IN THE MATTER OF ARBITRATION BETWEEN:

NATIONAL COUNCIL OF HUD LOCALS 222, AFGE, AFL-CIO, Union, v. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Agency.	)	Issue: FLSA Overtime FLSA Exemptions

Union's Renewed Motion for Partial Summary Judgment
Relating to Liability for Certain GS-11, 12, 13 and 14 Positions and
Union's Motion for Summary Judgment on Certain Damages for all GS-10's and Below
and for Certain GS-11, 12, 13 and 14 Positions

The Union, by and through its attorneys, Michael J. Snider, Esq., Ari Taragin, Esq., Jeffery Taylor, Esq., Jason Weisbrot, Esq. and Jacob Schnur, Esq. and Council President, Carolyn Federoff, Esq., request that the Arbitrator grant its **Motion for Partial Summary Judgment relating to Liability for Certain GS-11, 12, 13 and 14 Positions** as a matter of law. The Union further moves for **Summary Judgment** on the issue of certain categories of damages for all GS-10 and below employees and for Certain GS-11, 12, 13 and 14 Positions.

Applicable Law

Summary Judgment motions are both allowed and used in arbitrations.

See, e.g., ***AFGE, Local 1760 and Department of Health and Human Services, Social Security Administration, Office of Hearings and Appeals, Region II,*** 36

FLRA 212 (June 28, 1990); ***Elkouri & Elkouri: How Arbitration Works,*** 6th Ed., ABA, BNA (2003).

More importantly, Arbitrators have uniformly utilized the Federal Court's summary judgment standard when reviewing such motions during arbitration proceedings. See generally ***SSA vs. AFGE, Local 1336***, Document No. ARBIHS09312, KC-99-R-0006, LAIRS 22362 (01 Jul 1999)(arbitrator determined that a motion for summary judgment may be granted where there is no dispute regarding the material facts, or if only a question of law is involved); ***SSA vs. AFGE, Council 220***, Document No. ARBIHS08711 (27 Nov 1996)(arbitrator granted motion for summary judgment where the only issue was an interpretation of the Work Schedules Act). Additionally, the Federal Labor Relations Authority has upheld an arbitrator's discretion to entertain motions for summary judgment. ***See AFGE, Natl. Council SSA Fld. Operations Council vs. SSA***, 54 FLRA NO. 88, 0-AR-2912 (1998).

The availability of summary judgment helps a factfinder " 'to secure the just, speedy, and inexpensive determination of every action.' " ***Celotex Corp. v. Catrett****,* 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 1). Summary judgment is appropriate where there is no dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56 of the Rules of the United States Court of Federal Claims (RCFC); ***Anderson v. Liberty Lobby, Inc****.,* 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is material if it would affect the outcome of the suit. ***Anderson****,* 477 U.S. at 248, 106 S.Ct. 2505. The moving party bears the burden of showing that there is an absence of any genuine issue of material

fact. ***Dairyland Power Coop. v. United States***, 16 F.3d 1197, 1202 (Fed.Cir.1994) (citing ***Celotex***, 477 U.S. at 325, 106 S.Ct. 2548).All doubt over factual issues must be resolved in favor of the party opposing summary judgment. ***Mingus Constructors, Inc. v. United States***, 812 F.2d 1387, 1390 (Fed.Cir.1987).

The non-moving party, however, has the burden of producing sufficient **evidence** that there is a genuine issue of material fact in dispute which would allow a reasonable finder of fact to rule in its favor. ***Anderson,*** 477 U.S. at 256, 106 S.Ct. 2505. Such evidence need not be admissible at trial; nevertheless, mere denials, conclusory statements or evidence that is merely colorable or not significantly probative is not sufficient to preclude summary judgment. ***Celotex,*** 477 U.S. at 324, 106 S.Ct. 2548; ***Anderson,*** 477 U.S. at 249-50, 106 S.Ct. 2505; ***Mingus,*** 812 F.2d at 1390-91; *see also* ***Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.,*** 731 F.2d 831, 835-36 (Fed.Cir.1984) (in making a determination as to whether genuine issues of material fact exist, the court is not to accept a party's bare assertion that a fact is in dispute).

"The party opposing the motion must point to an **evidentiary conflict** created on the record by at least a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant." ***Barmag,*** 731 F.2d at 836**.** Summary judgment must be granted against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case and for which that party bears the burden of proof at trial. ***Celotex,*** 477 U.S. at 322, 106 S.Ct. 2548.

Evidence in Support of Motion for Partial Summary Judgment Regarding Liability for Certain GS-11, 12, 13 and 14 Positions

In this case, the Agency has carried out a "HUD FLSA Evaluation" in which it has had classification experts evaluate each HUD employee PD and make a decision as to whether HUD now considers the position, and all incumbent employees in the position, to be FLSA exempt or FLSA non-exempt.

HUD has provided the Union with dozens of PDs which indicate that, in HUD's view, the positions and incumbents in those positions are now FLSA non-exempt. By and large[1], the Agency has ceded all GS-11 positions in the Agency and a fair number of GS-12 and GS-13 positions. The Agency's self-classification of these positions, and of the incumbents in those positions, is an ***admission*** by the Agency that it has found the positions and incumbents to be FLSA non-exempt. Ergo, there are no factual disputes over this matter and the Union is entitled to judgment on liability for these positions/employees as a matter of law.

The ceded positions are as follows (copies of each PD and HUD FLSA Evaluation are attached on CD ROM to the hard copies of this **Motion**):

PD Ref #	Position Title	Series	Grade	PD Number	Exemption
1	Social science analyst	101	11		non-exempt
10	Economist	110	11	AS2739.01	non-exempt
11	Economist	110	11	AS2658.01	non-exempt
12	Field economist	110	11		non-exempt
13	Research economist	110	11		non-exempt
35	Administrative staff specialist	301	11		non-exempt
539	Administrative support assistant	301	11	AS2457	non-exempt

[1] The only, and a notable, exception is the GS-904 (Law Clerk) position, which the parties are about to litigate.

36	Correspondence analyst	301	11	AS2204.02	non-exempt
757	Correspondence analyst	301	11		non-exempt
537	Correspondence management specialist	301	11		non-exempt
585	CPD representative	301	11	BO5823	non-exempt
586	CPD representative	301	11	HD0041	non-exempt
588	CPD representative	301	11	FD0002	non-exempt
587	CPD specialist	301	11		non-exempt
582	Data systems coordinator	301	11		non-exempt
37	Education and outreach specialist	301	11		non-exempt
409	Freedom of information specialist	301	11		non-exempt
38	Freedom of information specialist	301	11		non-exempt
39	Freedom of information specialist	301	11		non-exempt
40	Freedom of information specialist	301	11		non-exempt
41	Freedom of information specialist	301	11		non-exempt
755	Management information specialist	301	11	BO0015	non-exempt
42	Office administrator	301	11		non-exempt
589	Office administrator	301	11	HD0044	non-exempt
759	Office administrator	301	11	WO5521	non-exempt
43	Presidential management intern (PMI)	301	11		non-exempt
44	Program coordinator	301	11		non-exempt
538	Program evaluation specialist	301	11	WO5525	non-exempt
606	Program evaluation specialist	301	11	WO5524	non-exempt
561	Program support specialist	301	11	AS2747	non-exempt
758	Program support specialist	301	11	000434	non-exempt
756	Quality assurance specialist	301	11		non-exempt
45	Staff assistant	301	11		non-exempt
492	Correspondence assistant	303	11		non-exempt
491	Training services technician	303	11	AS0679.01	non-exempt
685	Staff assistant	303	11		non-exempt
101	Management analyst	343	11		non-exempt
459	Management analyst	343	11	WO4825	non-exempt
460	Management analyst	343	11	WO5531	non-exempt
461	Management analyst	343	11	MN2993.01	non-exempt
462	Management analyst	343	11	WO4826	non-exempt
463	Management analyst	343	11	HN0002	non-exempt
464	Management analyst	343	11	WO3950	non-exempt
766	Management analyst	343	11	WO5429	non-exempt
102	Operations analyst (listed as "program analyst" on copy 2)	343	11	WO5103	non-exempt
103	Program analyst	343	11	GR0286.01	non-exempt
104	Program analyst	343	11	MM8251	non-exempt
458	Program analyst	343	11	WO4831	non-exempt
786	Program analyst	343	11	BUS0015	non-exempt
787	Program analyst	343	11	AS2913.01	non-exempt
788	Program analyst	343	11		non-exempt
171	Equal opportunity specialist	360	11		non-exempt
172	Equal opportunity specialist (civil rights analyst)	360	11	000269	non-exempt

