be absolutely foreclosed.

The Grievants open their argument on page 17 by asserting that: "OPM provisions provide that employees should not be penalized for the failure of the Agency

to keep proper records." No such OPM provisions are actually cited, nor is the Agency aware of such provisions. In any case, as already discussed, there is no evidence that the HUD did not keep proper records. As shown above, HUD kept records of hundreds of thousands of dollars worth of overtime, comp-time and credit hours claimed by the Grievants. As Dr. Johnson acknowledged, "Obviously, if I got 200 credit hours or 190 credit hours, I would have to have requested it." Tr. (8/30) at 209. Of course, HUD could not keep records of that which its employees chose not to report; for example, when Dr. Johnson made the unilateral decision not to report his time because "it's a pain." Tr. (8/30) at 120.

The Evidence of Over-Tour Work by a Handful of 360s from a Handful of Offices Was Too Vague and Conclusory to Satisfy the Union's Burden of Proof

As the Grievants admit in the heading on page 17 of their brief, the burden is on the Grievants to show the amount and extent of over-tour work by a just and reasonable inference. As discussed in HUD's initial brief, the Grievants' have failed to satisfy this burden. The Grievants' evidence -- especially the affidavits, but also the live testimony -- was vague and conclusory. The 26 affidavits make only 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.,* PFF ¶¶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. Many of the Grievants' witnesses were not credible and some -- notably Jessyl Ann Woods, Diane Whitfield and Richard Anthony -- were caught in outright contradictions.

The Claimed Pressure to Work Over-Tour Hours is Not Supported by the Evidence

Case law makes clear that part of the inquiry into whether over-tour work has been shown by just and reasonable inference is whether there is a reasonable relationship between the amount of work claimed and the work output accomplished. *See* cases cited on page 128 of HUD's initial brief. Here, 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. Indeed, the evidence showed that 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. 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. 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. Thus, in practice, 360 Investigators 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. Interestingly, 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. In contrast, there were no overtime claims from the three best performing offices -- New York, Boston and San Francisco. *See id.*

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. Thus their time did not benefit the Agency and is not "work." For example, 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. In short, because the amount of over-tour work being claimed is not consistent with the amount of work output that was accomplished, no just and reasonable inference is possible that the Grievants actually worked the amount of time they claim to have worked.[19] The Grievants' evidence certainly did not prove that "the Grievants did ***regularly*** perform suffer or permit overtime," as the Grievants claim on page 17 of their brief (emphasis added). Moreover, even if that statement had been proven, "regularly" is not an "amount" that the Arbitrator can award. Indeed, on page 128 of their brief, the Grievants admit that they cannot quantify their damages.

On page 17, the Grievants cite *Bloch v. Bell*, 63 F.Supp. 863 (W.D. Kentucky 1945), as laying out "the framework for establishing the burden on the employee as showing by a just and reasonable inference the amount of overtime work performed." Significantly, the court in *Bloch v. Bell* **denied** the employees' overtime claims which consisted of a claim that they worked "two hours during the five regular workdays." *Id.* at 866. Such an estimate, the court said was "too uncertain and indefinite." *Id.* at 865. The only claim that the court did allow in that case was a claim for Saturday work because independent evidence established the hours that the plant was open for work on Saturdays and that the plaintiff definitely worked all of the Saturdays that the plant was open. *Id.* at 866. In the present case, there was no evidence that the office is open

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[19] To be clear, this is not to say that an inefficient employee does not have to be paid for his inefficient work. Here the question is whether the evidence presented by the Grievants permits a just and reasonable inference that they actually worked a large number of additional hours. It does not.

at certain hours on Saturdays and that the majority of employees routinely show up for work.

George Lawley & Son Corp. v. South, 140 F.2d 439 (1st Cir. 1944), discussed on page 19 of the Grievants' brief, is likewise distinguishable. There, the plaintiff testified ***about specific occasions of overtime work*** based on entries in his wife's diary. Here, the Grievants are referring to specific e-mails and screenshots to "refresh" their "memories" of having worked ***on average*** so-and-so many hours extra every week for six years. As the court noted in *George Lawley & Son*, "the plaintiff must produce evidence definite enough to permit a finding without resort to guess and conjecture that he worked ***some particular number of hours***." *Id.* at 441 (emphasis added).[20] It also should be noted that the jury in *George Lawley & Sons* was asked to decide as a factual matter whether the plaintiff acted deceitfully in not keeping accurate time records, and the jury expressly found as a factual matter that he did not act deceitfully. *Id.* at 443. Here, in contrast, Grievant after Grievant admitted submitting incorrect time records.

On page 25, the Grievants cite *Cunningham v. Gibson Electric Co., Inc.*, 43 F.Supp.2d 965 (N.D. Ill. 1999), in which the plaintiff reconstructed his overtime work by referring to his personal calendar. This case is distinguishable in exactly the same way as *George Lawley & Son*. In *Cunningham*, the plaintiff testified ***about specific occasions of overtime work*** based on entries in his wife's diary. Here, there were no diaries and no calendars. Rather, the Grievants referred to e-mails and screenshots from specific days to "refresh" their "memories" of having worked ***on average*** so-and-so

[20] And, even if the Grievants' claims were more than guess and conjecture, there still would need to be evidence that the supervisors knew or should have known of the overtour work ***and*** had the opportunity to prevent it.

many hours extra every week for six years. As the court noted in *George Lawley & Son*, "the plaintiff must produce evidence definite enough to permit a finding without resort to guess and conjecture that he worked ***some particular number of hours***." *Id.* at 441 (emphasis added). This has not happened in the present case.

Fanelli v. United States Gypsum Co., 141 F.2d 216 (2nd Cir. 1944), another case cited by the Grievants in this section, is also distinguishable. In *Fanelli*, the employee's entire tenure in the job lasted only five months and his overtime claims were recollected from a memorandum that he composed one month after his discharge, *i.e.*, at most six months after he worked the overtime. Here, the employees -- in particular the affiants -- purported to reconstruct six years worth of overtime with, in most cases, no explanation of how the time was reconstructed. Indeed, some, like Dr. Johnson, admitted they had great difficulty with the reconstruction. *See* 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 . . .").

Significantly, despite the fact that the memorandum that refreshed the employee's memory in *Fanelli* had been composed almost contemporaneously with the work--

> the trial judge instructed the jury that the memorandum was not to be considered as 'an original document . . . indicative of the fact that he worked overtime,' did not 'verify' plaintiff's testimony 'in any way' and did not 'make his testimony any stronger;' and the trial judge admonished the jury in his final charge that 'there is no document to prove the statement' of the plaintiff.

141 F.2d at 218. Here, many of the Grievants also offered memoranda, charts or tables that purported to summarize their over-tour hours. As the judge did in *Fanelli*, the

Arbitrator here correctly recognized during the hearing that those documents are not evidence. For example, the Arbitrator correctly said about Union Exhibit 19:

> I'm going to accept it but not as evidence. I'm going to accept it as a summary that she prepared of what she believes she worked, but it doesn't -- it doesn't go to prove anything. It's just a chart, is all it is. But it's not -- I don't consider it at this point to be evidence.

Tr. (8/31) at 69.[21] The Arbitrator similarly said about Union Exhibit 12, "I'm not accepting it as evidence that he worked this time." Tr. (8/30) at 97.[22]

Each of the other cases cited by the Grievants in this section of their brief similarly highlights the heavy burden that a plaintiff must meet, and that the Grievants have not met. As stated in *Joseph v. Ray*, 139 F.2d 409, 411 (10th Cir. 1943), "[T]he judgment must be based upon facts, not speculation and conjecture." Or, as stated with a slightly different twist in *Johnson v. Kierks Lumber & Coal Co.*, 130 F.2d 115, 118 (8th Cir. 1942), "[T]he evidence to sustain this burden must be definite and certain." The Grievants' evidence here was anything but "definite and certain."

On page 20 of their brief, the Grievants cite *Woods v. Wilkerson*, 40 F.Supp. 131, 133 (W.D. La. 1941), a case in which the plaintiff's claims were denied. The judge wrote there:

> The perplexing question with the court is that no one can arrive by direct evidence at exactly how many hours per day this type of laborer is entitled to for services rendered.

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[21] The Agency presumes that the Grievants brief simply made a poor choice of words when they represented Union Exhibit 19 as "***showing*** overtour work performed between 2002 until 2006." Union's Closing Brief at 64 (emphasis added).

[22] Again, HUD presumes it was simply inartful phrasing when the Grievants' brief said about Union Exhibit 12: "[T]he charts also ***indicate*** that he came in early and worked through lunch on some occasions." Union's Closing Brief at 64 (emphasis added). As the Arbitrator recognized, the charts indicate nothing except Dr. Johnson's self-serving description of his claim.

Id. at 133. To resolve this dilemma, the judge examined the working hours of the individual who succeeded the plaintiff in the job. And, finding that the successor worked no overtime, the judge denied the plaintiff's claims.

Here, likewise, the evidence showed that 360s do not work under any firm deadlines and therefore have no need to work more than 40 hours in a workweek in order to accomplish their jobs. 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 an investigator doesn't complete a case within a hundred days would not prevent that individual from getting an "outstanding" rating. Tr. (11/1) at 108; *see also* PFF ¶¶34-39, 41. As in *Woods v. Wilkerson*, this comparison between the employees' claims and the evidence regarding the actual job requirements is very meaningful.

