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/

Daniel B. Abrahams
Peter M. Panken
Frank C. Morris, Jr.
Shlomo D. Katz
1227 25th Street, N.W., Suite 600
Washington, D.C. 20037
(202) 861-1854
Facsimile (202) 861-3554
dabrahams@ebglaw.com

Counsel to the Agency

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