484	Telecommunications specialist	391	11	MN2846	non-exempt
698	Financial operations analyst	501	11		non-exempt
729	Accountant	510	11		non-exempt
521	Budget analyst	560	11	AS2571	non-exempt
224	Construction analyst	828	11	D15312	non-exempt
699	Paralegal specialist	950	11		non-exempt
703	Paralegal specialist	950	11		non-exempt
704	Paralegal specialist	950	11		non-exempt
705	Paralegal specialist	950	11		non-exempt
706	Paralegal specialist	950	11	AS2858	non-exempt
707	Paralegal specialist	950	11	MN1006.01	non-exempt
505	Audio visual broadcasting engineering specialist	1071	11	WO5529	non-exempt
832	Affordable housing specialist	1101	11		non-exempt
835	Building operation specialist	1101	11	AS2768	non-exempt
309	Consumer protection compliance specialist (RESPA)	1101	11		non-exempt
820	Contract oversight specialist	1101	11	WO3646	non-exempt
310	Enforcement analyst	1101	11	D16421	non-exempt
311	Enforcement analyst	1101	11	MN2074	non-exempt
312	Grants evaluation specialist	1101	11	JO7119	non-exempt
313	Grants management specialist	1101	11		non-exempt
819	Housing program specialist	1101	11		non-exempt
314	Marketing and outreach specialist	1101	11	RE1946	non-exempt
796	Mortgage-backed securities specialist	1101	11		non-exempt
315	Operations analyst	1101	11		non-exempt
316	Public housing revitalization specialist	1101	11	D16321	non-exempt
819	Public housing revitalization specialist (facilities management)	1101	11		non-exempt
317	Public housing revitalization specialist (FM)	1101	11		non-exempt
318	Public housing revitalization specialist (generalist)	1101	11	OO00006	non-exempt
818	Public housing revitalization specialist (generalist)	1101	11		non-exempt
821	Real estate asset analyst	1101	11	AS2860.01	non-exempt
797	Transactions management technician	1101	11	WO5087	non-exempt
391	Financial analyst	1160	11	D16348	non-exempt
466	Photographer	1160	11		non-exempt
688	Realty Specialist	1170	11		non-exempt
686	Housing management specialist - trainee	1173	11		non-exempt
514	Training services technician	1702	11	AS2455	non-exempt
510	Inventory management specialist	2010	11	WO4955	non-exempt
173	Equal opportunity specialist	360	12		non-exempt
225	Construction analyst	828	12		non-exempt
320	Asset manager	1101	12		non-exempt
326	Enforcement analyst	1101	12	D16205	non-exempt
328	Grants evaluation specialist	1101	12		non-exempt
416	Public housing revitalization specialist	1101	12	000008	non-exempt

	(FM)				
335	Public housing revitalization specialist (generalist)	1101	12		non-exempt
393	Financial analyst	1160	12		non-exempt
175	Equal opportunity specialist	360	13		non-exempt
351	Enforcement analyst	1101	13	D16044	non-exempt
417	Grants evaluation specialist	1101	13		non-exempt
357	Lead grants evaluation specialist	1101	13		non-exempt
358	Lead grants management specialist	1101	13		non-exempt
365	Public housing revitalization specialist (FM)	1101	13		non-exempt
366	Public housing revitalization specialist (generalist)	1101	13		non-exempt
369	Senior asset manager	1101	13	000197	non-exempt
396	Financial analyst	1160	13	D16297	non-exempt
398	Senior financial analyst	1160	13		non-exempt
419	Program analyst	343	14	RE1451.01	non-exempt

Evidence in Support of Motion for Summary Judgment Regarding Certain Damages for All GS-10 and Below Positions and for Certain GS-11, 12, 13 and 14 Positions

On September 28, 2005, the Parties entered into a Partial Settlement Agreement (**GS-10 and Below PSA**). The coverage of the Agreement was limited as follows:

> This Agreement addresses only the FLSA classification of employees at the GS-10 and below level. It does not address damages for those or any other employees; it does not address the FLSA classification issues concerning any bargaining unit employees, other than those specifically and explicitly referenced.

In the **GS-10 and Below PSA**, the Agency agreed, for those employees in positions the Agency wished to exempt from the FLSA at the GS-10 and below levels, to take the following steps by October 21, 2005:

1. Identify each employee, including name, job title, job series, grade, step, geographic location, and contact information.

2. For each identified employee, provide the position description and all available predecessor position descriptions since June 18, 2000, the specific exemption relied upon to exempt the employee, all information relied upon to exempt the employee and a detailed explanation as to how the employee is properly exempt, in the Agency's view, including any FLSA review and/or

> worksheet(s), the name of the individual(s) who made the determination to exempt each FLSA exempt employee and the date the decision was made.

The Parties further agreed that, if the Agency did not identify an employee as described in paragraph 1 and provide the information described in paragraph 2 for an employee/position, that employee/position would be reclassified to FLSA non-exempt status effective the beginning of the first full pay period after October 21, 2005.

The Parties mutually agreed to the following definition of "affected bargaining unit employees:"

> "any listed employee in the Agency's Payroll Reports covering the period of June 18, 2000 through October 1, 2005 at the GS-10 level and below."

Regarding damages, the parties agreed" that the issue of damages (including retroactive date of reclassification) and attorney fees has not yet been resolved, and will be addressed by the parties separately."[2]

Damages for 10's and Below, and For Ceded GS-11, 12, 13 and 14 Positions/Employees

The Union seeks make whole relief, required by law, for all GS-10 and below employees who the Agency agreed to reclassify, and for all incumbents (between June 2000 and present) in the above-listed positions at the GS-11, 12, 13 and 14 levels, which the Agency has ceded as FLSA non-exempt.

[2] The Agency agreed to bear the cost of the Arbitrator for the mediation session held on September 28, 2005, but it is not clear if the Agency has yet paid the Arbitrator.

The Agency, by ceding GS-10's and below, has admitted that it wrongfully misclassified those employees and now the employees are entitled to retroactive remedies.

Similarly, the Agency, by ceding the above-listed positions at the GS-11, 12, 13 and 14 levels, has admitted that it wrongfully misclassified those employees and now those employees are entitled to retroactive remedies.

The Union will not move for Summary Judgment at this time over the issue of willfulness, but does move for liability for the following categories of damages:

1. Underpaid ("capped") overtime;
2. Compensatory time; and
3. Suffered and Permitted overtime.

29 U.S.C. § 216(b) states, in relevant part:

> Any employer who violates the provisions of section 206 and section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

The types of compensation described below are those classic remedies provided by the FLRA and courts for wrongfully classified employees, and are warranted as a matter of law. There is no factual dispute that could alter the entitlement of the relevant employees to these damages.

Differences Between Overtime Pay for Exempt and Non-Exempt Employees

Overtime for general schedule (GS) federal government employees is recoverable under either Title 5 of the United States code (Title 5 overtime) [for FLSA Exempt employees] or under the Fair Labor Standards Act (FLSA overtime)[for FLSA Non-exempt employees].

Each provision has certain advantages and provides an overtime hourly rate of one and one-half (150%) of the employee's basic hourly rate, with exceptions as explained herein. Federal employees are generally entitled to receive overtime pay at the rate of one and a half times their regular hourly rate under the Federal Employees Pay Act (FEPA or Title 5). 5 U.S.C. §§5501-5541 et seq.

However, overtime under Title 5 has three principle disadvantages.

First, overtime pay under Title 5 is capped at the employee's hourly rate. Prior to January 2004, Title 5 overtime pay was capped at the GS-10, step 1 overtime rate.[3] 5 U.S.C. §5542(a)(2). The result of the "cap" is that persons at or over GS-10, step 1 are paid at an overtime hourly rate which is the same as their basic hourly pay rate. In other words, overtime is paid the same as straight time. Prior to January 2004, employees at the GS-12 and above levels would earn less money per hour for overtime work than they would for straight time work.

[3] A copy of the current General Schedule pay scale is usually published as a note to 5 U.S.C. §5332 in the United States Code and can be found at www.opm.gov.

Second, under Title 5, employees are not entitled to a choice between compensatory time and overtime, while FLSA covered employees are entitled to overtime pay and, at their election, to compensatory time.

The third major disadvantage is that Title 5 overtime must be approved in advance, while FLSA Overtime must be paid even if it was "suffered or permitted."

Misclassified Employees Are Entitled to Damages for Underpaid ("capped") Overtime

When an Agency is found to have misclassified an employee as FLSA exempt, the classic remedy is to make the employee whole. In other words, "but for" the Agency's misclassification, any overtime the employee worked "would have" been worked at the true time-and-a-half rate, as opposed to the "capped" rate. Make whole relief, as a matter of law, is to pay each employee the difference between the capped rate and their true overtime rate for each hour of overtime they worked while wrongfully exempt.

Misclassified Employees Are Entitled to Damages for Compensatory time

Similarly, an Agency found to have misclassified an employee as FLSA exempt must, to make the employee whole, pay the employee, for each hour of compensatory time earned during the relevant time period, their overtime rate offset by the amount of their straight time / hourly rate (ie, the amount of compensation they received as comp time). ***U.S. Department of the Navy, Naval Sea Systems Command and IFPTE,*** 57 FLRA 543 (September 28, 2001)(**"NSSC"**).

The Authority explained in **NSSC** :

> 5 U.S.C. § 5543 differentiates among employees at various grade levels. For an employee whose rate of basic pay is below the maximum rate of basic pay for GS-10, the head of an agency may "on request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment under section 5542 or section 7 of the [FLSA]." 5 U.S.C. § 5543(a)(1). In contrast, for an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10, such as GS-12 employees, the head of an agency can require that the employee "shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work under section 5542 of this title." 5 U.S.C. § 5543(a)(2). The decision whether to award compensatory time in lieu of overtime pay for employees covered under § 5543(a)(2) is solely within the discretion of an agency. *See John Doe, et al. v. United States,* 47 Fed. Cl. 594, 594-95 (2000) ("The choice to award compensatory time rests entirely with the [a]gency for employees exceeding the maximum rate for GS-10." (footnote omitted)).
>
> The regulation governing compensatory time off for employee's covered by the FLSA (5 C.F.R. § 551.531(a)) is significantly different in that employees may elect compensatory time. In promulgating 5 C.P.R. § 551.531(a), the Office of Personnel Management (OPM) explained that "[t]he rules governing compensatory time off requested by an employee are not the same under both parts 550 and 551." 56 Fed. Reg. 26,340 (May 3, 1991). Distinguishing the rule under 5 U.S.C. § 5543(a)(2), OPM stated that "there is no legal authority for an agency to require that a nonexempt employee take compensatory time off in lieu of overtime pay under the FLSA." Instead, under 5 C.F.R. § 551.531(a), compensatory time off for employees covered by the FLSA is "[a]t the request of an employee."
> …
> We further note that, in an analogous situation, the Comptroller General found that an employee who was entitled to overtime pay under the FLSA, but was erroneously granted compensatory time off under title 5 instead, was entitled to an additional amount of overtime compensation under the FLSA. *See Matter of Marion D. Murray,* 59 Comp. Gen. 246 (1980) (*Murray*). There, as here, the amount of overtime compensation was to be offset by the value of the compensatory time off. Although the facts in *Murray* and the facts in this case differ in certain respects, both cases involve employees who were or should have been classified as non-exempt from the overtime provisions of the FLSA and they both involve situations in which compensatory time off under title 5 was granted in error. In each case, the appropriate remedy consists of the payment of overtime pay, calculated under title 29, reduced by the value of the compensatory time off.