Another case cited on page 20 of the Grievants' brief is *Lowrimoore v. Union Bag & Paper Co.*, 30 F.Supp. 647 (S.D. Ga. 1939). This, too, was a case in which the plaintiffs recovered nothing because there was "no sufficient, satisfactory evidence upon which could be fairly found a judgment showing the number of hours that the [plaintiffs] were at work." *Id.* at 649.

The Grievants close this section of the brief by citing several cases in which the judge accepted employees' recollections of hours worked because the employer kept no records. *See, e.g., Martin v. Tony & Susan Alamo Found.,* 952 F.2d 1050, 1051 (8th Cir. 1992); *Mumbower v. Callicott*, 526 F.2d 1183, 1186 (8th Cir. 1975). These cases are inapposite here, where the employer did keep records. The fact that the employees now challenge the accuracy of the records which they themselves helped create, and whose accuracy they certified, does not mean that HUD kept no records.

Reliance on Non-OPM Cases is Unwarranted

Beginning on page 22 of their brief, the Grievants attempt to argue that HUD had actual or constructive knowledge of the Grievants' alleged over-tour work. At this point, a general observation is in order regarding the cases cited by the Grievants. Virtually none of the cases cited in the Union's Closing Brief arose in the Federal sector. This is significant because of an important difference between the definition of "suffered or permitted" work under the Department of Labor regulations applicable to private sector cases and the OPM definition applicable to HUD.[23] DOL's regulation at 29 C.F.R. §785.11 states:

> Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.

In contrast, OPM's regulation at 5 C.F.R. §551.104 states:

> 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***. [Emphasis added]

The Arbitrator should take careful note of the highlighted phrase in OPM's regulation, which does not have a direct counterpart in DOL's regulation. Thus, to the extent that any private sector case found that overtime was suffered or permitted because the

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[23] OPM, not DOL, administers the FLSA with respect to HUD employees. *See* FLSA §4(f) (29 U.S.C. §204(f)); 5 C.F.R. §551.102(a). "[T]he OPM regulations are obviously the first point of reference that federal employers must use in implementing the FLSA[.]" *Adams v. United States*, 26 Cl.Ct. 782, 786 (1992). In case of a conflict, "the OPM regulations are presumptively controlling." *Id.*

employer knew or should have known about the work, but the case did not include a finding that the plaintiff's supervisor had the opportunity to prevent the work from being performed, the relevance of that case to the grievance against this Agency is thereby diminished.

An example of such a case is *Pabst v. Oklahoma Gas & Electric Co.*, 228 F.3d 1128 (10th Cir. 2000), cited on page 22 of the Union's Closing Brief. In that private sector case, unlike in this Federal sector arbitration, it was not at issue whether the supervisors had the opportunity to prevent over-tour work. In addition, the court found in that case that it would have been futile for employees to report overtime work because the employer had defined overtime work as non-compensable. 228 F.3d at 1133.

That is not the case here, where the employer paid for $1,720,000.00 worth of over-tour work for 360s during the grievance period. *See* Joint Exhibit 2 (TC21, 29 and 32). Note that the NFC Data extracted in the table on pages 27-46 above reflects over-tour compensation only for those Grievants who testified or submitted affidavits in this arbitration. Considering the fact that almost every grievant who submitted evidence in this proceeding has been paid for reported over-tour work, HUD is at a loss to understand how the Grievants could testify under oath that they were repeatedly told that no such compensation was available.

<u>The *Pabst* Case Cited by the Grievants Does Indicate that HUD Acted in Good Faith</u>

However, *Pabst, supra,* is significant because the trial court in *Pabst* held, and the Tenth Circuit affirmed, that the employer had shown good faith. The burden applied by the court to reach these findings was rather low. As the Tenth Circuit explained:

> Admittedly, the record here is devoid of the sort of evidence -- reliance on attorneys or other experts in personnel matters -- that courts have found particularly persuasive in holding FLSA violations reasonable. Nevertheless, because the law of on-call time under the FLSA is fact-sensitive, and because the facts relied upon by the district court lend at least some support to the conclusion that OG&E acted in good faith under a reasonable, albeit mistaken, belief that its particular on-call scheme was non-compensable under the statute, we find no abuse of discretion.

228 F.3d at 1136-37. Like the on-call scheme at issue in *Pabst*, the exempt or nonexempt status of an employee under the FLSA also is fact sensitive. Indeed, as Ms. Federoff testified, the FLSA "is a very complex area of the law." Tr. (9/11) at 135. Thus, even if HUD had violated the FLSA by classifying 360s as exempt -- which is not the case -- the Arbitrator should find that it was a good faith mistake, and no liquidated damages are due.

The evidence in this matter showed that, once the grievance was filed, HUD promptly began to review the exempt status of its employees, reasonably selecting the most numerous job series to review first. PFF ¶471. This case is thus similar to *Bratt v. County of Los Angeles*, 912 F.2d 1066 (9th Cir. 1990), where the court said:

> While the Employees present arguments that the County did not do as good a job as it could have done, they fail to show that the County had anything other than an honest intention to comply with the Act. The person assigned to make the coverage decisions arguably was adequately qualified, and his decisions whether to make more extensive studies of individual jobs and corresponding data involved practical considerations on how best to complete the required evaluations in a timely fashion.

Id. at 1072. Based on this evidence, the court found that the employer had acted in good faith. Under the identical facts that are present in HUD's case, the Arbitrator must find that HUD acted in good faith.

The *Pabst* Case Cited by the Grievants Also Indicates that HUD Did Not Act Willfully

Also, the court said in *Pabst, supra*:

> The same facts that support the district court's conclusion that OG&E's failure to compensate plaintiffs for all of their on-call time was reasonable and in good faith support the district court's conclusion that OG&E's violation of the FLSA was not willful.

222 F.3d at 1137. An employer acts willfully when he shows reckless disregard for the requirements of the FLSA. *See Mireles V. Frio Foods*, 899 F.2d 1407, 1416 (5th Cir. 1990). However, as explained in *Mireles*, an employer can overcome the "reckless disregard" component of the willfulness test by a very modest showing. Simply failing to seek legal advice concerning pay practices does not evidence a willful violation. *Id.*. Nor is a negligent violation of the statute a willful violation. *Id.* Indeed, in *Mireles*, all the employee did was review some "brochures and pamphlets," and that was sufficient to avoid an extended limitations period. *Id.* Here, HUD did more than that, including beginning promptly 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.

In *Walton v. United Consumers Club, Inc.*, 786 F.2d 303 (7th Cir. 1986), the appellate court reversed the trial court's ruling that the employer's FLSA violation was willful because the employer knew the FLSA was "in the picture." *Id.* at 311. "In the picture" is simply not the applicable standard for determining willfulness. Ms. Federoff's alleged statement to Mr. Mesewicz that "I think you have a Fair Labor Standards Act problem" (Tr. (9/11) at 130; *see also id.* at 124, 138) is akin to telling Mr. Mesewicz that

the FLSA is "in the picture." That is not grounds for finding that HUD violated the FLSA willfully (if at all), and thus an extended statute of limitations is not proper.

In *Cox v. Brookshire Grocery Co.*, 919 F.2d 354 (5th Cir. 1990), the court found that the employer's FLSA violations were not willful because the employer "offered reasonable and prudent justifications for its decision" to treat the employee as exempt. *Id.* at 356. Here, too, the Agency has offered reasonable and prudent justifications for treating GS-360s at the GS-11,12,13 and above levels as exempt. In fact, this very Arbitrator presided over evidentiary hearings in September 2005 at which the Agency made reasoned arguments and filed a brief defending the position that these employees are exempt under applicable law. The issue apparently is complex enough that no decision has been issued yet. Moreover, even the Union's president admitted that the FLSA "is a very complex area of the law." Tr. (9/11) at 135. Thus, even if the Arbitrator were eventually to rule that GS-360s at some levels are not exempt, that would not mean that HUD's position was not reasonable. Moreover, even if the employer acted "unreasonably," he did not necessarily act "willfully." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988).

For all of these reasons, if HUD violated the FLSA, the Arbitrator should find that any such violation was not willful, and the maximum three-year statute of limitations should not apply.

The Union Has Not Proved that 360s Were Directed to Perform Over-tour Work for which They Received No Compensation

On page 23 of their brief, the Grievants attempt to distinguish the present case from *Davis v. Food Lion, supra*. The Grievants assert: "Unlike the facts in *Davis*, where employees were instructed not to perform after-hours duties, the evidence in this matter established that employees were urged to perform work on cases outside of the normal

tour of duty [because the] employee handbook instructs the Grievants to contact individuals after-hours." However, that is not what the evidence showed. As already discussed, the HUD handbook for 360s states that only investigators may need to contact witnesses outside of "business" hours. Union Ex. 42 at 4. And, it requires only the "reasonable efforts of the investigator." *Id.* at 1. This does not require 360s to perform uncompensated work at home or on weekends since that is more than "reasonable efforts" and since many 360s already have tours of duty that are outside of "business" hours. *See* page 49 above. Moreover, an EOS can request comp-time or credit hours to make a late night phone call, and some do make such requests. *See id.* At the risk of excessive repetition, the table on pages 27-46 clearly demonstrates that such compensation was routinely available. Thus, as stated previously, the argument that the handbook required calls to be made outside of business hours is another proverbial red herring.

