IN THE MATTER OF ARBITRATION BETWEEN:

NATIONAL COUNCIL OF HUD LOCALS 222, AFGE, AFL-CIO, NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LL1450, IAM,	)	Arbitrator Sean Rogers
Union,	)	Issue: FLSA Overtime Damages
v.	)	
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,	)	
Agency.	)	

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UNION'S CLOSING BRIEF

The Union, by and through its undersigned counsel, Snider & Associates, LLC, moves the Arbitrator to rule in its favor and conclude that the employees in this arbitration are entitled to overtime compensation for suffered or permitted work performed for the Agency between June 2000 and the present. The Union hereinafter reincorporates its closing brief on liability for the series 360, GS-11 and higher Grievants, as well as the numerous motions for summary judgment on the issue of damages that have been filed with the Arbitrator to date. In particular, the Union's prior arguments regarding capped overtime damages and comp time damages are included herein by reference.

ISSUE

1. Whether the Grievants are entitled to Underpaid (“capped”) overtime damages;
2. Whether the Grievants are entitled to Compensatory time (“comp time”) damages;
3. Whether the Grievants are entitled to damages for Suffered or Permitted overtime;
4. Whether the Agency has proven that it acted in good faith to comply with the FLSA so as to avoid payment of liquidated damages;
5. Even if the Agency proved that it acted in good faith to comply with the FLSA, whether liquidated damages are payable in the discretion of the Arbitrator;
6. Whether the Union proved that the Agency’s violation or violations of the FLSA were willful, so as to apply a three-year statute of limitations; and
7. If so, what is the remedy?

STATEMENT OF THE CASE

This part of the case involves hundreds of GS-360 employees from various offices of Housing and Urban Development (HUD or the Agency) who worked suffer or permit overtime by performing Agency work during travel, before the start of their workday, during lunch, after the workday ended, by taking work home on weekday evenings, and by performing Agency work over the weekends and on holidays, all without proper compensation and through the willful violation of the Fair Labor Standards Act (the FLSA).

For years, the Agency misclassified all of the Grievants at issue in this hearing. The Union maintains that every Grievant at issue in this hearing is and always was performing FLSA non-exempt work during the relevant time frame, June 2000 to the present.

Ms. Carolyn Federoff, a trial attorney in the Boston District Office, has been the Union Council President since June 2000. The Union filed the instant Grievance in this matter in June 2003. She filed the instant Grievance because informal negotiations between the Union and the Agency to acknowledge and correct related FLSA violations failed and members of the Union felt a Grievance was necessary to resolve overtime issues.

The entire universe of GS-360 employees at the GS-11 level and above since June of 2000 is approximately 500 employees[1]. In order to promote the efficiency and expediency of the arbitration proceeding, the Union presented representational testimony. Case law provides that representative testimony is allowable when duplicative testimony would become redundant and wasteful of time and resources. *See Riech v. Southern New*

England Home Communications Corp., 121 F.3d. 58; *McLaughlin v. HO FAT SETO, H-O, space, F-A-T space, S-E-T-O*, 850 S.2d. 586. In *AFGE, Local 3614 vs. EEOC* (2006) (Klein, J., Arbitrator), the Arbitrator issued an **Opinion And Award** that found violations of overtime policy for investigators and support staff. Despite the fact that only one support staff employee testified, the Arbitrator concluded that, in light of the finding that the representative support staff employee worked suffer or permit overtime, the other non-exempt support staff employees worked suffer or permit overtime as well. *See* Award at 74-77. She then remanded to the parties to determine damages, retaining jurisdiction.

The Agency violated the FLSA when it forced non-exempt employees to take compensatory time. Arb, 8.30.06, P.42-44[2]; EE 10. Arb. 8.29.06, P. 204-205, 222-223; Arb. 8.30.06, P.214; Arb. 9.7.06, P.16, 221-222; Arb. 9.20.06, P.147; Arb. 11.7.06, P.83. *See* 5 CFR 551.531. Furthermore, the Agency cannot allow compensatory time of non-exempt employees to expire; it must pay the employee at the overtime rate in effect when the compensatory time was earned. Id. The Agency treated its employees as exempt under the FLSA. Employees who are exempt are only entitled to overtime pay if it is officially ordered or approved, which has been interpreted to mean approved in writing in advance by an official who is authorized to order it. FLSA exempt employees are, therefore, paid only overtime with their supervisor's advance written permission. On the other hand, non-exempt employees are entitled to overtime compensation for even suffer or permit work.

[1] The arbitration also included series 360 GS-11/12/13/14/15 employees that are represented by NFFE 1450. The relevant time period for the remedy for the NFFE grievance is three years prior to the filing date of October 19, 2005, assuming the Agency acted willfully, until the present.
[2] Citations to the Transcript are: Arb. DATE, P PAGE; Exhibits: EE (Employer Exhibit), UE (Union).

The regulations at 5 CFR 551.401 are straightforward for FLSA non exempt employees. Hours of work is defined as all claims spent by an employee performing activity for the benefit of an agency under the control or direction of the agency. Such time includes time during which an employee has suffered or permitted to work. In addition, 551.402 provide that the agency has to exercise appropriate controls.

The Union demonstrated that the Grievants did perform considerable work for the Agency without being paid for it. The Agency benefited from it and knew or should have known about the work. Suffered or permitted overtime is by its nature unrecorded and consistent work performed for the benefit of the Agency. The Union presented witnesses who testified to the fact that they performed uncompensated suffer or permit overtime. The witness testimony was corroborated by other employees, supervisors, as well as documentary evidence. There are various types of documentary evidence that the Union uses to support its claims of overtime: NFC data that shows employees were not compensated with overtime during time periods in which employees performed overtime work, electronic documents, called screen shots, and e-mails, that show times employees accessed files or documents.