And in **Note 14** of **NSSC**, the Authority noted that:

> We are aware that, under 5 C.F.R. § 551.501(a)(7), an employee who takes compensatory time off is not eligible to receive overtime pay. However, this exclusion from the overtime pay provisions of the FLSA applies when the employee's compensatory time off is granted under the compensatory time off provision of the FLSA, namely, 5 C.F.R. § 551.531. If the Agency had correctly classified the grievants as covered under the FLSA for the periods of the overtime worked, and if the employees had properly been given a choice and had requested and taken compensatory time off, there would be no basis, under law, to grant any additional compensation. Here, however, the grievants were not given the choice to which they were legally entitled under title 29, since their compensatory time off was erroneously granted under the overtime provisions of title 5. Consequently, 5 C.F.R. § 551.501(a)(7) does not operate to bar the additional differential to the grievants ordered by the Arbitrator.

Therefore, all HUD employees that were misclassified are entitled to comp time damages, as explained above, as a matter of law.

Misclassified Employees Are Entitled to Damages for Suffered or Permitted Overtime

There are two kinds of claims involved in this arbitration, “straight” and “suffer or permit” overtime. Straight overtime involves work performed by an employee in excess of 40 hours per week, which can be found in the Agency’s records, and, for which the employee did not receive appropriate compensation. In contrast, “suffer or permit” overtime is by its nature unrecorded and consists of work performed for the benefit of the Agency, and about which the agency knows or has reason to believe that the work is being performed. Examples of such claims in the instant arbitration include allegations of working through lunch or before or after regularly scheduled hours.

It is the employee’s burden – through the Union – to establish that he/she has “performed work” for which appropriate compensation was not provided and to “produce

sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680, 687-688 (1946). This can be accomplished through testimony or documents.

Recovery is not precluded simply because an employee is unable to prove hours worked with exactness or precision. *E.g., Mt. Clemens, supra*; *Reich v. Southern New England Telecommunications Corp*., 121 F. 3d 58,67 (2d Cir. 1997). Once the employee or union has satisfied this burden of proof, the burden shifts to the employer to provide evidence of the "precise amount of work performed" or evidence to "negative the reasonableness of the inference to be drawn from the employee's evidence." *Mt. Clemens* at 689. To the extent that the employer fails to meet its burden, the fact-finder can "award damages to the employee, even though the result be only approximate." *Mt. Clemens* at 689 (citation omitted).

Since the Agency has ceded all GS-10's and below and now (we urge the Arbitrator to find) has also ceded certain GS-11, 12, 13 and 14 positions/employees, it must, to 'make whole' the affected employees, compensate those employees with payment for all time suffered or permitted. While the Union understands that it bears the burden of proving the existence, extent and amount of the damages to a reasonable and justifiable inference, it now seeks a declaratory judgment that the Agency is liable for "suffered or permitted" overtime and that the damages hearing will proceed only on that evidence required to show the extent of the claims themselves.

Misclassified Employees Are Entitled to Liquidated Damages

Under 29 USC Section 216 of the FLSA, an employer is liable for both past due overtime and "an additional equal amount as liquidated damages." Liquidated damages are provided "for losses [employees] might suffer by reason of not receiving their lawful wage at the time it was due" (*Martin v. Cooper Elec. Supply Co.,* 940 F.2d 896, 907 (3d Cir. 1991) and "constitute [] compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages." (*Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697, 707 (1945)). Federal employees are entitled to liquidated damages (*See* 29 USC Section 204(f)) and Arbitrators have the authority to award such damages (*E.g., U.S. Department of Health and Human Services, Social Security Administration, Baltimore Maryland and American Federation of Government Employees,* 49 FLRA 483, 489-90 (March 10, 1994)).

While discretionary, there is a strong presumption in favor of doubling, a presumption which can be overcome only by the "employer's good faith . . . and reasonable grounds for believing that [the] act or omission was not a violation." 29 USC Section 260. 16 The employer bears this burden of proving "good faith" under Section 260, a burden which "is a difficult one to meet", with double damages "the norm, single damages the exception . . . ." *Walton v. United Consumers Club, Inc*., 786 F.2d 303, 310 (7th Cir. 1986).

Correspondingly, to establish "good faith", the employer must provide "plain and substantial evidence of at least an honest intention to ascertain what the Act requires

and to comply with it." *Brock v. Wilamowsky*, 833 F. 2d 11, 19 (2d Cir. 1987). As noted by another court, good faith "requires more than mere ignorance of the prevailing law or uncertainty about its development. It requires that an employer first take active steps to ascertain the dictates of the FLSA and then move to comply with them." (citations omitted). *Reich v. Southern New England Telecommunications Corp.,* 121 F. 3d 58, 71 (2d Cir. 1997). Thus, even evidence that an employer "did not purposefully violate the provisions of the FLSA is not sufficient to establish that . . . [the employer] acted in good faith." *Reich* at 71 (citations omitted).

The Union here also claims that it is entitled to the greater of interest or liquidated damages. In making that argument, it recognizes that there is no entitlement to both interest and liquidated damages, which would amount to an unlawful double recovery. *E.g., Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697, 707 (1945).

Here, the Agency has not and cannot, as a matter of law, establish good faith. Therefore all affected employees are entitled to the higher of either liquidated damages, or interest.

Further Argument Regarding Liability on Positions Ceded Through HUD's FLSA Review

The Agency has Ceded All Listed GS-11, 12, 13 and 14 Positions/Employees Listed as Non-Exempt.

FLSA exemptions are an affirmative defense that must be pleaded and proved by the defendant. ***Fife v. Harmon*** , 171 F.3d 1038 (5th Cir. 1999); ***Jones v. Giles***, 741 F.2d

245, 248-49 (9th Cir. 1983). Here, the Agency has agreed with the Union that the positions listed above, and all incumbents in those positions, are and have been FLSA exempt for the duration of the applicable time frame (June 2000 to present). That is clear and undisputable. Why do we need an ORDER from the Arbitrator?

Since the Agency has ceded those positions, however, ***no action*** has been taken to actually reclassify any employee as FLSA Non-exempt other than GS-10's and below[4]. Since the Agency has not acted, the Union is entitled to Judgment on liability for these positions, absent a signed settlement agreement.

While the Arbitrator has previously described the Agency's post-Grievance efforts at justifying its FLSA Exemptions as most likely "prepared in expectation of litigation and lack material and probative value," it is indisputable that the Agency's own FLSA Review and determination, when **HUD itself** concludes a position is FLSA ***non-exempt***, is a binding admission upon HUD.

Conclusion

Undisputably, the Agency has ceded all GS-10's and below, and has now admitted, in writing, that certain GS-11, 12, 13 and 14 positions (and the employees who encurmbered them from June 2000 to present) are, and have been, non-exempt. The Agency has not yet reclassified these GS-11/12/13/14 employees and therefore the Union moves for Summary Judgment on liability for those positions.

[4] The Union has submitted a 7114 RFI in an attempt to evaluate the Agency's compliance with the **GS-10 and below PSA.** If and when it receives information from the Agency, the Union will then evaluate the Agency's compliance and, depending on the results, return to the Arbitrator for compliance.

Certain damages are required as a matter of law for these positions, including undercompensated ("capped") overtime damages, compensatory time damages, suffered or permitted damages and liquidated damages. We ask for an Order awarding these as a matter of law, since the facts are undisputed.

Respectfully Submitted,

___/s/_____
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___/s/_____
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Certificate of Service

I certify that a copy of the foregoing was served upon the Agency and Arbitrator via email and via first class mail with CD ROM attachment.

Date: February 27, 2006

___/s/_____
Michael J. Snider, Esq.

IN THE MATTER OF ARBITRATION BETWEEN

The U.S. Department of Housing and Urban Development
And
The American Federation of Government Employees
National Council of HUD Locals 222, AFL-CIO

Before Arbitrator Sean J. Rogers

HUD/AFGE FLSA Overtime Grievance

Agency Opposition to Union's Renewed Motion for Partial Summary Judgment Relating to Liability for Certain GS-11, 12, 13 and 14 Positions and Union's Motion for Summary Judgment on Certain Damages for all GS-10s and Below and for Certain GS-11, 12, 13 and 14 Positions

The agency requests that the union's Motions for Summary Judgment in this matter be denied in their entirety. In support of its request, the Agency submits the following:

Standard For Summary Judgment

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. A fact is material if it might significantly affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247,248 (1986).

The party moving for summary judgment bears the burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the non-moving party must set forth evidence of specific facts showing the existence of a genuine issue for trial. *Anderson, 477 U.S.* at 242, 248-250. Only facts that may affect the outcome of the case under governing law are "material" *Anderson* 477 U.S. at 248.

The Arbitrator must resolve any doubts about factual issues in favor of the party opposing summary judgment. All favorable inference must be drawn in favor of the party opposing summary judgment. At the summary judgment stage, the arbitrator's function is not to weigh the evidence and render a determination as to the truth of the matter, but only to determine whether there exists a genuine factual dispute. *Anderson*, 477 U.S. at 248.

Union's Renewed Motion for Partial Summary Judgment Relating to Liability for Certain GS-11, 12, 13 and 14 Positions

The union's motion attempts to put a square peg into a round hole. The facts in this matter simply do not fit into the analytical framework of summary judgment. In this regard, it must be noted that the concept of summary judgment presupposes the existence of a completed record. There is no such completed record here.