The DOL Cases Cited by the Grievants Are Inapposite

On pages 23-24, the Grievants cite several DOL regulations regarding the definition of working time. As already noted, those regulations are inapplicable to the extent that OPM's regulations impose a narrower definition of working time -- in particular, the requirement that supervisors have the opportunity to prevent work from being performed. 5 C.F.R. §551.104. It is simply a misstatement of the law to say, as the Grievants do on page 24, that: "The key inquiry is whether the employer ***knew or had any reason to believe*** work was being performed. 29 C.F.R. §785.12. Actual or constructive knowledge of over-tour work will be sufficient to show the time devoted to that work is compensable" (emphasis in original). Aside from the fact that the Grievants

misquote section 785.12, which actually does not contain the word "any," the inquiry described is only part of the inquiry under OPM's rules, but not all of it.

It follows that the cases cited by the Grievants beginning on page 24 of their brief are of limited relevance to this case. For example, *Reich v. Department of Conservation & Natural Resources*, 28 F.3d 1076 (11th Cir. 1994), involved an Alabama state agency, not a federal agency subject to OPM. Thus, it did not involve the OPM standard for defining work. Accordingly, the finding that work had been performed in that without any inquiry as to whether supervisors had an opportunity to prevent the work being done is not helpful to the Arbitrator in this case.

Directions to Cease Over-Tour Work after it Came to Supervisors' Attentions Do Not Prove Violations or Willfulness

What is useful in *Reich v. Department of Conservation* is the court's finding that the employer did not violate the FLSA willfully. The court said:

> Although the Department should have done more to ameliorate the problem, it did at least attempt to address it, albeit ineffectively. . . . Its failure to rectify this troublesome situation can better be described as resulting from negligence rather than from willfulness.

28 F.3d at 1084.

Here, too, the evidence showed once HUD became aware that 360s were claiming large amounts of overtime, the supervisors attempted to rein in the practice. However, some employees in this case continued to flout and violate the rules. For example, Mr. Maurice McGough testified about Dr. Johnson:

> No, I did not observe Don Johnson working off tour hours during the period of time I supervised him. I did become aware just the week before last that he was working tour, pas[t] tour hours because he came into my office at approximately 6:20, 6:30, to talk to me.

> Q. Can you tell us what, what happened and what he said and what you said?
>
> A. Well, he came in to have essentially, it was a more in the nature of a personal conversation. And we spoke for a few minutes, when I noticed what time it was, and I asked him what time he had come in that morning and he told me had come in at approximately nine o'clock. And I said, you know, Don, you have to go home. I mean, you are working pas[t] core hours and you have to go home, and, and please give me a credit hour or comp time request for the time that you have worked over eight hours today and I will be glad to sign it. So, he left and then subsequent to that, I sent an e-mail to his immediate supervisor, Gordon Patterson. . . . So, I sent Gordy an e-mail message indicating that I was aware that Don had worked pas[t] core hours on that day, I believe it was a Thursday, two weeks ago this coming Thursday. And directed Gordy to instruct Don not to do that anymore.
>
> Q. Are you aware whether Mr. Patterson had ever directed him not to work pas[t] core hours before that?
>
> A. Gordon had directed him not to work pas[t] core hours. Gordon had, since he had assumed the position of Branch Chief in February of 2006, he had instituted regularly scheduled staff meetings with his branch. I know during one of those meetings early on, he gave a general instruction to the staff not to work beyond their regular tour of duty without getting authorization, compensation. And I know that he specifically communicated that to Don, verbally on at least two occasions and prior to the instance that I just described, once in writing.

Tr. (9/20) at 97-99. Mr. McGough further testified:

> I was somewhat concerned and, and a little bit mystified as to why Don came into my office, he had, he had essentially just completed testifying to the fact that he had been suffered to, that Management had suffered him to work uncompensated overtime, and then within a matter of days, he shows up in my office, clearly pas[t] his tour of duty. I was somewhat mystified.
>
> Q. Why?
>
> A. Well, I guess since he had been advised not to work beyond his tour of duty, and he had testified that to the extent that he felt that working beyond his tour of duty was a

> violation of the Fair Labor Standards Act, why he would continue to do so. Obviously, we didn't want him to do it. And obviously, he took exception to having to, in his mind, do it. So, I was confused. Why are you here?

Tr. (9/20) at 140.[24] Thus, as in *Reich v. Department of Conservation*, any FLSA violation here must be deemed at most negligent, but not willful.

Also on page 24 of their brief, the Grievants cite *Lyle v Food Lion, Inc.*, 954 F.2d 984 (4th Cir. 1992). Aside from not being a Federal sector case, that case is distinguishable because the evidence in the present case showed that 360s could finish their duties within the allotted time and that there were no adverse consequences to those who did not finish.

Also on page 25, the Grievants repeat the false statement that the Time and Attendance Records "recorded only and exactly 8 hours per day 5 days per week" and "accounted for only 8 hours per day or 80 hours per pay period." As the prior discussion and the analysis of the approximately 1,000 instances of over-tour compensation makes clear, this argument is both unfounded and unprincipled.

Not surprisingly, the Grievants close their discussion of "knew or should have known" without citing the case of *Newton v. City of Henderson*, 47 F.3d 746 (5th Cir. 1995). In that case, the Fifth Circuit rendered judgment in favor of the employer, reversing the district court's ruling. The court found that the plaintiff's supervisors explicitly told him not to work unauthorized overtime hours. In addition, the employer had established specific procedures to be followed in order to receive payment for overtime including submitting the request for overtime within 72 hours of the time

[24] Of course, the fact that Dr. Johnson was in the office at that particular moment does not prove he worked on that or any other occasion, since he admitted engaging in personal pursuits (studying for a promotion) at work.

worked. The court found that the plaintiff ignored these procedures, much as some of the 360s here ignored HUD's procedures (*e.g.*, Dr. Johnson, who considered them a "pain"). The court also rejected the plaintiff's argument that the employer should have known that he worked overtime because it had access to information regarding all the activities performed by the plaintiff. The court observed, "If we were to hold that the [employer] had constructive knowledge that [plaintiff] was working overtime because [plaintiff's supervisor] had the ability to investigate whether or not [plaintiff] was truthfully filling out the [employer's] payroll forms, we would essentially be stating that the [employer] did not have the right to require an employee to adhere to its procedures for claiming overtime." *Id.* at 749.

<u>The Grievants Make More Spurious Adverse Inference Requests</u>

Beginning on page 26, the Grievants turn to their request that an adverse inference be drawn from the unavailability of certain records. HUD has already responded to this argument in its initial brief and beginning on page 20 above. Simply put, there is not a shred of evidence in the record that the Agency has destroyed a single document. There also was no evidence that the scan records sought by the Grievants were "readily available," as assumed by the Grievants on page 26.

The case cited on page 26 of the Grievants' brief as a basis for an adverse inference -- *Dept. of Commerce, NOAA, Nat'l Weather Serv. and Nat'l Weather Serv. Employees Org.*, 38 FLRA 120 (1990), *enforcement denied*, *FLRA v. Dept. of Commerce, NOAA*, 962 F.2d 1055 (D.C. Cir. 1992) -- is clearly distinguishable. First, the FLRA said in *Dept. of Commerce* that: "[T]he record reflects that they can be requested when needed." There was no such evidence here, except the speculation of the Grievants themselves, which is entitled to no weight at all.

Second, the FLRA said in *Dept. of Commerce* that: “[T]he information is within the control of an agency.” Here, the evidence was that many of the records are in the control of commercial landlords.

Third, the FLRA said in *Dept. of Commerce* that: “In this case, there was an arrangement between the Respondent and the NOAA” for services including providing the desired documents. There was no evidence of such an arrangement in the present case between HUD and any of the record custodians.

Finally, the Grievants’ acknowledge on page 27 of their brief that all HUD was required to do to avoid an adverse inference was to “mak[e] an effort to obtain and deliver the information to the Union.” As Union Exhibit 11 shows, HUD provided abundant scan records and sign-in/sign-out sheets to the Grievants. Clearly HUD did make “an effort” to obtain and deliver the information to the Union, but that effort was only partially successful. As the Grievants’ themselves testified, the information simply was not in HUD’s possession. *See, e.g.,* Tr. (8/30) at 70, 259.

In any case, the entire notion that there is something in the scan or sign-in/sign-out records that HUD would take the trouble to hide is off-base -- even presuming that HUD would hide any evidence, which obviously is not the case considering the hundreds of thousands of pages of documents that have been turned over to the Grievants. As already discussed, it is plainly incorrect to assume that the records would have been adverse to HUD if they could have been 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. Given these facts, it is impossible to draw any inference regarding the missing records. It is at least as likely that they support HUD as

it is possible that they would have hurt HUD. For all of these reasons, no adverse inference is appropriate.

The Understaffing Red Herring

On page 27 of their brief, the Grievants assert that: "The nature and amount of work assigned to the Grievants since 2000 has increased while the number of employees has decreased. The Agency has an understaffing problem." Significantly, the evidence cited by the Union ("Arb. 9.6.06, P.68-69; UE 36, 37, 54") does not support the preceding sentences. Similarly, they do not support the claim that "the workload has increased ***exponentially*** over the past several years."

First, on the cited pages of the September 6, 2006 transcript (which correspond to page 59 in the 21-line version), the Grievants' counsel elicited from ***one*** Grievant "your impression as opposed to absolute numbers" regarding the staffing level in ***one*** office -- Fort Worth -- since 2002, not 2000. Second, Union Exhibit 36 addresses only staffing in 2005 and 2006, not any other years. Third, Union Exhibit 37 contains no information at all about FHEO staffing, only a general comment that a contractor recommended at some point that HUD increase its overall staffing. This is not probative in any way regarding the workload of 360s. Finally, Union Exhibit 54 contains the 26 affidavits, which do not appear to contain any information relevant to staffing needs.