The Union further requests that the Arbitrator draw an adverse inference against the Agency for its failure to provide certain material documents. The Union requested documentary evidence that the Agency either never produced or only provided limited or incomplete copies. The Union discovered during the course of its investigation into the FLSA violations, that the Agency maintained sign-in/sign-out records, scan in/scan out records, and/or log-in/log-out records at every office. Despite the numerous requests by the Union, the Agency repeatedly failed to provide those documents. The Arbitrator must

draw an adverse inference against the Agency for not producing documents that would otherwise prove its case. The only reasonable explanation is that the documents would contribute to proof of the Union's claims.

Similarly, the Union requests an adverse inference to be drawn from the Agency's failure to call (in person, by phone or by affidavit) witnesses who possessed or should have possessed, material and relevant information – such as supervisors of the Union's Affidavit Witnesses.

The Agency's violation of the FLSA was willful and it failed to act in good faith because it specifically ignored the Union's warnings that similar policies have been declared violations of the law. The Agency knew, through its supervisors and management, that employees were working uncompensated overtime, but failed to compensate them or to stop the practice. It committed a violation of the FLSA by failing to keep accurate records of the time of arrival and departure, in direct violation of the Department of Labor and Office of Personnel Management recordkeeping requirements. The Agency did not make a good faith effort to comply with the Fair Labor Standards Act. The proper remedy for the suffer or permit violations is payment to each employee for the amount of hours they worked through lunch, after a shift, or on weekends or holidays, plus liquidated damages dating back three years from the date of the filing of the grievance and attorney fees, pursuant to the Back Pay Act.

ARGUMENT

I. The Union Must Only Present Evidence Sufficient to Prove That Overtime was Worked as a Matter of Just and Reasonable Inference.

To focus the argument, the court must examine the key difference between the two types of overtime compensation in the federal government:

a. Title 5 Overtime is provided via the Federal Employee Pay Act of 1945 (hereinafter "FEPA"), 59 Stat. 295, et seq., June 30, 1945, *codified at*, 5 U.S.C. §§5542, et seq.

b. FLSA Overtime is based upon the Fair Labor Standards Act of 1938, as amended 1996, 52 Stat. 1060, et seq., June 25, 1938, *codified at*, 29 U.S.C. §§201, et seq.

As to the present case, a principle difference between Title 5 Overtime and FLSA Overtime is that Title 5 Overtime must be approved by a qualified manager in writing and in advance. 5 U.S.C. §5542(a); 5 C.F.R. §555.111(a)(1). Without advanced approval from a manager who has been explicitly deputized to authorize overtime, Title 5 Overtime cannot be paid to a federal employee[3]. *See Doe V v. United States*, 372 F.3d 1347, 1363 (Fed. Cir. 2004); *Bilello v. United States*, 174 Ct.Cl. 1253, 1257 (1966); *Doe VI v. United States*, 463 F.3d 1314, 1322 (Fed. Cir. 2006). FLSA Overtime, on the other hand, has no statutory or regulatory requirement for approval of overtime in advance, but, rather, has an explicit requirement for overtime payment if the employer "suffer or permits" overtime to be worked by an employee. 29 U.S.C. §203(g). *See Holzapfel v. Town of Newburgh, NY*, 145 F.3d 516 (2nd Cir. 1998).

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. § 551.102(e). Employers, therefore, are

obligated to compensate non-exempt employees for overtime work that is allowed to take place even without the appropriate prior authorization. This suffer or permit overtime work may be regularly scheduled (i.e. takes place on a continuing basis as a fixed part of their established schedules) or can be irregular or occasional overtime (i.e. overtime that does not form any predictable pattern and, therefore, cannot be made a part of the employees' regular schedule). Traditionally, suffer or permit overtime work is claimed during periods of pre-shift, post-shift, or mealtime breaks. The burden of proof for claiming compensation for performing suffered or permitted overtime initially rests with the employee. To do so, the employee must show: (1) that s/he performed overtime work under the FLSA for which s/he was not paid; and (2) Produce enough evidence to show the amount and extent of that work as a matter of just and reasonable inference.

A. The Agency's Time and Attendance Records are Not Reliable and Accurate.

Since employees are presumed to be non-exempt until a proper FLSA determination is performed, and as the Union has put forth an extremely strong case on liability for the instant employees, we assume here that the employees at issue were or should have been nonexempt from the FLSA during the relevant time period.

Section 11(c) of the FLSA requires employers to "make, keep and preserve records" of employees and "their wages, hours, and other conditions and practices of employment" in accordance with the regulations. 29 U.S.C.A. Sec. 211(c); 29 C.F.R. Sec. 516.1. Pursuant to the recordkeeping requirements in 29 C.F.R. Part 516, employers must maintain these records for non-exempt employees. 29 C.F.R. Sec. 516.3, 516.11-

[3] Considering the Agency classified its employees as exempt, it never made any attempts to prevent the suffer or permit work because the Agency believed it was not liable for Title 5 pay - the work was not ordered and approved in advance.

.23, 516.29-.30 and 516.33-.34. Among the other recordkeeping requirements, the employer must maintain for **each** employee: “the hours worked each workday and the total hours worked each workweek.” 29 C.F.R. Sec. 516.2(a)(7); see also 29 C.F.R. Sec. 516.2(a)(8) and (a)(9).