In its motion at page 3 the union states "In this case the Agency has carried out a 'HUD FLSA Evaluation' in which it has had classification experts evaluate each HUD employee PD and make a decision as to whether HUD now considers the position, and all incumbent employees in the position to be FLSA exempt or FLSA non-exempt."[1] The union then proceeds to assert that the FLSA evaluations are admissions by the agency of FLSA status, and, therefore, there are no factual disputes and the union is entitled to summary judgment.

The flaw in the union's argument is readily apparent. Summary judgment rests on the absence of issues of material fact in the record. As noted above, *Anderson* holds that a fact is material if it might significantly affect the outcome of a case. In this case, significant material facts are absent from the record. Thus, the record is incomplete and it is impossible to conclude that there are no genuine issues of material fact. Specifically, the missing material facts are the duties performed by the employees in question.

An underlying principle governing FLSA exemptions is that the designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee *5 CFR 551.202(i).* The Federal Circuit held that position descriptions cannot be relied upon to make FLSA exempt status determinations. *Berg v. Newman*, 982 F.2d 500, 503 (Fed. Cir. 1999), *Ale v. Tennessee Valley Authority, upheld on appeal*, 269 F. 3d 680 (6th Cir. 2001).[2]

The foregoing establishes clearly that the fact pattern in this case cannot support a summary judgment in favor of the union. Such a conclusion would be contrary to law. The record is incomplete. The union's motion is premature and must be denied.

Union's Motion for Summary Judgment on Certain Damages for all GS-10s and below and for Certain GS-11, 12, 13 and 14 Positions

The union does not even attempt to place this motion within the summary judgment analytical framework. Rather, it merely refers to the Parties' Partial Settlement Agreement by which it was agreed that positions at the GS-10 level and below would be

[1] The agency does not dispute the fact that the FLSA evaluations in question were purely paper reviews.

[2] This is case law relied upon by the union itself in its November 13, 2005 Motion for Summary Judgment.

classified as FLSA nonexempt.[3] It then attempts to establish an analogy between the GS-10 and below positions and the GS-11, 12, 13 and 14 positions at issue herein, and asserts that damages are due the GS-11-14 positions on the same grounds as they are due the GS10s and below.

Again, the union's reasoning is flawed. It ignores the fact that the GS-10s and below are the subject of a settlement agreement while the GS-11-14 positions are not[4]. Thus, the agency is not precluded from revisiting the FLSA determinations of the GS-11-14 positions herein. A consideration of duties actually performed, either through further management review or an arbitration hearing, may result in FLSA exempt determinations[5]. Accordingly, the union's attempted analogy has failed.

The facts, then, demonstrate that the union has failed to meet any of the established criteria for summary judgment. Accordingly, its motion must be denied.

Conclusion

A thorough examination of the circumstances of this case can lead to only one conclusion. The union wants to have things both ways. Namely, it wants paper FLSA reviews to be defective if the result is "exempt". It wants paper FLSA reviews to be binding on the agency if the result is "nonexempt". These contradictory concepts cannot coexist. Law dictates that FLSA rests on the duties actually performed by the employee. Absent the evaluation of duties performed, summary judgment regarding FLSA status cannot be obtained.

In light of the foregoing facts, the agency requests that the arbitrator deny the instant motions for summary judgment in their entirety.

Respectfully submitted,

_____

Norman Mesewicz
Agency Representative

Certificate of Service

I certify that a copy of the foregoing was served upon the union via Email. March 24, 2006. _____

[3] There is no dispute over damages entitlement for the GS-10s and below. The hearing is scheduled for June 2006.

[4] The settlement agreement is its own authority for the FLSA status of the GS-10s and below. It is separate from established FLSA exemption criteria. There is no reference in the settlement agreement to "wrongful misclassification".

[5] In early March the agency revisited the FLSA status of the GS-950-12 Paralegal Specialist positions and reversed an initial finding of FLSA exempt.

IN THE MATTER OF ARBITRATION BETWEEN:

NATIONAL COUNCIL OF HUD LOCALS 222, AFGE, AFL-CIO, Union, v. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Agency

Agency's Supplemental Response to the Union's Renewed Motion for Partial Summary Judgment Relating to Liability for Certain GS-11, 12, 13 and 14 Positions and Union's Motion for Summary Judgment on Certain Damages for all GS-10's and Below and for Certain GS-11, 12, 13 and 14 Positions

The United States Department of Housing and Urban Development ("HUD", "Department" or "Agency"), through its counsel, Epstein Becker & Green, P.C., hereby submits this supplemental response to the Union's Renewed Motion for Summary Judgment. HUD appreciates the Arbitrator's consideration in permitting new counsel an additional round of briefing on the Union's motion.

As shown below, the Union is not entitled to judgment as a matter of law. Specifically--

- The Union misunderstands the purpose of HUD's internal review of GS-11 and higher positions;
- As a matter of law, an employer's voluntary reclassification of certain positions from exempt to non-exempt is not an admission that the employees are non-exempt;
- As a matter of law, exempt or non-exempt status can be determined only by analyzing each employee's actual duties and not merely by reading a written position description;

- The Partial Settlement Agreement covering GS-10s and below clearly states that the agreement is not an admission of retroactive liability; and

- Summary judgment on damages is inappropriate because many legal and factual issues remain to be resolved before accurate damages can be determined to be due.

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party shows it is entitled to a judgment as a matter of law. *Cf.* Rules of the U.S. Court of Federal Claims ("RCFC") 56(c). The Union argues that a September 2005 Partial Settlement Agreement covering workers at levels GS-10 and below that expressly says it is effective October 21, 2005, is not retroactive and doesn't resolve damages nevertheless entitles the Union to summary judgment on damages. The Union further argues that HUD's decision to start paying overtime to some GS-11 and above workers also is a basis for summary judgment. The Union's arguments, however, do not meet the legal standard for summary judgment. The Union has failed to state what the material facts are, let alone to show that they are not in dispute.

For all of these reasons, the Union's motion for summary judgment should be denied.

I. INTRODUCTION

The Union's motion purports to cover two matters. First, the Union asks the Arbitrator to rule as a matter of law that 109 different job positions in grades GS-11, 12, 13 and 14 are non-exempt. (The precise positions are listed on pages 3-6 of the Union's motion.) In normal circumstances, we suppose it would be unusual to move for summary judgment on 109 different jobs with virtually no factual or legal arguments in support. The Union's brief offers no facts about any of these classifications or the actual duties of the incumbents who work in them. Rather, the only basis that the Union

asserts for its request is the fact that HUD has prospectively reclassified those 109 job-titles as non-exempt. According to the Union, that action by HUD is an admission that the incumbents in the named positions are in fact non-exempt. However, as discussed below, the Union is factually and legally wrong.

Second, the Union asks the Arbitrator to rule as a matter of law that all GS-10s and below as well as the 109 higher-level classifications listed in the Union's motion are entitled to certain categories of damages. The Union's request is founded on the incorrect premise that HUD already has admitted that all of these employees are in fact entitled to back overtime wages. In fact, neither HUD's voluntary reclassification of GS-11 and higher positions nor HUD's agreement to reclassify GS-10 and lower positions is such an admission.[1] Thus, this part of the Union's motion lacks merit as well.

II. DISCUSSION

A. The Union's motion fails to satisfy the moving party's initial burden of identifying material facts as to which there is no genuine dispute

A party moving for summary judgment must identify in some manner all of the material facts upon which the party bases its motion and as to which the party believes there is no genuine dispute. *See* RCFC 56(h). Granted that arbitration proceedings are less formal than judicial proceedings, and therefore the Union may not have felt the need to file formal "Proposed Findings of Uncontroverted Fact" as described in the Rules of the Court of Federal Claims. Nevertheless, summary judgment clearly is

[1] HUD wishes to make clear at the outset that it has every desire to negotiate a complete resolution of the GS-10 and lower positions and the GS-11 and GS-12 paralegal positions in accordance with the prior understandings of the parties. And, if negotiations do not succeed, HUD will submit to further arbitration proceedings. Nevertheless, HUD's agreement to establish a framework for negotiations and settlement is not the same as an admission that can support summary judgment. *Cf.* Fed. R. Evid. 408 *and* Advisory Comm. Notes to 1972 Proposed Rules *reprinted in*, 28 U.S.C.A. (exclusionary rule applies to completed compromises and not only offers to compromise).

inappropriate if the Union does not make at least some showing based on HUD's pleadings or other documentary evidence—for example, affidavits or exhibits—that there is no genuine issue as to any material fact. It is insufficient as a matter of law for the moving party to rest on the mere assertions in its motion, which is what the Union has done here. *See, e.g., H.N. Wood Products, Inc. v. United States*, 59 Fed.Cl. 479 (2003).

In this case, the Union mistakenly relies on a supposed admission by the Agency as the basis for contending that no material facts are in dispute, but the Union has not attached any document or evidence to its motion purporting to show that HUD really made an admission. The Union asserts that HUD conducted an internal review which found certain GS-11, 12, 13 and 14 positions to be non-exempt. However, the Union provides the Arbitrator with no facts about that internal review—in particular, the Union offers no facts that would show when the review was conducted, the conditions under which the review was conducted, what HUD's reasons were for conducting the review, and whether HUD intended the review to be definitive and retroactive. All of these facts would be material to a finding of whether the review constitutes an admission.

Although a movant may sometimes satisfy its burden by showing that there is an absence of facts supporting the non-movant, this is not such a case. Rather, viewing the evidence and all factual inferences in the light most favorable to the non-moving party as the law requires, *see Asco-Falcon II Shipping Co. v. United States*, 32 Fed.Cl. 595 (1994) (citing *Confederated Tribes of the Colville Res. v. United States,* 20 Cl.Ct. 31, 38 (1990)), there are ample facts which compel the conclusion that HUD has made

no admissions. At the very minimum, there is significant doubt as to what the material facts are. Accordingly, the Union's motion should be denied.