There similarly is no evidence for the assertion on page 27 that employees had to "double or even triple their workloads." In fact the evidence showed that HUD did not pressure employees to "get the job done," and, by and large, the Grievants did not "get the job done" as well as they claim. PFF ¶¶34-41, 99-102, 193-194, 266, 291.

On page 28 of their brief, the Grievants ask the Arbitrator to take judicial notice of information in HUD's FY 2008 budget request. HUD does not object to that request

insofar as it relates to historical data contained therein, but does object to drawing any conclusions from prognostications about the future. Significantly, page W-4 of the budget request makes clear that the "mission critical" staffing level for FHEO is only ***360*** non-supervisory (*i.e.*, GS-0360-09/11/12/13) positions in the field and another ***40*** at headquarters. On page W-5, the budget request confirms that any understaffing has no impact on 360s ability to complete their investigations. Instead, the shortfall is covered by reducing other work. Specifically, the budget request states:

> The loss of FTEs [*i.e.*, Full-Time Equivalents] has resulted in a reduction in the level of service that FHEO is able to provide to its constituency. It has required FHEO to shift resources away from other legislated civil rights work in order to continue efforts to reduce the number of housing complaints investigated and administratively processed within the 100 day time period prescribed by the Fair Housing Act. For example, the reduction of FTEs has compromised FHEO's ability to conduct compliance reviews and provide monitoring and technical assistance to grantees and other constituencies and to provide education and outreach to the public. Further, at the current FTE levels, FHEO is unable to engage in meaningful succession planning.

Id. Coupled with the evidence that most investigations are not completed in 100 days, the information in this budget request really is, for the most part, irrelevant to this case.

<u>The Budget Request Referred to by the Grievants Confirms That Investigators Can Complete Their work in a Forty-Hour Week</u>

Interestingly, the Grievants cite information from the budget request stating that a Title VIII case takes an average of 117 to 120 hours to complete. Union's Closing Brief at 28. This equates to almost three 40-hour weeks, *i.e.*, 21 or fewer calendar days, which is about 20% of the of the 100-day goal to process a Title VIII case.

This means that an "average" Equal Opportunity Specialist should be able to complete five cases within any 100-day period, and 16 cases a year (allowing four

weeks for vacation) while working only forty hours per week. In contrast, 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. 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), half of what a GS-360 should be able to accomplish working 40-hours a week and taking four weeks vacation. 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.

As mentioned above, the budget request cited by the Grievants confirms that any understaffing has little or no impact on 360s ability to complete their investigations because any shortfall is covered by reducing other work. This is consistent with the testimony of Mr. Charles Brandt regarding the Resource Estimation Allocation Process ("REAP") system.[25] Mr. Brandt explained that in allocating resources, work is prioritized based on its importance to HUD's mission. Tr. (9/21) at 98-99. Mr. Brandt referred to what he informally called "workload drivers" and explained:

> We go through many Title 8 complaints that -- they have to be processed, but there's nothing that says you have to do six handbooks a year or you have to develop five training -- try training sessions and stuff like that.

Id. at 97. He further explained:

> [W]e like to think of work in terms of what we call required, things that have to be done, important, and nice to do. So that some of the work that goes in that goes into that "should-take time", is in the "nice to work", "nice to do" category. And so it necessarily wouldn't be a show stopper it didn't get done -- and again, things like updating the

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[25] Mr. Brandt is the Branch Chief of the Productivity Analysis and Support Branch, which is part of the Budget Management and Systems Development Division in the Office of Budget, which is in turn part of HUD's Office of the Chief Financial Officer.

> handbook, the database administration, doing some research, you know, background work and checks and things like that. Employees keeping up to date on the way -- trends and things like that going on. So that would be one element why it might be possible to get the job done without having -- being staffed up to the full REAP baseline.
>
> The other thing is some of the -- some of the estimates in REAP are forward looking. In other words, we come in and we say -- they say, "You know, next year we're going to be doing this and this is new, we haven't done this before," so we attempt to measure it. Or they say -- it turns out that they say, "Don't do it," or, you know, it doesn't come -- it's not as much work as they anticipated. I mean, it's not like they're trying to fool us, it's just that these are estimates and, you know, the estimates are only as good as the people who make them as things develop.

Id. at 102-103.

The Grievants make the unfounded assertion on page 98 of their brief that although some work was only "nice to do" and not necessary, "[t]he employees [ ] did perform that work for the benefit of the Agency." No citation to the record accompanies that statement, nor does anything in the record support it. In fact, what Mr. Brandt made clear was that the "nice to do" work simply did not get done if there were not adequate resources. The statement on page 100 of the Grievants' brief that, "The union contends that bargaining unit employees completed the work without the recommended number of REAP FTEs," is similarly unsupported argument, not fact.

In short, it clearly would be wrong for the Arbitrator to draw any conclusions about the need for overtime work by specific Grievants -- many of whom are consistently performing below standard even with light caseloads -- from generalized information such as budget requests and REAP data. There simply is no connection between the two inquiries.

The Grievants Cite More Distinguishable Private Sector Cases

On page 29 of their brief, the Grievants again cite the DOL standard rather than the narrower OPM standard for suffered or permitted overtime. They also cite several private sector cases which are clearly distinguishable from the present circumstances. In one of those cases, *Handler v. Thrasher*, 191 F.2d 120 (10th Cir. 1951), the court found that "the employer knew that [the plaintiff] was on duty seven days per week." *Id.* at 123. That certainly was not true in the present arbitration. Another case cited on page 29, *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508 (5th Cir. 1969), was a child labor case in which the employer claimed to not know that employees were bringing their children to the workplace to help with their work. The court rejected this defense, noting that all the work was done on one premises which "was of such a size that everyone in it could see everyone else." 407 F.2d at 513. Under these circumstances, the court said--

> it is not lightly to be presumed that an employer can remain ignorant for a protracted period of time of the personnel who openly, regularly, and within the framework of his business confer substantial benefits upon him.

Id.

In the present case, in contrast, the employees are claiming to have worked at home, on travel, in taxis, on a golf-cart, on a boyfriend's couch, and possibly in other places, all as detailed in HUD's initial brief. Moreover, even when 360s work in the office, some of them do not have supervisors in the same city. And, even among those who have supervisors in the same city, many work in cubicles in large offices where they are not necessarily visible to their supervisors at any given time. As 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.

Rather than supporting any of the Grievants' arguments, *Gulf King Shrimp* strongly supports HUD's defense in this case. As the evidence showed, most of the Grievants in this case have flexible tours-of-duty which allow them to vary their arrival and departure times on a daily basis. And, all of the Grievants have a flexible lunch period which allows them to take lunch within a two-to-three hour window rather than at a fixed time. In similar circumstances, the *Gulf King Shrimp* court said:

> [T]he employer could have observed his employees at work and still have no inkling that their regular time had expired. Since the workmen were allowed to take their lunch hour whenever they chose, and did in fact take it at different hours of the day, any failure to take advantage of the free time which they were allotted was a matter exclusively within their knowledge and not readily accessible to the employer.

407 F.2d at 514 (citing *Fox v. Summit King Mines*, 143 F.2d 926 (9th Cir. 1944)). The same is true in the present case, as the EOS quoted in the previous paragraph admitted.

<u>The Union Continues to Make Statements Unsupported by the Record</u>

Also on page 29, the Grievants deny the applicability of the *de minimis* rule and assert, ***with no citation to the record***, that: "The overtime work at issue always exceeded 7.5 minutes." Not only was there no such evidence, the evidence showed the opposite. For example, some of Ms. Cardullo's e-mails offered as evidence 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). Not one of those e-mails would justify 7.5 minutes of work.

Likewise, many of Ms. Buchanan's e-mails reproduced in Union Exhibit 28 show times 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)). Similarly, Union Exhibit 71 contains two e-mails, each of which is 1.5 lines long and would have taken a *de minimis* amount of time to compose and send.

Beginning on page 30 and continuing for most of the remainder of their brief, the Grievants provide their summary of the evidence. The Agency will not address the Grievants' assertions sentence-by-sentence and instead incorporates by reference and reasserts all 478 of its Proposed Findings of Fact. HUD's Brief at 4-110.

Indeed, there is no need to refute the Grievants' allegations point-by-point, since one need only read the very first paragraph on page 30 regarding Ms. Cardullo's testimony to see how unreliable the Grievants' account of the testimony is. On the transcript pages cited by the Grievants, Ms. Cardullo did not say she arrives "by" 8:00 A.M. more than 99% of the time, which seemingly was meant to imply that she frequently arrives earlier. Rather, the testimony was that she arrives "at" 8:00 A.M. more than 99% of the time. The Grievants' counsel even asked her, "And how do you know that?", to which she replied:

> I take the train in every morning, so I get in the same time. If the train is a little late, I might get in five or 10 minutes late.

Tr. (8/29) at 38 (in the 21-line version, and 43-44 in the Grievants' version). She freely admitted that she never arrived early. Nor does it appear that she took leave all the times she was 10 minutes late.

Likewise, on page 31 of their brief, the Grievants cite Ms. Cardullo as saying that her supervisors "regularly" saw her working and eating at her desk. There was

absolutely no such testimony on the cited transcript pages. In fact Ms. Cardullo said on the cited page, "My supervisor would ***occasionally*** stop by the desk and see me working while I was eating" (emphasis added).

On page 32, the Grievants assert that Ms. Cardullo "sent emails" (plural) to her supervisor while on sick leave. In fact, her testimony on the cited page was: "Yes, I believe I sent an e-mail to my supervisor." A reasonable reading is that she was not certain whether she sent even one e-mail to her supervisor.