Every covered employer must keep certain records for each non-exempt worker. The Act requires no particular form for the records, but does require that the records include certain identifying information about the employee and data about the hours worked and the wages earned. The law further requires this information to be accurate. The following is a listing of the basic records that an employer must maintain:

1. Employee's full name and social security number.
2. Address, including zip code.
3. Birth date, if younger than 19.
4. Sex and occupation.
5. Time and day of week when employee's workweek begins.
6. **Hours worked each day.**
7. **Total hours worked each workweek.**
8. Basis on which employee's wages are paid (e.g., "$6 an hour", "$220 a week", "piecework")
9. Regular hourly pay rate.
10. Total daily or weekly straight-time earnings.
11. **Total overtime earnings for the workweek**.
12. All additions to or deductions from the employee's wages.
13. Total wages paid each pay period.
14. Date of payment and the pay period covered by the payment.

See Fact Sheet #21: Recordkeeping Requirements under the FLSA at http://www.dol.gov/esa/regs/compliance/whd/whdfs21.htm. (29 CFR Part 516 et seq.).

The Agency failed to produce records that meet the statutory requirements. The time sheets maintained by the Agency are not reliable. There was ample testimonial evidence to support the position that the time and attendance records were not accurate with regard to the number of actual hours worked by the employees. There is evidence that the timekeeper and employees were instructed to put down 8 hours per day, rather than the times that they actually performed work. See, infra.

Pursuant to 29 CFR 516.2, the Agency is required to keep accurate records of total daily earnings and hours worked during the workday or weekend, as well as actual hours worked each day and each week. The time and attendance sheets were a tool that the Agency used to conceal overtour work by only recording the 8 hours per day per 40 workweek[4]. The Agency was required to maintain these records, particularly in this instance, where there was an on-going grievance regarding the time worked.

The Agency's argument, that the time and attendance sheets, also referred to as "T&A sheets," are certifications of the accuracy of the time worked, must fail for several reasons.

1. The Witness Testimony Supported The Union's Position That The Time And Attendance Sheets Were Not Accurate And Timekeepers Did Not Record Actual Hours Worked..

The testimonial evidence of Union and Agency witnesses alike, exemplified the fact that employees worked beyond their tour of duty though they consistently signed the time and attendance sheets provided by the Agency. The Agency supervisors admitted that they were only certifying that they (and their employees) worked at least 40 hours per workweek, not that overtour work was not performed.

[4] The Union maintains that damage calculations for those employees working compressed work schedules will be based on an 80 hour pay period rather than a 40 hour work week.

Timekeepers maintain the time and attendance records, fill in the timesheets and then give them to the employees so that they can double-check the information that they have put on the records. Arb. 8.31.06, p. 142; Arb. 9.7.06, P.217-218. And then they give them to the supervisor for authorization. Arb. 8.31.06, p. 142. The timekeeper fills out forms based on timesheets provided by employees and leave slips. Arb. 8.31.06, p. 143. The supervisor actually certifies the correctness of the timesheet, not the employee. Arb. 8.31.06, p. 144. Employees can still be paid if they are not in the office (for instance, on sick leave) and did not sign the "certification." Arb. 8.31.06, p. 148-149.

Ms. Jessyl Ann Woods, Grievant, for example, testified:

> The employee could take him a slip, but then it's not required that we take them a slip, and they've told us on several occasions that whatever we need to do to get the work done we need to do that. Even in the -- in our handbook it states that sometimes that, you know, we'll have to contact clients in non-working or non-duty hours to get the work done.

Arb. 8.31.06, p. 151.

Mr. Patterson, Agency supervisor, admitted that he signed the time and attendance records certifying how many hours he was being paid for: "I don't think signing my time sheet for pay purposes indicating I've worked 80 hours in a two-week period is contradicted by me working, let's say, 85 hours or 86 hours or 81 hours. I don't see that as a contradiction." Arb. 11.1.06, P.99-101. He testified that he worked more than 80 hours in a pay period but did not report the extra work on his leave and earnings statements. Arb. 11.1.06, P.99.

Ms. Carter, Agency supervisor, testified that she did not record extra hours on her time sheet when she worked over her tour of duty. Arb. 11.15.06, P.70-71. She, too, certified that the 40 hours was all she worked during that particular pay period. Arb.

11.15.06, P.72-75. This is evidence that the certifications on the time and attendance sheets were only intended to ensure employees worked 40 hours per week, with leave, and not to record all hours worked, included suffer or permit hours not compensated..

Ms. Green, another Agency witness, further testified that she did not report the extra time on her time and attendance records, which she did certify as being accurate. Arb. 11.15.06, P.89-90. The record was only certified for the minimum numbers of hours for pay, i.e. 40 per week or 80 per pay period. Arb. 11.15.06, P.89-90. Similarly, Mr. McGough certified his time sheet as accurate despite the fact that he testified to working more than 40 hours per week without being compensated. Arb. 9.20.06, P.131-133. He testified that when he signs a subordinate employee's time and attendance sheet it is to certify only that those hours were worked. Arb. 9.20.06, P.177-179. He admitted he did not enter all of his hours worked because he is an exempt employee.

2. The Agency Time Sheets Were Not Certifications By Employees That No Suffer Or Permit Overtime Was Performed.

The certification on the time and attendance says nothing that would indicate it forecloses any excess uncompensated hours. The Union submitted a sample T&A sheet from an activity at the Department of Defense (DoD) that exemplifies a certification that employees are being compensated for <u>all</u> hours worked during that pay period. The declaration on DoD's time and attendance sheets have a certification that no suffer or permit overtime was performed, which does not appear on the Agency's timesheet. Arb. 9.20.06, P.179-180, 182-184. The DoD declaration reads: "attendances and absences certify correct. Overtime approved in accordance with existing laws and regulations for non exempt FLSA. I did not suffer or permit any overtime work other than as reported for

this pay period." The Agency could have easily placed a similar certification on its T&A sheets, but did not do so.