B. HUD has made no admission that any GS-11, 12 13 and 14 positions are non-exempt

1. The Union misunderstands the purpose of HUD's internal review

Following the filing of the Union's grievances, the Department performed what the Union refers to in its Motion for Summary Judgment as the "HUD FLSA Evaluation." The Union asserts on page 3 of its Motion that HUD classification experts evaluated each HUD employee position description ("PD") at the levels of GS-11 and higher and made "a decision as to whether HUD now considers the position, and all incumbent employees in the position, to be FLSA exempt or FLSA non-exempt." This appears to misunderstand what the purpose of HUD's internal review was.

The reality is that the classifiers did not "make a decision as to whether HUD now considers the position, and all incumbent employees in the position, to be FLSA exempt or FLSA non-exempt." Firstly, the classifiers looked only at written PDs, some of which were ten or more years old. Declaration of Deputy Assistant Secretary Barbara J. Edwards ("Edwards Declaration") ¶7. They did not look at "all incumbent employees." Edwards Declaration ¶8.

Also, the classifiers' work was undertaken on extremely short notice and in an expedited manner. It was done in order to evaluate HUD's litigation position and minimize the potential costs to taxpayers in the event HUD is ultimately found in the course of the arbitration to be classifying employees incorrectly. *Id.* In essence, HUD, out of an abundance of caution, made a decision to limit its litigation risks and "cap" potential damages by paying overtime on a prospective basis to certain workers. This

would allow HUD to schedule and manage overtime and contain its dispute with the Union. It also would help establish a framework for a possible settlement. But it did not and does not mean these workers are in fact non-exempt. In reclassifying positions as it did, HUD followed OPM's regulations, which state:

> If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee should be designated FLSA nonexempt.

5 C.F.R. §551.202(d). Thus, the classifiers did not make a decision as to whether HUD now considers a given incumbent employee to be FLSA exempt or FLSA non-exempt. Rather, the classifiers made a recommendation whether a given PD clearly describes an exempt job or whether reasonable doubt exists so that the job should be considered non-exempt until future clarification can be obtained. The classification decision was meant to be used for questionable cases on a going-forward basis. However, this is not an "admission" for purposes of the arbitration that any position is non-exempt. Indeed, HUD is not precluded from revisiting all its voluntary reclassifications, particularly of positions GS-11s and higher, as applied to an individual employee. *See* Edwards Declaration ¶8.

2. As a matter of law, HUD's voluntary prospective reclassification of certain GS-11, 12, 13 and 14 positions from exempt to non-exempt is not an admission that the employees are non-exempt

It is hornbook law that a party's change to a prior practice is not an admission that the prior practice was somehow improper. *See, e.g., Columbia & Puget Sound R.R. Co. v. Hawthorne*, 144 U.S. 202 (1892). Thus, Federal Rule of Evidence 407 states:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously would have

> made the injury or harm less likely to occur, evidence of subsequent measures is not admissible to prove negligence, culpable conduct . . . .

As explained in the Advisory Committee Notes, the rule applies, among other circumstances, to an employer's employment policies and actions. *See* Advisory Committee Notes to 1972 Proposed Rules, *reprinted in* 28 U.S.C.A.

For example, in *Dennis v. County of Fairfax*, 55 F.3d 151 (4th Cir. 1995), a black employee was suspended after being involved in a fight. Later, he was reinstated and given back pay. The employee sued, claiming that the employer's corrective action amounted to a concession that discrimination actually took place. However, citing F.R.E. 407, the Fourth Circuit rejected the employee's assertion. The Court said:

> Appellant labors under a misapprehension: namely, that corrective action by an employer amounts to a concession that discrimination actually took place. As a general matter, voluntary remedial acts are no basis for subsequent liability.

55 F.3d at 153-54.

Here, too, the Union labors under a misapprehension that HUD's actions amount to a concession that employees were non-exempt. Accordingly, the Union's motion should be denied.

3. As a matter of law, exempt or non-exempt status can be determined only by analyzing each employee's actual duties and not merely by reading a written position description

Even if HUD had intended to definitively reclassify all employees based on its paper review of PDs, it could not have done so. OPM regulations state unambiguously that:

> The designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties <u>actually</u> performed by the employee.

5 C.F.R. §551.202(i) (emphasis added). *See also* 29 C.F.R. §541.2 ("Job titles insufficient"). Here, as explained in the declaration of Deputy Assistant Secretary Edwards, the classifiers did not review the actual job duties of any incumbent employee. Rather, they reviewed only written PDs. Some of those PDs are 10 or more years old and do not necessarily reflect the actual job duties of some or all of the incumbents now. Edwards Declaration ¶7. Thus, under no circumstances could a final decision as to the status of an individual employee have resulted from the so-called HUD FLSA Evaluation.[2]

C. HUD has made no admission that all GS-10 and below positions are non-exempt

The Union's motion similarly lacks merit vis-à-vis employees at the level of GS-10 and below. The Union's motion does not even ask the Arbitrator to find that HUD made an admission that all GS-10 and lower positions are non-exempt. Instead, the Union takes this for granted and asks for summary judgment on damages. The Union's position apparently is based on the existence of a Partial Settlement Agreement entered into between HUD and the Union in September 2005 in which the Agency agreed to reclassify the employees in question effective October 21, 2005. However, for the reasons explained below, this is not an admission of retroactive liability.

[2] It should be noted also that Section 9.01 of the Collective Bargaining Agreement states expressly that: "A position description does not list every duty that an employee may be assigned but reflects those duties which are series and grade controlling." The CBA is silent regarding the role of a PD is determining exempt or non-exempt status.

1. The Partial Settlement Agreement covering GS-10s and below clearly states that any reclassification will be prospective only and that the agreement is not an admission of retroactive liability

The Union's request for summary judgment on damages for GS-10s and below erroneously presupposes that retroactive liability for GS-10s and below has been determined. In contrast, the Partial Settlement Agreement relating to GS-10s and below states expressly—

> The parties agree that the issue of damages (including retroactive date of reclassification) . . . has not been resolved, and will be addressed by the parties separately. [Emphasis added]

Furthermore, the Partial Settlement Agreement clearly states that reclassifications were not retroactive, but rather became effective October 21, 2005. Accordingly, the Settlement Agreement is of prospective effect only, and the Union's claim that the Partial Settlement Agreement is an admission of liability is contradicted by the express language of the agreement itself.

2. As with the higher-level jobs, HUD neither intended to, nor did, admit that any of the positions in question are non-exempt

HUD did not intend the Partial Settlement Agreement between HUD and the Union dated September 28, 2005 to be an admission that any individual employee is non-exempt. Rather, the Partial Settlement Agreement was meant to be a framework for future negotiations. Thus, in paragraph 1 of that agreement, the Department agreed to identify by October 21, 2005--after just 15 business days--any employees at GS-10 or below that the Department considered to be exempt. HUD further agreed that—

> If the Agency does not identify an employee as described in paragraph 1 and provide the information described in paragraph 2 for an employee/position, that employee/ position will be reclassified to FLSA non-exempt status

effective the beginning of the first full pay period after October 21, 2005.

This provision gave HUD only 15 working days to review the status of approximately 250 individual employees. It is unreasonable to think that HUD would have agreed to a definitive resolution, yet given itself so little time to fully research the relevant facts. Obviously, HUD did not intend that result. Rather, consistent with 5 C.F.R. §551.202(d) which states that cases of reasonable doubt should be resolved in favor of finding the employee non-exempt, HUD decided prospectively that it would treat all workers at GS-10s and below as non-exempt and start paying them overtime. Edwards Declaration ¶¶9-10. At the same time, HUD would engage the Union in future negotiations regarding retroactive liability, if any. This is not an admission that those 250 employees were never exempt; it is merely a method of containing its dispute with the Union and putting a "cap" on potential damages. It also reflects HUD's desire to resolve outstanding issues. That, however, is not an admission of liability that would support summary judgment. *See* Fed. R. Evid. 408.

3. As with the higher-level jobs, exempt or non-exempt status of GS-10 and lower jobs can be determined only by analyzing each employee's actual duties and not merely by reading a written position description

Again, even if HUD had intended to conclude that all 250 employees were not exempt, it would have had to review their individual job duties. A blanket finding based on a written job description would have been improper. 5 C.F.R. §551.202(i); 29 C.F.R. §541.2.

D. Summary judgment on damages is inappropriate because many legal and factual issues remain to be resolved before accurate damages can be calculated

On page 8 of its Motion, the Union states that it seeks a judgment that HUD is liable for the following types of damages: Underpaid ("capped") overtime, compensatory time, and "suffered and permitted" overtime. The Union incorrectly asserts that: "There is no factual dispute that could alter the entitlement of the relevant employees to these damages." *Id.*

It is not clear what the purpose of the Union's motion is. Summary judgment is not required to determine what damages are theoretically available under the right facts. And, to the extent that the Union believes it has shown sufficient facts to actually be awarded specific types of damages—which appears to be the Union's belief based on the quotation above--the Union is wrong. Even if the Arbitrator were to find that there are no genuine issues of material fact as to liability and that the Union is entitled to judgment as a matter of law—which the Arbitrator should not do, for the reasons explained above—the Union still would not be entitled to summary judgment on the categories of damages it seeks. As shown below, there <u>are</u> genuine disputes regarding material factual issues. In addition, there are legal issues because of which the Union is not entitled to judgment as a matter of law.

1. Summary judgment on "capped" overtime is inappropriate because the Union fails to offer evidence that FEPA applies or that overtime work was approved in writing by an authorized official

"Capped" overtime is a creature of the Federal Pay Act ("FEPA") in Title 5 U.S.C.A., not the FLSA. Significantly, the Union's grievance was not filed under FEPA, but rather was styled an "FLSA Overtime Grievance." That grievance made no mention

of FEPA. Thus, it is not even clear that the Union has the right to seek FEPA overtime. Certainly, such a demand is improper on the meager record that now exists. For example, there is no evidence that a cap on overtime pay was imposed or that, if a cap was imposed, anyone actually suffered harm. Thus, summary judgment clearly is inappropriate.