On the same page, the Grievants state that Ms. Cardullo regularly had discussions with her supervisor about not being able to meet the 100-day deadline. That claim does not support an assertion that Ms. Cardullo worked overtime, since the record showed that she had an extremely light caseload. In one year, she had only ***two*** cases (Tr. (9/13) at 250), which translates to the equivalent of 240 hours worth of work for the entire year. The average caseload in Ms. Cardullo's office is seven to nine cases per year (Tr. (9/13) at 251), half of what a GS-360 should be able to accomplish working 40-hours a week and taking four weeks vacation.

On page 34, the Grievants assert that Dr. Johnson's supervisors had actual knowledge of his over-tour work. Again, the cited transcript pages do not support that statement. The evidence showed only that 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.

Regarding the assertion that Dr. Johnson was under pressure to close his cases in 100 days, the evidence showed that 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), not because he needed to do so. Later Dr. Johnson testified that he completed many cases in "***under*** the hundred days" by working extra time (Tr. (8/30) at 184 (emphasis added)), implying that he did not necessarily need over-tour hours to simply meet his deadlines.

Moreover, significant evidence simply contradicted his testimony. Specifically, Dr. Johnson's performance appraisals in Union Exhibit 10 demonstrate that he 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.

Also, 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.

Finally, Dr. Johnson's performance appraisals also indicate that he worked with a significant degree of independence, a fact that he confirmed in his testimony. Union 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.

Indeed all of the Grievants who testified indicated quite clearly that they worked quite independently as they were really quite professional in their work. In fact Ms. Buchanan did not have her supervisor within 175 miles of her office.

On page 35, the Grievants assert that all of the over-tour work performed by Dr. Johnson "was Agency work and for its benefit." But Dr. Johnson's own testimony belies this claim since he 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. Also, when he stayed late, he made personal phone calls and browsed the internet. Tr. (8/30) at 114.

On pages 35-36, the Grievants quote one of Dr. Johnson's supervisors as allegedly saying, "Whether you like it or not, you have seniority in program operations; I'm going to need you." How this proves, or even suggests, that Dr. Johnson worked overtime is difficult to imagine. In any case, this self-serving statement by Dr. Johnson lacks any credibility. 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 establish 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 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.

On page 37, the Grievants again misuse their demonstrative Exhibit 12 ("Union Exhibit 12 indicates . . ."), about which the Arbitrator said, "I'm not accepting it as evidence that he worked this time." Tr. (8/30) at 97.

On page 38, the Grievants assert that Dr. Johnson's taxi driver "would see Dr. Johnson working[.]" Not surprisingly, the only evidence cited is Dr. Johnson's own self-serving statement. The taxi driver himself testified only as follows:

> Q. And do you ever observe what he is carrying when you pick him up in the morning?
>
> A. Some kind of folder, files or folders.
>
> Q. And did you ever observe what he is doing in the car?
>
> A. I can see that he is writing, sometimes reading and write.
>
> Q. How often do you see him reading and writing?
>
> A. Whenever I see from the rear view mirror, that is --
>
> Q. Hopefully you are watching the road most of the time.
>
> A. Yes, sir.
>
> Q. Okay. Whenever you look in the rear view mirror, what do you see him doing?
>
> A. Sometimes he is reading, sometimes writing.
>
> Q. Okay. And what, do you know what amount of the time while you are driving he is doing the reading and writing?
>
> A. What amount of time? I have never noticed, whenever I see from the rear view mirror, he is always doing something.

Tr. (9/6) at 108-109. It is very clear that the taxi driver had absolutely no idea what Dr. Johnson was doing in the back seat. He might have been working, but he just as well might have been studying for a promotion, doing crossword puzzles, or doing just about anything else. What is clear is that no supervisor was present to witness, know about, or have the opportunity to prevent this alleged work.

On page 39, the Grievants assert that on the day that Dr. Johnson traveled to Lisle, Illinois, he returned to his residence at 7:00 P.M. The taxi driver, however, testified that they left Lisle at 2:00 or 3:00 P.M. and the trip took 45 minutes. Tr. (9/6) at 109-111.

On the bottom of page 39, the Grievants make the wholly irrelevant assertion that: "Dr. [Johnson] ***may*** have laid a copy of the note on his (***Patterson?***) chair" (emphasis added; question mark in the original). The fact that Dr. Johnson testified that he ***may*** have -- but then again, may not have -- left a note on an unnamed person's chair -- whom the Grievants' counsel speculates was Mr. Patterson -- is not evidence of overtime work. It is, however, a metaphor for the quality of the Grievants' evidence in general.

On pages 42-44 of their brief, the Grievants summarize some of the testimony of Ms. Phyllis Bell. Ms. Bell claims to have worked 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. Indeed, the Grievants admit that, "Frequently, during onsite trips, the extra work is not planned[.]" Union's Closing Brief at 43. When supervisors are never given advance notice of an employee's over-tour work, there is little or nothing the supervisors can do to prevent the work from being performed. There was no evidence, for example, that

Ms. Bell called her supervisor from her travels to inform him that she would be performing unplanned over-tour work.

Also, it is not at all clear that Ms. Bell did perform over-tour work. She 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.

On page 44, the Grievants assert regarding Ms. Bell: "It was never made clear to her that she must get authorization to work over her regular hours." That statement is contradicted by the evidence that, 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. As shown in the NFC Data beginning on page 27 above, Ms. Bell earned credit hours more than 40 times during the grievance period -- an average of more than once a month during the first half of the grievance period -- and has also earned overtime during the grievance period.

On pages 45-51 of their brief, the Grievants discuss Ms. Jessyl Ann Woods. As discussed at some length in HUD's initial brief and above, Ms. Woods was the least credible of all the 360s who testified. The multiple inconsistencies in Ms. Woods' testimony are even reflected in consecutive paragraphs on page 46 of Grievants' brief -- incredibly, without any attempt from the Grievants to explain away the obvious contradiction. First the Grievants state: "She regularly arrived at 9:30 a.m." Then the Grievants state: "As many as three times per week, she would arrive early . . . ." Not that any further comment is necessary, but so just the record is clear: when Ms. Woods

was asked how frequently she came in early, she answered: "Oh, it's hard to say exactly." Tr. (8/31) at 48. Also, the scan-in records in Union Exhibit 20 thoroughly refute her claim to have come in early with any frequency. *See* PFF ¶¶174-177.[26]

On page 49, the Grievants state that Ms. Woods "never requested comp time or overtime . . . ." That is another blatant untruth, as the NFC Data shows. Union Exhibit 17 likewise shows that Ms. Woods earned comp-time. Also she earned credit hours 59 times during the grievance period, as shown above. Thus, she clearly knew how to be compensated for her extra work and could have done the same for all of her extra work, had it really occurred.

The reality, however, is that Ms. Woods doesn't do much work. 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. Indeed, 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

[26] Regarding the claim on page 48 that "[t]here is no scan data for the time periods she [claims to have] performed her weekend work at the office," there is little doubt that, were the data available, it would further demonstrate Ms. Woods' dissembling. In this sense, it is to Ms. Woods benefit that the records apparently do not exist.

her supervisors knew or should have known she was working overtime to complete her cases on time cannot be accepted.[27]

On page 51, the Grievants briefly discuss Mr. Albert Grier. Mr. Grier also is discussed in PFF ¶¶257-269 in HUD's initial brief. Mr. Grier, like Ms. Woods and many other 360s, "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.

On pages 52-56, the Grievants summarize testimony of Ms. Buchanan. On the bottom of page 53, the Grievants make the odd claim that Ms. Buchanan deserved credit hours (rather than overtime). If the Union is conceding that the very independent Ms. Buchanan, who works without a supervisor, is exempt, then HUD agrees. In any event, the NFC Data shows that Ms. Buchanan did earn credit hours on 13 occasions, and that she earned comp-time on seven occasions. Thus, she clearly knew what to do when she worked over-tour hours. If she did not ask for compensation on certain occasions, the Arbitrator could well infer that it is because she did not work over-tour hours on those dates.

On page 54, the Grievants assert that: "Just because the last entry for a particular day is 5:58 p.m. does not mean that Ms. Buchanan left at that time." While that may be true, the bottom line is that an entry with a time of 5:58 P.M. ultimately proves nothing at all. It certainly does not prove that Ms. Buchanan did work overtime. In Ms. Buchanan's case, even a later entry would not prove that she worked overtime because she might have been in the office until a later hour for personal reasons. Ms.

[27] Beginning on the bottom of page 50 and continuing halfway down the next page, the Grievants repeatedly cite testimony of Ms. Woods given on September 7, 2006. Ms. Woods did not testify on that day. In any event, the statement that the Agency chose to assign more than 40 hours of work has no basis in fact. Ms. Woods certainly was not accomplishing enough work to justify over-tour hours.

Buchanan admitted to working on a host of personal items on HUD premises both during and after her tour of duty, including:

- 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.

Also on page 54, the Grievants assert that Ms. Buchanan's supervisor had actual knowledge of her overtime work on the Friday before she testified. The evidence does not support that. Rather, 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. Even the evidence that Ms. Buchanan was a member of a team and that another member of the team sent an e-mail to a supervisor at about 1:00 A.M. does not establish the supervisor's knowledge of Ms. Buchanan's work.

Also on page 54, the Grievants assert that Ms. Buchanan skipped lunch "a lot of times." This does not prove the amount and extent of her work as a matter of just and reasonable inference.