B. Without Reliable and Accurate Records, the Burden Shifts to the Union to Prove the Number of Hours Worked by the Grievants, To a Just and Reasonable Inference.

The relevant portion of 5 C.F.R. § 551.102(e) provides: "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. § 551.102(e). Further, relevant parts of 5 C.F.R. § 551.401 provides: "(a) All time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency is 'hours of work'. Such time includes: … (2) Time during which an employee is suffered or permitted to work[.]" 5 C.F.R. § 551.401.

When the supervisor is aware that an employee is performing work outside of his/her scheduled tour of duty and does nothing to prevent it from occurring, he/she has suffered or permitted the employee to work. As a result, the employee is entitled to overtime compensation since suffered or permitted work is hours of work under the FLSA.

The burden should not be placed on the employee to maintain records of overtime work performed, especially considering that the Agency told employees that there was no compensation for excess work. Employees could not reasonably foresee this proceeding so as to maintain the evidence. Furthermore, the Agency was in the best position to accurately and properly record the actual time worked.

1. The Burden Is On The Grievants To Show The Amount And Extent Of Overtour Work By A Just And Reasonable Inference.

OPM provisions provide that employees should not be penalized for the failure of the Agency to keep proper records. To prove that an employer has violated the FLSA, an employee must "show the amount and extent of overtime work as a matter of just and reasonable inference." *Davis v. Food Lion,* 792 F.2d 1274, 1276 (4th Cir. 1986), *citing Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 687, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). In this matter, the testimonial evidence of the Grievants was corroborated by substantial documentary evidence, e.g. the e-mails, NFC data, the screen shots from the employees' computers, and testimony of other co-workers and supervisors. This evidence was sufficient to prove that the Grievants did regularly perform suffer or permit overtime work. The just and reasonable inference is that these and other GS-360 employees performed much more uncompensated overtime work than was testified about in detail.

There is a long line of case history establishing what qualifies as a just and reasonable inference in FLSA cases. In *Bloch v. Bell, et al*., the court laid out the framework for establishing the burden on the employee as showing by a just and reasonable inference the amount of overtime work performed. *Bloch v. Bell, et al*., 63 F.Supp. 863, 863-866 (W.D. Kentucky 1945). This case involved an action under the FLSA by an employee seeking to recover unpaid wages, liquidated damages, and attorney's fees. *See Bloch v. Bell*, et al., 63 F.Supp. 863, 863-866 (W.D. Kentucky 1945). The employee suing for overtime compensation under the FLSA has the burden of establishing by competent evidence the existence and extent of overtime employment. FLSA of 1938, § § 6, 7, 29 U.S.C.A. § § 206, 207. Though the court noted that where evidence is uncertain as to amount of overtime employment, there is not sufficient

substance on which a finding can be predicated*, Jax Beer Co. v. Redfern*, 124 F.2d 172 (5th Cir. 1941), it went on to conclude that such rule does not mean that documentary evidence is necessary to establish employee's claim, or that employee's evidence must establish his claim in full. *Bloch*, 63 F.Supp. at 865; *see* FLSA of 1938, § § 6, 7, 29 U.S.C.A. § § 206, 207. Even though the evidence may be uncertain as to the exact amount of overtime employment, it may show very conclusively that a certain minimum amount of overtime employment actually existed. *Bloch*, 63 F.Supp. at 865.

The court explained that testimony from the memory of the employee himself is competent to establish such a minimum claim. *See Joseph v. Ray*, 139 F.2d 409, 412 (10th Cir. 1943); *George Lawley & Son Corp. v. South*, 140 F.2d 439, 441, 442 (1st Cir. 1944); *Fanelli v. United States Gypsum Co.*, 141 F.2d 216, 218 (2nd Cir. 1944); *Johnson v. Kierks Lumber & Coal Co.*, 130 F.2d 115, 119 (8th Cir. 1942); *see also* FLSA of 1938, § § 6, 7, 29 U.S.C.A. § § 206, 207. Furthermore, nothing in the regulations prevent an employee from recovering overtime compensation even if he/she never demanded such compensation during employment. *George Lawley & Son Corp.*, 140 F.2d at 441-442; FLSA of 1938, § § 6, 7, 29 U.S.C.A. § § 206, 207.

The employee in *Bloch* was employed and paid on a weekly wage regardless of the number of hours he worked during any particular week. *Bloch*, 63 F.Supp. at 864. Employees including the plaintiff were supposed to punch the time-clock upon arrival and upon departure, but this requirement was not enforced with respect to the complainant, and in many instances his time of arrival or time of departure was not so recorded. *Id.* Although the exact time that the complainant worked on Saturdays was not shown by the evidence, it was definitely shown that the complainant worked at least three and one-half

hours on the Saturdays that the plant was in operation. *Id.* It was in operation on all but 10 or 12 Saturdays during each year. Accordingly, the Court ruled that the evidence was sufficient to establish the complainant's claim for overtime employment to the extent of three and one-half hours per week for 40 of the 52 weeks of the year. *Id.* at 866.

In *George Lawley and Son Corp.*, the court examined the sufficiency of evidence presented by an employee in an action against his former employer to recover unpaid overtime compensation under the FLSA. *George Lawley and Son Corp.*, 140 F.2d. at 440-445. The court stated that plaintiff had the burden of proving the number of hours of overtime worked each week and amount of wages due each pay period and must produce evidence to permit a finding without resort to conjecture that he worked some particular number of overtime hours. FLSA of 1938, § 7, 29 U.S.C.A. § 207. Where the court on appeal from judgment for employee for overtime compensation under the FLSA, found that entries in the diary of employee's wife could be useful to refresh employee's recollection regarding overtime worked, the court assumed that employee worked the amount of overtime found by the trier of fact. *George Lawley and Son Corp.*, 140 F.2d at 441-442; FLSA of 1938, §. 7, 29 U.S.C.A. 207.