Furthermore, even if "capped" overtime was worked, there is no evidence that it was authorized. OPM's Federal Pay Act regulations state:

> [O]vertime work means work in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek that is--
>
> (1) Officially ordered or approved; and
>
> (2) Performed by an employee.

5 C.F.R. §550.111(a). The regulations further provide:

> Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated.

Id. §550.111(c) (emphasis added).

The requirement for a written order or approval from an authorized official is strictly construed. *Doe v. United States*, 372 F.3d 1347 (Fed. Cir. 2004). Thus, the Union must offer evidence sufficient to establish that the employees in this case had obtained such orders or approvals prior to working overtime. But the Union has offered nothing. Accordingly, a finding for the Union is impossible and this aspect of the Union's motion must be denied.

2. Summary judgment on compensatory time is inappropriate because the Union fails to offer evidence regarding the extent to which compensatory time was earned and by whom and the extent to which it was offset by overtime compensation

Under section 18.03 of the Collective Bargaining Agreement as well as under applicable regulations, some employees are entitled to choose between compensatory time-off and overtime compensation. *See generally* 5 U.S.C. §5543. However, the Union has offered no evidence regarding the numbers or identities of employees who are entitled to make that choice. And, not only is there no evidence that any overtime was worked, to the extent overtime was worked, there is no evidence on the record how that overtime was compensated (time and a half, half time, comp time, etc), and no evidence that the Agency failed to give eligible employees the choice between compensatory time off and overtime pay. Thus, this part of the Union's motion also must be denied.

3. Summary judgment on "suffered or permitted" overtime is inappropriate because the Union fails to offer any evidence that overtime work was "suffered or permitted"

Under OPM's regulations—

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

5 C.F.R. §551.104. The Union offers no evidence that any given employee's supervisor knew or had reason to know that that employee was working overtime. After a hearing, the facts may show that some employees' supervisors knew of overtime work and others did not, or that no employees' supervisors knew. Regardless, there is no

evidence presently in the record from which to draw any conclusions on this matter. Accordingly, summary judgment is inappropriate.

4. Summary judgment as to liquidated damages is inappropriate because misclassified employees are not automatically entitled to liquidated damages

Before the arbitrator even gets to liquidated damages, there must be findings of liability and clear entitlement to damages. That's simply not the case on this factually barren record.

In any case, liquidated damages may only be awarded in the fact-finder's discretion when the employer has not acted in good faith. *See* 29 U.S.C. §260; *see also Brock v. El Paso Natural Gas Co.,* 644 F. Supp. 1202 (W.D.Texas 1986). The Union apparently thinks the arbitrator has no discretion. Here, the Union asserts, "the Agency has not and cannot, as a matter of law, establish good faith." Motion at 15. But the Union's assertion is without foundation. First, as for why HUD has not yet offered any evidence of good faith, such evidence belongs in the damages phase, and there has not yet been such a phase. The Union is making a circular argument—skip the damages phase because the Agency has not offered any evidence that should have been offered in the damages phase. As for the second part of its assertion, the Union fails to meet its basic burden of proving by a preponderance of the evidence that HUD "cannot, as a matter of law, establish good faith." In fact, the Union offers no evidence.

Indeed, the evidence at the damages phase may show any number of bases for HUD's good faith. In some cases, reliance on advice of counsel has been sufficient to avoid or limit liquidated damages. *See, e.g., Van Dyke v. Bluefield Gas Co.,* 210 F.2d 620 (4th Cir. 1954); *Kimball v. Goodyear Tire and Rubber Co.,* 504 F. Supp. 544 (E.D. Tex. 1980); *Ferrer v. Waterman Steamship Corp.,* 84 F. Supp. 680 (D.P.R. 1949). In

Hultgren v. County of Lancaster, 913 F.2d 498 (8th Cir. 1990), the employer asserted the defense successfully where there was evidence that the employer researched the FLSA and DOL opinion letters on the point at issue. *See also Wright v. City of Jackson, Miss.,* 727 F. Supp. 1520 (S.D. Miss. 1989).

Here, many of the jobs that the Agency has treated as exempt appear to parallel jobs that the Department of Labor and/or OPM consider exempt. HUD's classification system has been in place for a long time. *See* Edwards Declaration ¶7. At the time HUD created that system, it may have relied on "ancient" guidance from OPM. Reliance on the advice of OPM can be an absolute defense to damages. *See Adams v. United States*, 350 F.3d 1216 (Fed. Cir. 2003). Thus, HUD cannot say for certain at this time what the origin of every classification decision was. The FLSA was originally applied to federal employees in 1974. And at one time, the OPM regulation contained a "rebuttable presumption" that all employees at GS-11 or higher were exempt. See 53 Fed. Reg. 1739 (January 22, 1988). With more time and individual examination, the historical antecedents of HUD's classification system may become clearer. But for now, the record is incomplete and summary judgment is not possible.

Moreover, liquidated damages are not an "all or nothing" proposition. Rather, partial reduction of liquidated damages can be ordered as well. *See Hodgson v. Square D Co.,* 459 F.2d 805 (6th Cir. 1972); *Burke v. Mesta Machine Co.,* 79 F. Supp. 588 (W.D. Pa. 1948)). Without a single shred of evidence, the Arbitrator is in no position to meaningfully exercise his "discretion" and grant summary judgment on this matter. Accordingly, summary judgment must be denied.

III. CONCLUSION

Because there are genuine disputes as to material facts and because the Union is not entitled to judgment as a matter of law, the Union's motion should be denied.

Dated: April 3, 2006

Respectfully submitted,

EPSTEIN BECKER & GREEN P.C.

/s/

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Certificate of Service

I hereby certify that a copy of this Supplemental Response was sent to Michael J. Snider, Esquire on April 3, 2006 by email to mike@sniderlaw.com and carolyn_federoff@hud.gov.

/s/
Daniel B. Abrahams

DC:580791v5

IN THE MATTER OF ARBITRATION BETWEEN:

NATIONAL COUNCIL OF HUD LOCALS 222, AFGE, AFL-CIO, Union, v. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Agency

Declaration of Barbara J. Edwards

I, Barbara J. Edwards, do hereby state as follows:

1. I am the Deputy Assistant Secretary for Human Resource Management at the U.S. Department of Housing and Urban Development ("HUD" or "Department"). In that capacity, my responsibilities include the Office of Human Resources. I am considered to be the primary leader in Human Capital matters for the Department.

2. Prior to my current position, I served as Deputy Assistant Secretary for Resource Management, where I was responsible for administering a $142 million budget. My responsibilities included delivery of support for national initiatives, providing policies and guidelines, and strategic planning for the Office of Administration's services, including but not limited to human resources, to include staffing and classification and human resources related services.

3. I have also held positions in HUD as Deputy Assistant Secretary for Technical Services, Director and Deputy Director of Human Resources, and Director of Labor and Employee Relations.

4. As part of my official duties, I and my staff have been personally involved in formulating the Department's positions and actions in response to the grievances filed by the Union on June 18, 2003 and December 24, 2003.

5. In particular, I am aware that the Department performed what the Union refers to in its Motion for Summary Judgment as the "HUD FLSA Evaluation." However, the Union appears to misunderstand both the purpose and the procedure of that evaluation.

6. Specifically, the Union states on page 3 of its Motion that HUD classification experts evaluated each HUD employee position description ("PD") at the levels of GS-11 and higher and made "a decision as to whether HUD now considers the position, and all incumbent employees in the position, to be FLSA exempt or FLSA non-exempt." This is incorrect for several reasons.

7. First, it is important to understand that the classifiers did not review the actual job duties of each incumbent employee. Rather, they reviewed only written PDs. Some of those PDs are 10 or more years old and do not necessarily reflect the actual job duties of some or all of the incumbents. Furthermore, even if the PDs were more current, the applicable Office of Personnel Management ("OPM") regulations state that the designation of an employee as FLSA exempt or non-exempt ultimately rests on the duties actually performed by the employee. Thus, under no circumstances could a final decision as to the status of an individual employee have resulted from the so-called HUD FLSA Evaluation.

8. Furthermore, the classifiers did not "make a decision as to whether HUD now considers the position, and all incumbent employees in the position, to be FLSA

exempt or FLSA non-exempt." As just explained, the classifiers did not look at "all incumbent employees." Also, the classifiers' work was undertaken at short notice and in an expedited manner in order to evaluate HUD's litigation position and minimize the costs to taxpayers in the event HUD is ultimately found by the arbitrator to be classifying employees incorrectly. Consistent with OPM's regulations, which state that, in cases of reasonable doubt, an employee should be treated as non-exempt, HUD has begun treating all questionable cases as non-exempt on a going-forward basis. However, HUD never intended this as an "admission" for purposes of the arbitration that any position is non-exempt, nor do I believe that HUD is precluded from revisiting the classification as applied to a particular employee.

9. Similarly, with regards to GS-10s and below, HUD did not intend the Partial Settlement Agreement between HUD and the Union dated September 28, 2005 to be an admission that any individual employee is non-exempt. In paragraph 1 of that agreement, the Department agreed to identify by October 21, 2005 any employees at GS-10 or below that the Department considered to be exempt. HUD further agreed that—

> If the Agency does not identify an employee as described in paragraph 1 and provide the information described in paragraph 2 for an employee/position, that employee/position will be reclassified to FLSA non-exempt status effective the beginning of the first full pay period after October 21, 2005.

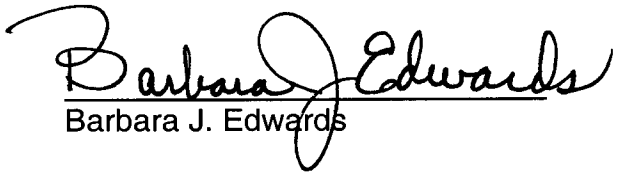
10. This provision gave HUD 15 working days to review more than 20 job classifications consisting of approximately 250 individual employees. Again, consistent with OPM's rule that cases of reasonable doubt should be resolved in favor of finding the employee non-exempt, HUD decided to treat all GS-10s and below as non-exempt on a prospective basis.