The testimony of Ms. Durbin-Dodd is discussed on page 57 of the Grievants' Brief. Contrary to the Grievants' statement, Ms. Durbin testified that she arrives with a carpool at 7:40 or 7:45 AM and leaves 8.5 hours later. Tr. (9/14) at 6-7. She also testified emphatically that "I have not worked beyond my tour of duty in the office." Tr. (9/14) at 9.

The Grievants close this section of the brief by asserting again -- again without substantiation -- that the Agency assigns more work than employees can complete in 40 hours. The Grievants claim that this establishes the Agency's knowledge that over-tour work is being performed.

In fact, the claim that the Agency assigns more than 40 hours of work has been thoroughly rebutted. As discussed above, the Grievants cite information from HUD's FY '08 budget request stating that a Title VIII case takes an average of 117 to 120 hours to complete. Union's Closing Brief at 28. This equates to about three 40-hour weeks, *i.e.*, 21 or fewer calendar days, which is about 20% of the of the 100-day goal to process a Title VIII case. Thus, an "average" Equal Opportunity Specialist should be able to complete five cases within any 100-day period, and 16 cases a year (allowing four weeks for vacation) while working only forty hours per week. The average

caseload in Philadelphia is seven to nine cases per year (Tr. (9/13) at 251), half of what a GS-360 should be able to accomplish working 40-hours a week and taking four weeks vacation. 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.

Moreover, the Grievants' argument presumes that the work is actually getting done. However, the evidence shows otherwise. Interestingly, 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.*

Even when the 100-day goal is met, it is not uncommon in some offices for investigators not to turn in their cases until the 95th or 98th day or later. Tr. (9/13) at 132; *see also* Union Exhibit 81 and PFF ¶438 (more than 326 days). 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. As one supervisor testified: "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. 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.

In short, 360s 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). And, 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.

The Corroborating Witnesses Did Not Corroborate That Supervisors Knew of Over-tour Work or Had the Opportunity to Prevent It

On pages 58-61, the Grievants summarize the testimony of the so-called corroborating witnesses. At most, these witnesses testified that they saw the 360s working. However, they did not, and could not, corroborate that the other two requirements of "suffered or permitted" were met, *i.e.*, that supervisors knew or should have known of the work and had the opportunity to prevent it.

In any case, the Grievants characteristically twist and blow out of proportion the actual testimony of the corroborating witnesses. For example, Ms. High is cited as testifying that she "would call Ms. Woods, who indicated she had to finish work and would just grab (ie, [sic] eat) lunch at her desk (ie, [sic] while working)." But Ms. High never said that. The actual testimony was as follows:

> But I may call and say, "Okay, you ready to go to lunch?" and she'll say, "No, I can't go."
>
> Q. Okay.
>
> A. "I've got to finish this up." And she says, "I'll get something here at my desk."
>
> Q. Okay. And she told you she was working through lunch?
>
> A. Sometimes. It's not a lot, not often, but sometimes.

In fact, 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.

On the subject of lunch: It is undisputed that most of the Grievants received a one-hour lunch period, of which one-half hour was unpaid and one-half hour was paid. Thus, the actual workday was only 7.5 hours, and the actual workweek was only 37.5. It follows that even if an Equal Opportunity Specialist worked an additional half-hour per day and 2.5 hours per workweek, he or she would not be entitled to any overtime pay.

Ms. Woods' corroborating witness, Ms. High, also 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.

On page 61, the Grievants cite the testimony of Dr. Johnson's taxi driver that Dr. Johnson carried folders when he came to the taxi. As already noted, there is absolutely no evidence was to what was in those folders, if anything.

The Grievants' Documentary "Evidence"

On pages 61-77, the Grievants listed all of the documentary exhibits which they tried to introduce, without making any distinction between those that the Arbitrator accepted and those that the Arbitrator rejected. HUD supposes that the Grievants did not intend to mislead the Arbitrator by arguing from exhibits that he rejected and by mischaracterizing demonstrative exhibits as proof. Nevertheless, the Grievants' loose attitude towards their burden of proof and towards the facts in general does come through loud and clear throughout their brief.

The Grievants make a very important admission regarding the probative value of their documentary evidence when they state on page 77: "The Union's documentary evidence must not be read alone without the context of the testimonial evidence." Thus, to the extent that the testimonial evidence of Ms. Cardullo, Dr. Johnson, Ms. Woods, Mr. Anthony and others lacked credibility (as discussed in HUD's initial brief), the documentary evidence is of little value as well.

Also on page 77, the Grievants make several other statements that require comment. The Grievants state:

> But without exact records, which the Agency painstakingly concealed over years of continuing FLSA violations, the Union is only under a minimum burden of just and reasonable inference showing that the work was performed and uncompensated.

In fact, as already discussed, there is no evidence at all that the Agency concealed anything. If anyone concealed anything it was the Grievants who did not keep track of their time and falsified their time and attendance records. There also is no authority for the proposition that the availability or unavailability of evidence changes the employees' burden.

The Grievants next state:

> In order to prove its damages, the Union's burden is even less burdensome; the best ***guestimate*** [sic] of employees taken with the documentary evidence is sufficient to prove the amount of uncompensated overtime. [Emphasis added]

However, that clearly is not the law. The Grievants' burden of proof is not satisfied by "guesstimating." As the Fifth Circuit Court of Appeals said in *Jax Beer, supra*:

> The evidence as to the material facts in the case is so uncertain and conjectural that we find nothing substantial upon which to predicate a verdict. To uphold the findings and judgment of the lower court we must base decision upon the guess, speculation, and averages made up from the

> uncertain recollections of these appellees. This we refuse to do.

124 F.2d at 175.

Likewise, the court explained in *George Lawley & Son*: "[T]he plaintiff must produce evidence definite enough to permit a finding ***without resort to guess and conjecture*** that he worked some particular number of hours." 140 F.2d at 441 (emphasis added). Here, the Grievants' admission that their claims are guesstimates must doom their entire claim.

Finally, the Grievants state on page 77 of their brief:

> In other words, if one employee testified to performing 3 hours of uncompensated overtour hours per week and the documentary evidence corroborated the testimony then the Arbitrator can reasonably conclude that the employee did work three hours overtime per week.

Alas, there is not a single instance where documentary evidence corroborates that an EOS worked three uncompensated over-tour hours ***per week***. While there might have been evidence of ***isolated instances*** on which a 360 was in the office three hours after his or her tour of duty ended, there was no evidence that the person worked throughout those three hours late, nor was there evidence that a supervisor knew or should have known about, and had the opportunity to prevent, any such work.

Turning to some of the Grievants' exhibits in particular, HUD notes that many of them have already been cited in HUD's initial brief as refuting the Grievants' claims. For example, the scan records in Union Exhibit 20 show that Ms. Woods rarely arrived at work early and also arrived late with disturbing frequency, without taking leave.

The Grievants cites Union Exhibit 37 as "exemplif[ying] the fact that the Agency used REAP data for staffing decisions." Union's Closing Brief at 68. The significance -- more correctly, the lack of significance -- of the REAP data was already discussed on

page 75 above. However, noting that Union Exhibit 37 is dated in 2002, the Agency asks the Arbitrator to take arbitral notice of Congressional testimony by Ms. Carolyn Federoff in the same time period, in which she acknowledged that nobody is certain how meaningful REAP really is. She said:

> However, despite hours of review, many of us cannot understand what REAP has actually measured—does it measure what staff should be doing, or what staff are actually doing? The process for both REAP and TEAM asked staff to record what they are actually doing. ***It seems obvious that we would have enough staff to do that which staff are doing.*** But the question remains, do we have enough staff to do that which we are supposed to do by law, rule or regulation? Do we have enough staff to protect the public's interest and deliver the mission of the agency? We remain unconvinced that REAP or TEAM achieve this.

Prepared Statement of Ms. Carolyn Federoff, President, AFGE, Council 222, before the U.S. Senate Committee on Banking, Housing and Urban Affairs, Subcommittee on Housing and Transportation, July 24, 2002 (emphasis added), *available at* http://banking.senate.gov/02_07hrg/072402/federoff.htm.

Also on page 68, the Grievants cite Union Exhibit 38 as evidence that Kansas City had one of the top performing FHEO offices. The very same exhibit demonstrates that 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.*

On page 69, the Grievants effectively acknowledge that they have been consistently misrepresenting the instructions in the HUD handbook. As already discussed, the handbook does not use the phrases "non-working" or "non-duty" hours,

and this language does not require 360s to perform uncompensated work at home or on weekends. Clearly there is no “directive” in the handbook for the 360s to work overtime, much less uncompensated overtime.

Several exhibits, for example Union Exhibits 45, 52, 74 and 79 are e-mails with time stamps outside of the senders’ duty hours. As already discussed, such e-mails do not give supervisors an opportunity to prevent over-tour work when the e-mails are sent after the fact or at an hour when the supervisor will not see them. For the most part, they also are not evidence of more than a *de minimis* amount of activity.

Union Exhibits 49, 50 and 51 are misrepresented as Agency decisions. They are in fact the opinions of one non-management Agency employee.

The summary of Union Exhibit 54 on page 71 incorrectly characterizes the affidavits as “representative.” That is a legal conclusion which, as discussed in HUD’s initial brief, the Arbitrator should reject.

The description of Union Exhibit 58 on page 72 ends with the statement: “Based on this report, it is ***conceivable*** that HUD was overworking employees because the Agency did not have an adequate amount of staff to handle the work” (emphasis added). Almost anything is conceivable. As already discussed, the Grievants must meet their burden of proof with facts, not conjecture.