Under the FLSA, an employer at its peril must decide which employees are covered by the act, and must keep track of amount of overtime worked by such employees. *George Lawley and Son Corp.,* 140 F.2d at 442; FLSA of 1938, § 7, 29 U.S.C.A. § 207. The court stated that the employee had the burden of persuasion as to the number of hours of overtime worked each week and the amount of wages due each pay period, but that to prevail he must only produce evidence definite enough to permit a finding without resort to guess or conjecture that he worked some particular number of overtime hours.

George Lawley and Son Corp., 140 F.2d at 440, *citing, Jax Beer Co.*, 124 F.2d at 175; *see also Johnson*, 130 F.2d at 118; *Joseph*, 139 F.2d at 409.

Based on the limited record, the testimony of the employee and the testimony of his wife, the court concluded that the jury could reasonably find the employee worked uncompensated overtime. *George Lawley and Son Corp.*, 140 F.2d at 441-442. The court specifically addressed the issue of whether unclear diary entries could serve to refresh the recollection of the employee. *Id.* The court stated: "[the diary entries] may have refreshed the plaintiff's recollection as to the precise amount of overtime worked on some particular occasions[5]. He testified to this effect and the [factfinder], who saw him and observed his manner on the stand, believed him…." *Id.* at 441-442.

In *Joseph v. Ray*, the court considered the burden of proof when an employee brought suit against his employer to recover overtime compensation, liquidated damages, and attorney's fees under the FLSA. *Joseph*, 139 F.2d at 410-412. The court stated that in an action to recover overtime compensation allegedly due under the FLSA, the employee must prove by a fair preponderance of the evidence not only that he worked in excess of statutory work week but the number of hours worked in excess thereof. *Joseph*, 139 F.2d at 411-412; *Jax Beer Co.*, 124 F.2d at 175; *Woods v. Wilkerson*, 40 F.Supp. 131, 133 (W.D.La. 1941); *Devoe v. Atlanta Paper Co.,* 40 F.Supp. 1009, 1111-1113 (E.D.Va. 1941); *Lowrimoore v. Union Bag & Paper Co.*, 30 F.Supp. 647 (S.D.Ga. 1939). FLSA of 1938, § § 6, 7, 16(b), 29 U.S.C.A. § § 206, 207, 216(b). The court went on to conclude that the District Court's finding, based on employee's testimony that employee worked 70 hours per week, was not clearly erroneous, though no written work records reflecting

[5] Ultimately the court stated, in dicta, that the factfinder could have concluded the overtime was worked based solely on the diary entries, had they been entered into evidence. *Id.* at 440-442.

number of hours worked were submitted. *Joseph*, 139 F.2d at 411-412; FLSA of 1938, Secs. 6, 7, 16(b), 29 U.S.C.A. 206, 207, 216(b).

After concluding that the employee was non-exempt, the court analyzed the trial court's findings of hours worked for the purpose of computing overtime compensation and liquidated damages based on the sufficiency of the evidence. *Joseph*, 139 F.2d at 411-412. The court stated that despite the fact there was no written work records reflecting the number of hours worked, the employee's testimony and conclusions were sufficient for the factfinder to establish hours worked. *Id.* at 412. The employer in that case testified that the employee was instructed not to work in excess of forty hours per week. *Id*.

The employee should not be punished for the employer's failure to comply with the law. Furthermore, partial compensation of overtime hours worked does not preclude recovery of overtime pay damages. *See* AFGE Local 3614 and U.S. EEOC, 60 FLRA 6.01, January 28, 2005. The fact that the employer has failed to maintain adequate records will not preclude plaintiffs' recovery of overtime pay. *See Brock v. Norman's Country Market*, 835 F 2nd. 823, (11th Cir. 1988). In fact, according to precedent "when an employer has failed to keep proper records, courts should not hesitate to award damages based on the 'just and reasonable inference' from the evidence presented." *Reich v. Stewart*, 121 F.3d 400, 406, C.A.8 (Neb.1997); *See also Martin v. Tony & Susan Alamo Found.,* 952 F.2d 1050, 1052 (8th Cir.), *citing, Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 687, 66 S.Ct. 1187, 1192, 90 L.Ed. 1515 (1946), *cert. denied,*505 U.S. 1204, 112 S.Ct. 2992, 120 L.Ed.2d 869 (1992).

If inaccurate or incomplete records have been kept, the employee need only show that he or she, "has in fact performed work for which he or she was improperly

compensated and produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Brock, quoting, Anderson v. Mount Clemmons Pottery*; *See also Mumbower v. Callicott,* 526 F.2d 1183, 1187 (8th Cir.1975) (in absence of statutorily required time records, court relied upon employee recollections to compute back wages for employee who "had her own key to the premises and served as her own supervisor"), *citing Overnight Motor Transp. Co. v. Missel,* 316 U.S. 572, 580 n. 16, 62 S.Ct. 1216, 1221 n. 16, 86 L.Ed. 1682 (1942). The Agency is, in fact, under the substantial burden of overcoming the inference of uncompensated overtime work without reliable or accurate records. The Agency failed to meet this burden because the record and witness testimony supports the Union's position that employees worked overtime.