11. HUD never intended the above statement to be an admission that any individual employee is non-exempt or was non-exempt in the past. To the contrary, the Partial Settlement Agreement states—

> The parties agree that the issue of damages (including retroactive date of reclassification) . . . has not been resolved, and will be addressed by the parties separately.

12. As a further indication that HUD never intended to admit that any positions were improperly classified, the Partial Settlement Agreement clearly states that reclassifications will be effective October 21, 2005.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 29, 2006.



Barbara J. Edwards

IN THE MATTER OF ARBITRATION BETWEEN:

NATIONAL COUNCIL OF HUD LOCALS 222, AFGE, AFL-CIO, Union, v. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Agency.	)	Issue: FLSA Overtime FLSA Exemptions

UNION'S SUPPLEMENTAL REPLY BRIEF TO AGENCY'S OPPOSITION TO UNION'S MOTION FOR SUMMARY JUDGMENT RELATING TO LIABILITY FOR CERTAIN GS-11, 12, 13 AND 14 POSITIONS AND UNION'S MOTION FOR SUMMARY JUDGMENT ON CERTAIN DAMAGES FOR ALL GS-10'S AND BELOW AND FOR CERTAIN GS-11, 12, 13 AND 14 POSITIONS

Introduction

The Agency, having retained counsel, was given an additional opportunity to address the Union's Motion for Summary Judgment, which it did via a **Supplemental Opposition** on April 3, 2006. Essentially the Agency has reiterated the same arguments made in its March 24, 2006 **Opposition**. We address each in turn.

Edwards' affidavit was a sham, created by the Epstein, Becker and Green law firm for her signature. The arguments in the Agency Brief and Edwards affidavit conflict with the facts on the ground and must be discounted accordingly. The Agency, having reclassified – on its own – thousands of employees' positions as non-exempt, must now bite the bullet and actually reclassify the employees themselves.

Historical Background

In September, October and November 2005, the Union asked the Agency repeatedly which FLSA Exemption was relied upon for each and every employee. For example, on September 27, 2005, the Union requested:

> We also now request that the Agency identify which exemption it relied upon to classify each employee as Exempt from the FLSA at the time the decision was originally made to do so, and which exemption it now relies upon for each and every exempt employee/position.

(See **Attached** 9/27/05 Email). At about the same time, the Agency apparently decided to perform some actions to evaluate its potential defenses, and did some FLSA Evaluations on employee PDs. When these were produced, in September 2005, the Union again requested, and the Agency agreed to provide, the PD for each employee:

> Please consider this a **reiteration** of our original 7114 Request for information.
>
> The Union requested the following information, and requests it again now:
>
> Please provide the following information in no case later than fifteen (15) calendar days:
>
> … A copy of each employee's position description.

In response, the Agency began to produce a huge number of Position Descriptions to the Union. Attached to the front of each and every PD was a document labeled "HUD FLSA Evaluation," which went through each of the potential exemptions to the FLSA and checked off which exemption applied, if any. When the Union asked the Agency the meaning of the FLSA Evaluation sheets, we were told by Mr. Mesewicz that "you asked for which exemption we are relying on, and this is it." In other words (unlike the

litigation position taken by Epstein, Becker & Green), HUD made a decision in the Fall of 2005 to classify dozens of positions as FLSA Nonexempt.

Despite the fact that it did so, the Agency has not, to date, reclassified any of the incumbents in those PDs. Nor has it issued a new PD to a single employee. Nor has it made any effort to evaluate the accuracy of any of the PDs. All of which points to one thing: HUD knows that its employees are non-exempt, admits they are non-exempt but has not yet reclassified them as nonexempt. We therefore ask the Arbitrator to ORDER HUD to do this ministerial task.

Every single GS-11 position came back from HUD as FLSA Nonexempt. Every single one (except the GS-904, but that was not done until March 2006). The Union has moved for Summary Judgment on liability on those positions that HUD "Evaluated" as non-exempt. This is not a major issue, not a large question or an unclear matter – it is a clearcut, undisputed fact. Now the Agency has admitted that it "chose" to treat these employees as non-exempt "going forward," but still somehow insists that they are non-exempt. That is ludicrous. If they are non-exempt going forward, and their duties did not change at all, then they are non-exempt going backwards as well. That is clear and logical. The Agency must be ordered to do that which it will not do on its own – reclassify the incumbents as non-exempt in accordance with its own FLSA Evaluations.

HUD has failed to produce any other facts, evidence, affidavits or genuine dispute. Summary judgment is appropriate, therefore, as a matter of law.

Applicable Law and Argument

In order to avoid Summary Judgment, the non-moving party cannot rely (as it does here) on mere speculation or argument, but must rather produce **evidence** that supports their position. In this case, the Agency **has not produced a shred of evidence** in support of its **Opposition** to Summary Judgment or its **Supplemental Opposition**. Accordingly, summary judgment for the Union is appropriate.

Summary judgment **shall be granted** if the responding party (the Agency) does not generate a genuine dispute through affidavits, documents, depositions, answers to interrogatories and admissions on file, together with other declarations, if any. It is incumbent upon the Agency to demonstrate that there is a **genuine** issue as to **material** fact and that the moving party is not entitled to judgment as a matter of law. See FED. R. CIV. P. 56(c). The Rule states in its entirety:

> **Rule 56. Summary Judgment**
>
> **(a) For Claimant.**
>
> A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> **(b) For Defending Party.**
>
> A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion.

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

> **(f) When Affidavits are Unavailable.**
>
> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.
>
> **(g) Affidavits Made in Bad Faith.**
>
> Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

The **Rule** itself provides that "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." The Rule is very clear that the **Opposition** must contain evidence, not mere argument:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

On a motion for summary judgment, the **non-moving party's opposition must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for trial**. See FED. R. CIV. P. 56(e); **Celotex Corp. v. Catrett**, 477 U.S. 317, 324 (1986).

The non-moving party is "required to provide **evidence** that would permit a reasonable [fact finder] to find" in its favor. **Laningham v. United States Navy**, 813 F.2d 1236, 1242 (D.C. Cir. 1987)(emphasis added). If the non-movant's evidence is "merely colorable" or "not significantly probative," summary judgment may be granted. **Anderson v. Liberty Lobby, Inc.**, 477 U.S. at 249-50.

To defeat summary judgment, the non-moving party must have more than "a scintilla of evidence to support [its] claims." **Freedman v. MCI Telecommunications Corp.**, 255 F.3d 840, 845 (D.C. Cir. 2001); see **Ben-Kotel v. Howard University**, 319 F.3d 532, 536 (D.C. Cir. 2003).

The "[Agency's] own naked opinion, without more, is not enough to establish a … case." **Goldberg v. B. Green and Co., Inc.**, 836 F.2d 845, 848 (4th Cir. 1988)(citing **Locke v. Commercial Union Ins. Co.**, 676 F.2d 205, 206 (6th Cir. 1982)(per curiam); **Kittredge v. Parker Hannifin Corp.**, 597 F. Supp. 605, 609-10 (W.D. Mich. 1984)). *See also* **Williams v. Cerberonics, Inc**., 871 F.2d 452, 456 (4th Cir. 1989)(assertions are in and of themselves insufficient). "[C]onclusory assertions that [the defendants'] state of mind and motivation are in dispute are not enough to withstand summary judgment." **Goldberg**, 836 F.2d at 828 (citing **Zoby v. American Fidelity Co.**, 242 F.2d 76, 80 (4th Cir. 1957)).

Moreover, self serving and/or conclusory affidavits cannot overcome summary judgment. *See, e.g.,* **Evans v. Technologies Applications & Service Co.**, 80 F.3d 954, 952 (4th Cir. 1996); **United States v. Urbanek**, 39 F.3d 1179 (Table), 1944 WL 589614 at * 4 (4th Cir. 1994).

In this case, in which the ***burden of proof*** is upon the Agency, its failure to introduce credible evidence that shows a genuine dispute of material fact must result in a decision on the evidence alredy before the factfinder.

Edwards' Affidavit is a Sham at Worst, and is Self Serving and/or Conclusory at Best

Ms. Edwards, declaring "under the penalty of perjury," attempts to make a mockery of this tribunal and her oath. It is clear that her attorneys prepared the Affidavit for her. First, compare her Declaration at paragraphs 1-3 with her profile on the HUD website found at http://www.hud.gov/offices/adm/about/bedwardsbio.cfm :

> Barbara Edwards is currently the Deputy Assistant Secretary for Human Resource Management. Her portfolio consists of the Office of Human Resources and the HUD Training Academy. She is a primary leader in Human Capital matters for the Department.
>
> Prior to her current position, Ms. Edwards served as Deputy Assistant Secretary for Resource Management, where she was responsible for administering a $142 million budget. Her responsibilities included delivery of support for national initiatives, providing policies and guidelines, and strategic planning for the Office of Administration's services, e.g., human resources, to include staffing and classification and human resources related services; space management; building operations; furniture and equipment; mail; telephones; printing; visual arts; and records and directives management.
>
> Ms. Edwards also held positions in HUD as Deputy Assistant Secretary for Technical Services, Director and Deputy Director of Human Resources, and Director of Labor and Employee Relations.

They are nearly verbatim. Next, compare the Agency's **Supplemental Opposition** at page 15 with Edwards' actual **Declaration**:

> "Here, many of the jobs that the Agency has treated as exempt appear to parallel jobs that the Department of Labor and/or OPM consider exempt. HUD's classification system has been in place for a long time. See Edwards Declaration ¶ 7."