Regarding Union Exhibit 61B, the Grievants state on page 73, “This memorandum corroborates the testimony of witnesses that employees were being directed to complete ***large amounts of work*** in a ***clearly delineated timeframe***” (emphasis added). This is an absolutely meaningless generalization. Despite the proclivity of some of the 360s to perform little or no work, there is no rule that says that HUD cannot expect its employees to perform large amounts of work or to do it in a

clearly delineated timeframe. Without specifics, these generalizations have no bearing on whether overtime work was or was not performed.

Also on page 73, the Grievants discuss Exhibits 62 and 63. As they do with other exhibits, the Grievants forget that the Arbitrator refused to admit these two exhibits.

On page 74, the Grievants summarize Union Exhibits 66, 67 and 68 as job descriptions for nonexempt GS-360s. There is no mention of the fact that these are not HUD documents. As the Arbitrator noted in rejecting Union Exhibit 53 (another non-HUD document), "I can't judge HUD's conduct by what other agencies do. I can only judge it by their conduct measured against the law." Tr. (9/20) at 158.

Speaking of the law, Union Exhibit 69 (also discussed on page 74) completely misstates the applicable legal standard for "suffered or permitted." In addition, the Grievants yet again "forget" that this particular exhibit was rejected by the Arbitrator. HUD is confident that the Arbitrator will recognize the Grievants' arguments for what they are -- grasping at the thinnest reeds in the absence of any real evidence that over-tour was suffered or permitted. The reality is that the Grievants have openly admitted that they cannot prove the amount and extent of their claims by just and reasonable inference and must instead guesstimate. Accordingly, the Grievants' claims must be rejected and the Grievants must be declared the losing party.

The Grievants Again Misstate the Law

On page 78, the Grievants make the incorrect statement that "there is no requirement under the FLSA that the Agency know about the suffer or permit overtime prior to it being performed." This is wrong as applied to Federal sector workers because under OPM's definition of "suffered or permitted" in 5 C.F.R. §551.104, the supervisor

must have an opportunity to prevent the work from being performed, a requirement which, in effect, requires the supervisor to know about the work before it is performed.

The Grievants Again Misstate Facts and Their Burden of Proof

Also on page 78, the Grievants admit that Mr. Thomas' supervisor could not see Mr. Thomas' work station from his (the supervisor's) own office. This negates any actual knowledge by the supervisor of Mr. Thomas' over-tour work except if there had been proof that the supervisor actually saw Mr. Thomas, which there was not.

Lastly on page 78, the Grievants offer a novel -- but incorrect -- formulation of their burden of proof. The Grievants state:

> Even if Mr. Thomas used the workout facility in the basement of the building at least once per week, it does not refute the just and reasonable inference of uncompensated overtime work being performed. Arb. 11.1.06, P.71-72. It would merely reduce the number of compensable overtime hours. [Underlining in original]

This is wrong because, as the Union admitted in its opening statement, the "just and reasonable inference" standard applies not only to whether work was performed, but also the "amount and extent" of such work. Tr. (8/29) at 27 (citing *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946)). Thus, once Mr. Thomas admitted that he was in the gym during working hours, but he offered no proof regarding the length of time that he was there, it is no longer possible for the Arbitrator to make ***any*** just and reasonable inference regarding the amount and extent of the work he performed, if any. The same thing is true as to employees who took an extended lunch.

The Grievants Again Misstate the Agency's Staffing Needs

On page 79, the Grievants contend that the Agency could have prevented the alleged overtime work from being performed if it had hired more FTEs or assigned less than 40 hours of work per week. Firstly, whether the Agency was adequately staffed is

outside of the Arbitrator's jurisdiction to determine. AFGE Contract ¶23.10(3).[28] In any case, as discussed above, the evidence showed that the Grievants ***were*** assigned less than 40 hours worth of work per week. As a group, the Grievants represented the worst-performing FHEO offices. Ms. Cardullo, for example, was performing at one-quarter to one-eighth of the level that a 360 should have been able to perform in 40 hours of work a week. *See* page 75 above.

The Grievants Misstate the Agency's Access to Grievants' E-mail

Also on page 79, the Grievants repeat their red herring argument about HUD allegedly having access to the Grievants' e-mail. In fact, Ms. Federoff admitted 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.") (emphasis added). 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. On page 92 of their brief, the Grievants suggest that there is distinction between "accessing e-mail" and "monitoring e-mail." This distinction is disingenuous because, as just noted, Ms. Federoff admitted that supervisors don't even have "access" to employees' e-mail.[29]

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[28] The cross-reference to Section 3.07 apparently should refer to Section 3.06, "Management Rights." This includes the right to determine the mission, budget, organization, and number of employees of the agency, among other matters.

[29] Moreover, HUD respectfully questions whether the Grievants are prepared to stand behind this interpretation of the Contract, *i.e.*, that "accessing" e-mails is not "monitoring." If as the Grievants suggest on page 106 of their brief, HUD had a duty of "diligently seeking out overtour work," then nothing less than full-time access by supervisors to employees' e-mail will be necessary. And, if supervisors have any spare time left over after monitoring employees' e-mails, they can sit and read scan-in and scan-out records. Obviously, the law does not contemplate that employers be so distrustful of employees who are themselves in positions of trust.

The Grievants Misstate the Role of the 100-Day Goal in Performance Appraisals

On page 80 of their brief, the Grievants state that "Performance goals and ultimately, performance ratings, were based on the 100 day deadline." This ignores the evidence 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. Indeed, 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. *See* PFF ¶136. Moreover, the Grievants' assertion ignores the evidence that where goals were based on the 100-day figure, the goals were set quite low. For example, 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.

The Effect of Supervisory Testimony

On pages 81-92 of their brief, the Grievants offer their spin on the testimony of the GS-360s' supervisors. The testimony of the supervisors has already been digested in the proposed findings of fact in HUD's initial brief, and no constructive purpose would be served by repeating it here. As discussed above, the supervisors were offered as rebuttal witnesses. In hindsight, given the Grievants' admissions that they have not met their burden of proof, the supervisors' testimony may not even have been necessary.

There Was No Evidence that a Single 360 Was Disciplined for Missing the 100-Day Goal

On page 83, the Grievants cite an employee's removal from telework as evidence that employees were reprimanded for not completing their work. However, the evidence relating to Ms. Burton-Thompson was not that she did not complete her work within 100 days, but rather that she was not at her workstation when she was supposed

to be. 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. Ms. Thompson-Burton's supervisor, Ms. Brenda Shavers, further 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.

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.

As further "evidence" that the Grievants were "pressured to get their work done in a certain time frame," the Grievants cite (on page 89 of their brief) the 60% case-closure goal in the Chicago office. With all due respect, HUD suggests that a goal that leaves 40% of all work unfinished is hardly a high-pressure standard. This theme is repeated on page 91 of the Grievants' brief, where the Grievants further state that only 80 of the 100 days were actually available to the 360s. This, however, ignores the testimony that 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). The evidence also showed that it is not uncommon in some offices for investigators not to turn in their cases until the 95th or 98th day. Tr. (9/13) at 132; *see also* Union Exhibit 81 and PFF ¶438 (more than 326 days).

The Grievants Mischaracterize Both the Evidence and HUD's Arguments Regarding Allegedly *De Minimis* Personal Work

On page 86 of their brief, the Grievants cite *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113 (4th Cir. 1985), a case in which the employees' "evidence as to precise work

performed preponderated against" the employer. *Id.* at 1116.[30] Primarily, the Grievants cite *Bel-Loc* regarding the definition of *de minimis*. The Grievants the assert that: "The Agency's claim about employee's personal use of the computer is a ridiculous attempt by agency to punish employees for *de minimis* use." The Grievants are wrong on several counts.

First, the Agency has no interest in "punishing" the Grievants. Rather, the Agency's interest in this case is to not pay spurious overtime claims.

Second, there was no evidence that the Grievants' use of the computer for personal purposes was *de minimis*. To the contrary, Dr. Johnson admitted that he read the local news on the internet every morning for five or ten minutes. Tr. (8/30) at 74. In addition, he regularly called his fiancée for four minutes. *Id.* at 114. This adds up to nine to fourteen minutes a day, which is not *de minimis*. From these admissions, the Arbitrator can reasonably infer that Dr. Johnson spent more than 7½ minutes every single day of the grievance period browsing the internet and making personal phone calls when he was being paid to work. This not only impacts his credibility, it also means that over the course of each year of this grievance he was paid for 46 hours -- more than a full workweek each year -- when he did not work.[31] If Dr. Johnson had proved any overtime work by a just and reasonable inference, which he did not, HUD would be entitled to a credit for those 46 hours.

Likewise, Ms. Buchanan admitted to performing a host of personal tasks on her computer. This means she was not working. Similarly, the evidence showed that Mr. Thomas went to the gym on working time. Again, this means he was not working.

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[30] Here, in contrast, there was virtually no evidence of "precise work performed."

[31] *I.e.*, an average of 11.5 minutes per day, five days per week, 48 weeks per year.

Importantly, it is the Grievants, not the Agency, that bear the burden of proof regarding the amount and extent of the overtime worked, if any. Considering the paucity of evidence regarding the amount and extent of overtime work -- even the Grievants admit that they can only "guesstimate" -- the Arbitrator must take into account the admissions by Grievants that they engaged in personal activities at their HUD desks, not to punish the Grievants but to preclude them from obtaining a windfall.