2. *Employer had Actual and/or Constructive Knowledge that the Overtime Work was Being Performed.*

The Tenth Circuit analyzed whether the employer has constructive knowledge based on prior reprimands of employees for reporting overtour hours that were not compensable. *Pabst v. Oklahoma Gas & Electric Co.,* 99-6108 (10th Cir. 2000). In that case, the employee tried to report hours spent monitoring systems as overtime, despite the Agency's instructions that no overtime was paid for such overtour work. *Id.* The court noted that it was futile, and even harmful, to report the overtime, considering the Agency's instructions that the time was not compensable. The court, therefore, rejected the employer's argument that it did not have knowledge of the overtour work because employees did not report evening and weekend hours: "While [the employer] arguably may have lacked knowledge of the legal proposition that the FLSA required compensating plaintiffs for their [overtime] at issue, [the employer] certainly knew that plaintiffs were performing the duties they had been assigned." *Id.* The court further noted that the

employer's reliance on *Davis v. Food Lion*, 792 F.2d 1274, 1276 (4th Cir. 1986), for discussion of knowledge theory:

> In *Davis*, 792 F.2d at 1275, the court found that 'Food Lion has an established policy which prohibits employees from working unrecorded, so-called 'off-the-clock', hours.' Davis argued that Food Lion's 'Effective Scheduling' system required him to work such off-the-clock hours in order to perform his required duties and avoid reprimand. *See id.* at 1275-76. The Fourth Circuit held the FLSA 'required Davis to prove Food Lion's actual or constructive knowledge of his overtime work,' id. at 1276, and found no clear error in the district court's 'factual finding that Food Lion has no actual or constructive knowledge of Davis's off-the-clock work,' *id.* at 1277.

The court ultimately distinguished the facts of its case from those of *Davis* and upheld the trial court's finding that employer did have knowledge of the overtour work.

Like it was in comparison to *Pabst, Davis* is not applicable to this case. Unlike the facts in *Davis*, where employees were instructed not to perform after-hours duties, the evidence in this matter established that employees were urged to perform work on cases outside of the normal tour of duty. The employee handbook instructs the Grievants to contact individuals after-hours. Furthermore, nothing in the CBA precludes lawful overtime under the FLSA. *See* CBA, Article 18, Section 18.02 at P.93-95.

DOL regulations, and by extension OPM, further explains the guiding principles behind determining compensable hours worked. *See* 29 C.F.R. §§ 785.1–785.45. These regulations make clear that it is management's duty "to exercise its control and see that the work is not performed if it does not want it to be performed." 29 C.F.R. § 785.13. Management simply "cannot sit back and accept the benefits" of work that is performed without compensating employees for their work. 29 C.F.R. § 785.13. Instead, it is management's legal duty to control the hours employees work through a combination of

clear policies and vigorous enforcement, including appropriate disciplinary action. For instance, a policy prohibiting certain types of work - such as a rule prohibiting unauthorized overtime - will not by itself relieve an employer of its legal duty to pay employees for suffer or permit work. In some cases, in fact, an employer's lax policy enforcement has helped to establish that the employer knew of and condoned the overtour work.

The key inquiry is whether the employer ***knew or had any reason to believe*** work was being performed. 29 C.F.R. § 785.12. Actual or constructive knowledge of overtour work will be sufficient to show the time devoted to that work is compensable. Plaintiffs commonly prove employer knowledge by showing: (1) a supervisor or manager was in a position to observe the work; (2) the work performed by the employee was too much to be completed within scheduled hours; and (3) a pattern of extra work performed and the employer's acquiescence in the extra work.

In one case, for example, a group of conservation officers established their employer's constructive knowledge of off-the-clock work activities by showing inconsistencies between their reported hours worked and the hours of work reflected in arrest records. *Reich v Department of Conservation & Natural Resources*, 28 F.3d 1076 (11th Cir. 1994). Similarly, an employer's scheduling system and limitations on overtime can be so stringent that the **assigned work cannot be performed** in the allotted time[6]. *See Lyle v Food Lion, Inc.*, 954 F.2d 984 (4th Cir. 1992). Furthermore, many unauthorized overtime policies constitute per se FLSA violations where there is a written handbook that declares that employees will not be paid for overtime that is not

preapproved. These policies violate the pay provisions of the FLSA; employees must be compensated for all hours worked. Consequently, employers can have policies that prohibit working unauthorized overtime, but they should provide that the employer will impose discipline for violations, not withhold pay for time worked.)

Based on precedent, an employer cannot escape liability for failing to compensate overtime if the employer is "consciously avoiding" knowledge of the overtime. Furthermore, instructing employees not to report overtime hours worked supports an inference of knowledge of the overtime worked.

> As a matter of law, Gibson [the employer]…actually knew that Cunningham [the employee] was not reporting overtime hours that he worked as a full time superintendent from September 18, 1994 through May 10, 1995 because McInerney personally instructed him not to report those hours. McInerney's knowledge is also properly inferred through his actions in "consciously avoiding" knowledge of the actual uncompensated overtime hours that Cunningham worked during that period of time.

Cunningham v. Gibson Elec. Co., Inc., 43 F.Supp.2d 965, 976 (N.D.Ill.,1999).

Similarly, the fact that the Agency made the effort to complete T&A sheets that recorded only and exactly 8 hours per day 5 days per week[7], rather than the actual hours that they worked, supports the Union's position that the Agency had actual or constructive knowledge of the overtime being worked. Furthermore, the documentary evidence and witness testimony establishes a strong inference that the Agency had knowledge the employees were working overtime[8]. The Agency, therefore, should be held liable for failing to properly compensate these employees for all hours worked.

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[6] *See* testimony regarding inability of Grievants to perform assigned work within 40 hour workweek at IIA1, infra.; *See also* Arb. 8.29.06, P.48, 81-82, 248, Arb. 8.30.06, P.214, Arb. 9.7.06, P.69-70, Arb. 12.13.06, P.67-71.