Edwards, of course, says no such thing at ¶ 7, or at any other place in her **Declaration**. The document is a fabrication made up as a bogus defense by Epstein, Becker & Green. The attorneys making up her Declaration, making up the Agency's defense, and making up facts, simply forgot to put this "fact" into Ms. Edwards' Declaration.

Further, Edwards does not actually attest to ***any facts*** about which she has first hand knowledge. She claims to have been "personally involved" in formulating positions and actions, but does not state anywhere that she has personal knowledge of the HUD FLSA Evaluation program, the decisions made by the HUD FLSA Evaluators or what they based their decision to find all GS-11 positions to be non-exempt.

Even if not a sham, Edwards' Declaration is self-serving and conclusory, not factual and material. She does not profess to have first hand knowledge of the actual decisions made, the reasons for the decisions or anything else truly relevant to this case.

Agency Supplemental Opposition and Opposition Help the Union

Here, the Agency has not produced a *shred* of evidence to support its **Opposition**. If anything, the **Opposition** and **Supplemental Opposition** support the Union's **Motion**: The **Opposition** states that "the agency is not precluded from revisiting the FLSA determinations of the GS-11-14 positions herein." (**Opposition** at 3). By stating that it is not "precluded from revisiting" its determination, the Agency admits that it has found the positions (and all incumbents therein) to be FLSA non-exempt.

Further, **in connection** with her discussion of the dozens of positions that HUD has recently classified as FLSA Non-exempt, Ms. Edwards stated that "HUD **has begun** treating all questionable cases as non-exempt on a going-forward basis." (Emphasis added). This statement must be formalized, since HUD is vacillating on this issue. Either the positions are non-exempt (and we urge the Arbitrator to so find, and to so order), or they are exempt. The Agency cannot have it both ways. Since Edwards admits that all of the GS-11, 12, 13 and 14 Positions that were classified as non-exempt are "questionable," then there is absolutely no reason to not reclassify all of the incumbents accordingly, especially since the Agency itself stated in black and white that it was "treating" them "as non-exempt on a going-forward basis." All we ask is that the Arbitrator formalize this admission and commitment into a binding Order.

To the extent that the PDs are accurate, the Agency has ceded those employees/positions as non-exempt. That is all the Union is seeking – a declaratory

judgment that those employees are non-exempt. To the extent that the incumbents perform duties of a similar nature in a similar way to the now-Nonexempt PDs, they are also entitled to be non-exempt. See ***DOD, Navy, Naval Explosive Ordinance Disposal Technology Division, Indian Head, MD and AFGE, Local 1923,*** 56 FLRA 280 (April 28, 2000)(**attached**).

"Retroactive" Liability for GS-10's and Below

During the meeting with the Union and Arbitrator on Thursday, April 6, 2006, the Agency has retracted its allegations in its Opposition at pp. 8-9, that the GS-10 and below settlement was not "retroactive." Daniel Abrahams admitted that the Settlement was in fact retroactive to either 2000 or 2001. Therefore we will not address these contentions.

Agency's Treatment of GS-10s and Below (Reclassification as FLSA Non-exempt) is "Similar" to the GS-11, 12, 13 and 14 Positions the Agency Found to be Nonexempt

FLSA exemptions are an affirmative defense that must be pleaded and proved by the defendant. Fife v. Harmon , 171 F.3d 1038 (5th Cir. 1999); Jones v. Giles, 741 F.2d 245, 248-49 (9th Cir. 1983). Here, HUD has ceded FLSA liability for these positions.

The Agency's **Supplemental Opposition** and Edwards' Declaration state that, just like the GS-11 through 14 positions, the Agency was treating and has been treating the GS-10 and below employees as "non-exempt going forward." The Agency used terms like "Similarly" (Edwards Declaration at par. 9):

9. Similarly, with regards to GS-10s and below, HUD did not intend the Partial Settlement Agreement between HUD and the Union dated September 28, 2005 to be an admission that any individual employee is non-exempt. In paragraph 1 of that agreement, the Department agreed to identify by October 21, 2005 any employees at GS-10 or below that the Department considered to be exempt. HUD further agreed that—

> If the Agency does not identify an employee as described in paragraph 1 and provide the information described in paragraph 2 for an employee/position, that employee/position will be reclassified to FLSA non-exempt status effective the beginning of the first full pay period after October 21, 2005.

10. This provision gave HUD 15 working days to review more than 20 job classifications consisting of approximately 250 individual employees. Again, consistent with OPM's rule that cases of reasonable doubt should be resolved in favor of finding the employee non-exempt, HUD decided to treat all GS-10s and below as non-exempt on a prospective basis.

and this statement:

> "HUD's voluntary prospective reclassification of certain GS-11, 12, 13 and 14 positions from exempt to non-exempt…"

(**Supplemental Opposition** at 6, bold heading #2). These statements are conclusive and binding – the Agency has indisputably classified these positions, and by extension all incumbents therein, as FLSA non-exempt.

Then the Agency engages in lawyerspeak: "HUD is not precluded from revisiting all its voluntary reclassifications, particularly of positions GS-11s and higher, as applied to an individual employee." (Supplemental Opposition at 6).

This, of course, is the lawyers' attempt at mitigating the actions of the client. That it cannot do. The Agency has "voluntarily reclassified" "positions GS-11 and higher" and now must deal with that reality. The Union provided the Arbitrator the facts – the hard evidence, in the form of documents provided by the Agency – admissions that HUD found these positions to be Nonexempt. That is true for the PD, for the position and for the incumbents, unless and until HUD comes forward with solid evidence that the PDs are inaccurate – which it has not done.

HUD could have provided affidavits from supervisors that the Nonexempt GS-11, 12, 13 and 14 PDs were inaccurate – and it did not.

HUD could have provided affidavits from the classifiers themselves who signed the HUD FLSA Evaluation sheets disclaiming their applicability – and it did not.

HUD could have produced real evidence, rather than mere hyperbole and a sham affidavit, to generate a genuine dispute of material fact – and it did not.

HUD could have avoided summary judgment, but it cannot and has not.

Subsequent Measures

The Agency claims that it's change to a few dozen PDs and attaching a statement labeled "HUD FLSA Evaluation" concluding "FLSA Non-Exempt" is not an admission of liability for those positions. While trying not to laugh, this argument is hard to take seriously.

It may be true that some subsequent measures are not a concession to other conclusions (like in the ***Dennis*** case), here we are not asking for a conclusion from fact A to fact B (although we could; see below). We are asking that Fact A be recognized for what it is – Fact A. In other words, the Agency has found that the positions at issue are non-exempt. No amount of good lawyering (or good dancing) can escape the conclusion that those positions have been ceded for liability purposes.

Furthermore, the FLRA has clearly and unambiguously found that an Arbitrator may indeed view Settlement Agreements and other probative actions by the Agency (ie, reclassifying PDs) as binding and an admission. See ***DOD, Navy, Naval Explosive Ordinance Disposal Technology Division, Indian Head, MD and AFGE, Local 1923,*** 56 FLRA 280 (April 28, 2000)(**attached**). The Agency there, much like the Agency here, argued that each and every individual employee's duties must be examined to

determine their proper exempt or nonexempt status. The Authority flatly rejected that argument:

> As previously mentioned, the Arbitrator concluded that the eight Equipment Specialists were nonexempt based on her specific findings that the knowledge requirements, supervisory controls and duties performed by the designated representatives were the same or virtually the same as other specialists who the Agency conceded did not meet the professional exemption criteria in § 551.207. Accordingly, we defer to the Arbitrator's findings as a sufficient basis for concluding that the employees at issue did not meet the criteria in § 551.207.

(**Attachment** at 8).

Liability for Ceded Positions and Incumbents

Notably, both the **Opposition** and **Supplemental Opposition** agree that the GS-11, 12, 13 and 14 positions that the Agency itself has classified as FLSA Non-exempt are, in fact, non-exempt and therefore ceded.

The **Opposition** states that

> Thus, the agency is not precluded from revisiting the FLSA determinations of the GS-11-14 positions herein. A consideration of duties actually performed, either through further management review or an arbitration hearing, may result in FLSA exempt determinations

(Opposition at 3). By stating that it is not "precluded from revisiting" the determination finding the positions (and all incumbents therein) FLSA non-exempt, the Agency is agreeing, as hard as it is for it to do so, that it has found the positions and incumbents to be, in fact, FLSA non-exempt.

Damages

The issue of damages is even more straightforward. The employees at issue, having been wrongfully exempted from the FLSA for decades, are now entitled to certain standard remedies that Arbitrators and the FLRA have repeatedly, consistently and without exception awarded. But for the Agency's failure to properly classify these individuals, they would have been paid time and a half overtime, for instance, rather than "capped" overtime. The same goes for compensatory time damages and suffered/permitted damages (which will have to be measured in more detail) and attorney fees.

Moreover, the Agency has not produced any caselaw contradicting that provided by the Union. Despite its proclamations that the Union's caselaw is not dispositive, the Agency has failed thus far to provide a single case to support its position. The Union's caselaw, in contrast, is directly on point.

Conclusion

The Agency has the burden of proof in this case. The Union moved for Summary Judgment on the current record before the Arbitrator. The record is full of admissions – binding admissions – that the Agency has classified the positions at issue as FLSA Nonexempt. The Agency had a full and fair opportunity to provide information in conjunction with its Opposition to Summary Judgment.

The Agency:

1. **failed** to provide any such information,
2. **failed** to rebut with competent evidence any of the Union's arguments regarding its evidence already in the record,
3. **failed** to raise any new defenses besides those provided to the Arbitrator and Union, and
4. **failed** to explain how there is any genuine dispute of material fact.

The Agency has not presented any evidence, testimony, ***or to provide any other credible evidence***. The Union requests judgment in its favor.

Respectfully Submitted,

April 10, 2006
Date

____/s/_____
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Certificate of Service

I certify that a copy of the foregoing was served upon Agency counsel.

April 10, 2006

_____/s/_____
Michael J. Snider