The Grievants Ignore the Significance of the Fact That They Received Credit Hours

On page 88, the Grievants admit that Mr. Grier was compensated with credit hours for 75% of his over-tour work. Apparently then, Mr. Grier knew how to report his over-tour work and be compensated for it. The Arbitrator might reasonably conclude from this that Mr. Grier actually was compensated for 100% of his work. Or the Arbitrator might conclude that the fact that Mr. Grier frequently reported his over-tour work caused his supervisor to have no reason to suspect that Mr. Grier also was performing uncompensated over-tour work. At the very least, the admission that Mr. Grier was compensated with credit hours for 75% of his over-tour work unequivocally rebuts the claim that HUD's time-keeping forms were "a tool that the Agency used to conceal overtour work by only recording 8 hours per day," as the Grievants have claimed.

The Understaffing Red Herring Again

On pages 96-101, the Grievants rehash arguments made above about alleged understaffing and alleged pressure to close cases in 100-days. These arguments have already been rebutted beginning on page 74 above and in HUD's initial brief.

The Grievants Cite More Inapposite and Distinguishable Cases

On pages 93-95 of their brief, the Grievants make additional arguments based on DOL's regulations that are not applicable to this case. *See* page 62 above. In any event, even the private sector cases cited are readily distinguishable. For example, in *Barfield v. New York City Health and Hospitals Corp.*, 432 F. Supp. 2d 390, 395 (S.D.N.Y. 2006), cited on page 94 of the Grievants' brief, it was "undisputed that plaintiff accurately reported all hours she worked[.]" That is not at all the case here.

On page 104 of their brief, the Grievants at last acknowledge that there is an OPM standard for suffered or permitted overtime. However, OPM Decision No. F-7404-05-01 cited by the Grievants does not at all support the Grievants' claims. First, that decision is easily distinguishable from the present case because, in the cited decision, supervisors were actively engaged in altering their subordinates' timesheets. This indicates that the supervisors had actual knowledge of how many hours their employees had worked. There was no such evidence here. Also, in the cited decision, employees were left in sole charge of facilities during their lunch hour, again providing the supervisor with actual knowledge that work was being done. Based on those facts that are not present here, OPM found that the employing agency had violated the FLSA. Notably, OPM concluded that that agency's violation of the FLSA was not willful, notwithstanding the finding that supervisors were altering timesheets.

The Arbitrator Should Rule That The Grievants Have Failed to Prove the Amount and Extent of Damages by a Just and Reasonable Inference and Therefore Take Nothing

On page 113, the Grievants request a declaratory judgment that they are entitled to damages. Again, the Grievants are ignoring their burden, which was to prove the ***amount and extent*** of damages. This is not a declaratory judgment action. If the

Grievants gave the Arbitrator sufficient evidence to permit a just and reasonable inference as to the amount and extent of overtime work performed, then the Arbitrator may award damages to the Grievants. However, HUD respectfully maintains for the reasons discussed above and in HUD's initial brief that the Grievants have not given the Arbitrator that evidence.

<u>HUD Acted in Good Faith</u>

Beginning on page 115 of their brief, the Grievants argue that HUD did not act in good faith. As discussed in HUD's initial brief, 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 v. United States, 68 Fed. Cl. 212, 229 (2005) ("*Bull I*") (citations and internal quotation marks omitted). 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 nonexempt, at least one other agency, the Equal Employment Opportunity Commission, currently classifies GS-360s as exempt. PFF ¶475. *See*

additional discussion on pages 134-136 of HUD's initial brief.[32] *See also* page 63 above.

In any case, because the Grievants have not proven that they are entitled to any damages, the issue of liquidated damages is moot. Likewise, the Grievants clearly are the "losing party" since they admit they have not proven damages.[33] As the losing party, the Grievants obviously are not entitled to attorney fees.[34]

Conclusion

This arbitration may ultimately leave the Arbitrator empathizing with the distinguished Judge Daniels of the U.S. General Services Administration Board of Contract Appeals who recently wrote, "[M]any trees have been felled to produce enough paper to print the results of the parties' efforts to explain the case to us: a transcript of a four-day hearing and very lengthy briefs. Now that we have had a full opportunity to understand the case, we are especially regretful that the trees were not allowed to live."[35]

In the present case, following the production of hundreds of thousands of pages of Time and Attendance Records, screenshots, e-mails, scan-in and sign-in/sign-out sheets and other documents, plus, not four, but sixteen days of hearings, at which the Grievants undeniably bore the burden to prove the amount and extent of their alleged

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[32] *And see Brock v. Superior Care*, 840 F.2d at 1062 (2nd Cir. 1988) (liquidated damages available only in jury trial).

[33] Even if the Arbitrator were to remand the case, which he has no authority to do, the Grievants would still be the losing party because they did not achieve their purpose. At a minimum, the Arbitrator would have to conclude that there was no clear "winning" or "losing" party.

[34] HUD reserves until such time as a specific attorneys fees request is submitted, if ever, all arguments regarding the reasonableness of the hours expended and the hourly rates sought.

[35] *AMEC Constr. Mgmt., Inc. v. General Services Administration*, GSBCA No. 16233, 2006 WL 2774022.

overtime as a matter of just and reasonable inference, the Grievants admit that “these damages are difficult to determine,” and they therefore ask the Arbitrator to require the parties to negotiate the amount of damages. Union’s Closing Brief at 128. As discussed above, the Arbitrator cannot issue such an order because he has no authority not to issue a decision on the merits of the question put before him, *i.e.*, the amount and extent of damages. And, it is clear what they Arbitrator’s decision must be. Specifically, since the Grievants admittedly can do no more than “guesstimate” the amount of overtime they allegedly worked (Union’s Closing Brief at 77), their claims must suffer the same fate as the claims of the plaintiff in *Wilkinson v. Noland Co.*, 40 F.Supp. 1009 (D.Va. 1941). There the court said:

> While I am convinced that the plaintiff performed some overtime for which he was not paid, he has failed to convince me by the greater weight or preponderance of the testimony [of the amount of his claim]. . . . While the law requires the defendant to keep a record of overtime, the failure of the defendant to keep such record is not evidence upon which I can compute overtime for this plaintiff. The burden is still upon the plaintiff, regardless of the defendant's failure to keep a record, to prove that he worked overtime and how much overtime he worked.
>
> It is not enough for a plaintiff to come into Court under this Act and assert that he is entitled to time and a half for overtime served. As in any other case, he must produce evidence that is convincing and prove his cause by the greater weight of the evidence. . . . Because of his failure to produce evidence that is convincing and substantial, and because of his failure to preponderate in his proof, this plaintiff cannot recover.

Id. at 1013. Here, too, the employees have failed to prove by a preponderance of the evidence how much overtime they allegedly worked.

Indeed, the Grievants here are in a worse position than the employee in *Wilkinson*, who at least had proved that he had worked overtime for which he was not

paid. Here, the Grievants have failed to prove that they engaged in activities that meet the OPM standard for "suffered or permitted" overtime. In particular, they have failed to show that their supervisors knew or should have known of their over-tour work and had an opportunity to prevent it. Unlike under the DOL rules applicable to the private-sector, an employee in the Federal sector is not deemed to be working if his supervisor has not had a chance to prevent him from doing so. Thus, work-related activities engaged in at home or other places out of the office without any advanced notice having been given to the supervisor are not "work" and are not compensable.

For the foregoing reasons and the reasons stated in HUD's initial brief, the arbitrator should find that:

1. 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. 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, rather than merely guesstimating.

3. Even if individual Grievants proved the amount and extent of their alleged overtime work as a matter of just and reasonable inference, the Grievants have failed to meet their burden of proof to show that the evidence introduced with respect to time allegedly worked by certain 360s at certain GS levels in a few of HUD's offices

represents an adequate sample upon which to award overtime compensation to other 360s regarding whom no such evidence was introduced. The testimony and affidavits are individualized and do not represent a common practice or policy of working over-tour hours. Each worker who claimed over-tour time had a unique account of the hours and days of work. There is no evidence of a fixed schedule of overtime or common fact patterns. Each claim stands on its own particularized facts. Accordingly, it is impossible from this record to generalize to a class approximately 500 GS-360s and award damages to an entire class. This further demonstrates the fallacy of not requiring a formal opt-in notice be filed by each individual claimant who seeks to assert a real overtime claim as required by the statutory language of the FLSA.

4. Even if there is some liability for overtime, the measure of damages should be reduced by the amount of capped overtime, compensatory time-off and credit hours already received and should further be limited to the half time formula as applied by the U.S. Department of Labor and the courts.

5. Even if 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. Even if the Agency violated the FLSA, any damages are limited to proven overtime worked by AFGE Grievants during the shorter of (1) the period beginning with November 3, 2003 (for AFGE Grievants) and September 4, 2005 (for NFFE Grievants, if any) or (2) two years prior to the issuance of the Arbitrator's decision;

7. Even if 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 HUD's conduct was prohibited by the statute.

8. The AFGE Grievants failed to meet their burden of proving the amount and extent of uncompensated Sunday travel;

9. The Grievants are the losing party with respect to these grievances; and

10. The Grievants are not entitled to an award of attorney fees.

Dated: March 28, 2007

Respectfully submitted,

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/s/

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Certificate of Service

I hereby certify that a copy of this United States Department of Housing and Urban Development's Reply Brief on GS-360 Damages was sent to Michael J. Snider, Esquire on March 28, 2007 by e-mail to mike@sniderlaw.com, carolyn_federoff@hud.gov and elizabeth_mcdargh@hud.gov.

/s/ Shlomo D. Katz

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