[7] The Union does not dispute that sometimes employee's used leave for all or part of a workday, but the ultimate time recorded on each sheet accounted for only 8 hours per day or 80 hours per pay period.

[8] *See* testimony regarding TEAM/REAP data at IIC1a and b, infra.

C. The Union Requests That The Arbitrator Find An Adverse Inference Against The Agency Based On Its Failure To Provide Certain Documents Requested During The Course Of The Proceedings.

The Agency, despite repeated requests by the Union for certain information, failed to provide sign in and out sheets or scan records from various office locations. The Agency further continues to destroy evidence including scan records that were not produced for various witnesses. The Union seeks a ruling for an adverse inference against the Agency based on its failure to provide the records. If the records served to boost the Agency's position then it would definitely provide the documentation, therefore, it must follow from the Agency's failure to produce the records that they adversely impacted the Agency's position. The Union made legitimate 7114 requests for the information, which it knows would have tended to show that union witnesses are being truthful, whereas the Agency's witnesses are not credible.

Material readily available to a respondent is considered to be normally maintained within the meaning of ' 7114(b)(4). In *Dept. of Commerce, NOAA, Nat'l Weather Serv. and Nat'l Weather Serv. Employees Org*., 38 FLRA 120 (1990), rev'd on other grounds, *FLRA v. Dept. of Commerce, NOAA*, 962 F.2d 1055, 1056B57 (D.C. Cir. 1992), the union, representing NWS employees, requested information concerning appraisals of NWS employees. That information, developed by NWS, was maintained by a NOAA administrative service center that provided personnel services to NWS. The Authority concluded that the Respondent was obliged to make an effort to obtain and deliver the information to the union:

> [R]espondent could have requested that it be provided with the appraisals in order to transcribe the names and duty stations of those bargaining unit employees who had received commendable or outstanding ratings . . . in order that it could provide the requested information to the Union. Alternatively, the Respondent could have requested NOAA to perform this service. In either event, we conclude that the requested information was normally maintained by the agency within the meaning of section 7114(b)(4). The fact that personnel records were not physically housed by the Respondent does not compel a contrary finding.

See Dept.of Commerce, NOAA, 38 FLRA at 129.

Similarly, in this case, the Agency was required to request the information, pursuant to 7114, and provide it to the Union. The fact that the documents were not physically kept by the Agency does not preclude them from being responsible for making an effort to obtain and deliver the information to the Union.

II. The Evidence Establishes That GS-360-11/12/13/14/15 Employees Worked Overtime Without Receiving Proper Compensation, Provable to a Just and Reasonable Inference

All of the employees in the instant grievance should have been classified as non-exempt under the FLSA. As such, these employees are entitled to overtime pay (time and a half) for any work performed in excess of forty (40) hours per week and/or any work in excess of eight (8) hours per workday that is suffered or permitted by the Agency. These employees credibly testified that they regularly performed work during their lunch hour (half-hour when you discount for the two fifteen minute breaks), came early, stayed late, took work home and worked on weekends and holidays without receiving full and/or proper compensation.

The nature and amount of work assigned to the Grievants since 2000 has increased while the number of employees has decreased. The Agency has an understaffing problem. *See* Arb. 9.6.06, P.68-69; UE 36, 37, 54.

At the same time, the workload has increased exponentially over the past several years. *Id.* These factors combined put pressure on the Agency to “get the job done,” which often required employees to double or even triple their workloads. The Agency benefited greatly as the work got completed, but did not question how fewer employees performed more work in the same amount of time. But the employees were not performing the work

in the same amount of time - instead they were working uncompensated overtime. Rather than receive overtime compensation for the excess hours, employees were denied any compensation for that work.

The Union requests that the Arbitrator take judicial note of the congressional report for HUD's FY 08 budget request located at http://www.hud.gov/utilities/intercept.cfm?/offices/cfo/reports/2008/cjs/part2/fheo/fheosalariesexpenses.pdf. This document exemplifies the staffing shortages experienced in FHEO at HUD over the last 6 years. The FHEO FTEs have been cut from 779 in FY 2002 to 609 in FY 2008, or 22% in 6 years. The FHEO has seen a steady increase in the number of cases filed each of the past two years, and expects the number to continue to grow. *See* W-2. A workforce analysis conducted in FY04 estimated a staffing shortage of 210 FTE. *See* W-5. Based on the staffing declines, it is estimated that HUS is 328 FTE below the recommended level (approx 54% below recommended levels). Furthermore, the report shows the projected per unit cost (in hours) for each unit of work. *See* W-18. For example, a Title VIII case takes an average of 117-120 hours to complete; while a compliance review takes 617 hours. *Id.*

A. <u>Employees Did Work Suffer or Permit Overtime Without Receiving Proper Compensation During the Relevant Time Period.</u>

The proper approach to measuring compensable hours is to first determine whether the employees met the two-part test for “work” articulated by the Supreme Court in *Tennessee Coal, Iron & R. Co.*, stating that work is physical or mental exertion: (1) controlled or required by the employer; and (2) pursued primarily for the benefit of the employer; then, if the performance of work is established, it must be determined whether

the work was performed with the employer's knowledge. *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

The term "employ" includes to suffer or permit work. 29 U.S.C.A. Sec. 203(g). The Act's regulations provide that "work not requested but suffered or permitted is work time." 29 C.F.R. Sec. 785.11. Unless the employer knows or has reason to believe that an individual is performing work on its behalf, the work performed is not within the purview of the Act. However, an employer does have an affirmative duty of reasonable inquiry, given the conditions prevailing in the business, to determine if work is performed on its behalf. *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 512 (5th Cir. 1969).

Waiting time while on duty is compensable, especially when unpredictable, or is of such short duration that employees cannot use the time effectively for his or her own purposes. *See Cole v. Farm Fresh Poultry*, Inc., 824 F.2d 923, 929-30 (11th Cir. 1987); *see also Fields v. Luther*, 28 WH Cases 1062, 1073-74 (D. Md. 1988). In those cases, employees are compensated even if the employees spend the time engaging in such amusements as playing cards, watching television or reading. *See Armour & Co. v. Wantock*, 323 U.S. 126, 132-34 (1944); Handler v. Thrasher, 191 F.2d 120 (10th Cir. 1951).

The de minimis rule does not apply to the Grievants in this matter. The CBA clearly provides that any work that exceeds 7.5 minutes is not de minimus. *See* CBA, Article 18, Section 18.05(2) at P.94. The overtime work at issue always exceeded 7.5 minutes.

Furthermore, OPM regulations provide that preparatory and concluding activities closely related to an employee's principal activities are compensable overtime. 5 CFR 551.412(a)(1). The intent of OPM is clear - only irregular overtime in small increments is

even arguably non-compensable under the de minimus rule. The overtime work in this matter was regular and performed in relation to the employee's principal activities. The Agency cannot arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time, or any practically ascertainable period of time the employee is regularly required to spend on assigned duties. *See* 29 C.F.R. Sec. 785.47 (1996); *Saunders v. John Morrell & Co.*, 1 WH cases 2d 885, 885-886 (N.D. Iowa 1992) (approximately three minutes per day held not to be de minimus).

1. Employee Testimony Supports the Union's Contention That Grievants Worked Suffer or Permit Overtime and Were Never Properly Paid for These Additional Hours of Work.

The witnesses each testified that there was too much work for the staff to handle and, accordingly, in order to complete this work they had to work overtime.

Ms. Vivienne Cardullo

Ms. Vivienne Cardullo is a series 360, GS-13 Equal Opportunity Specialist in the Philadelphia Regional Office of Housing Equal Opportunity for the Department of Housing and Urban Development. Arb. 8.29.06, P.42. She has been a GS-360/13 since 2/2000. Arb. 8.29.06, P.43. Her tour of duty was from 8:00 am-4:30 pm. Arb. 8.29.06, P.43-44. She arrived by 8:00 in the morning more than 99% of the time. Arb. 8.29.06, P.43-44.

Ms. Cardullo's performance appraisals were consistently at the highest level, "outstanding." Arb. 8.29.06, P.44-45. Ms. Cardullo's supervisor was Wayman Rucker and had been her supervisor since 2/2000. Arb. 8.29.06, P.45. She worked in the enforcement branch. Arb. 8.29.06, P.45.

In the Enforcement Branch: "Right now there are…Twelve GS-12s, three GS-13s. We recently lost a GS-11, and there has been recent retirements for, of three GS-13s."

Arb. 8.29.06, P.46. There were no GS-13 or GS-12 employees hired to replace those that retired. Arb. 8.29.06, P.46.

The work assignments came from her supervisor, Mr. Rucker. Arb. 8.29.06, P.47. The cases must be closed within a 100-day deadline and investigators get approximately 55 of those days to complete their work. Arb. 8.29.06, P.47. "The investigator's handbook is very detailed about the steps to be taken. The case file has to be litigation ready. So, there is really no shortcuts that can be taken in order to meet those deadlines. You need to work over and above your 40 hours a week." Arb. 8.29.06, P.48.

She begins working immediately after she arrives at the office. Arb. 8.29.06, P. 59-60. She would stay late once every three months for about an hour to an hour and a half[9]. Arb. 8.29.06, P.61-62. She took credit hours for that time. Arb. 8.29.06, P.63. Ms. Cardullo would work through lunch to make deadlines and to lessen the amount of work she would have to take home. Arb. 8.29.06, P.63-64. She also completed work from home 2 times per week since 2002. Arb. 8.29.06, P.64.

Between April 2002 and October 2003 she was on Weight Watchers and three days per week she would eat one of the meals at her desk while working. Arb. 8.29.06, P.64-67. Her supervisors regularly saw her working and eating at the desk. Arb. 8.29.06, P.68-69. There was a total of 73 weeks where she worked through lunch and was not compensated during the relevant time period. Arb. 8.29.06, P.70.

When she worked from home on her tele-work schedule, she regularly skipped lunch about 2 times per week. Arb. 8.29.06, P.75-76. She would work over 3-4 hours on

[9] Her boyfriend and daughters witnessed her working from home. Arb. 8.29.06, P. 85, 90-91. See fuller discussion of Corroborating Witness Testimony at Part II(A)(2), *infra*.

average 3-5 times per month when she was on her tele-work schedule. Arb. 8.29.06, P. 78. She worked until 4:00 a.m. in the morning on one occasion. Arb. 8.29.06, P. 78-79.

She was only compensated for about 10% of her working overtour at home with comp. time. Arb. 8.29.06, P. 79, 89. She did not get a chance to use 12 hours of this comp. time, which should be compensated at the prevailing overtime rate at the time she earned those hours. Arb. 8.29.06, P. 83-84.

Her supervisors had actual and/or constructive knowledge of her overtour work. Ms. Cardullo would send her supervisor emails from her computer in the evenings while she was working. Arb. 8.29.06, P. 79. She sent emails to supervisors as late as 11:30 pm. Arb. 8.29.06, P. 82. Ms. Cardullo worked while on sick leave, Arb. 8.29.06, P. 79-81, and sent emails to Mr. Marshall and her supervisor while on sick leave and working. Arb. 8.29.06, P. 81. She regularly had discussions with her supervisors about not being able to meet deadlines while only working 40 hours per week and also put her concerns in writing to Wanda Nieves. Arb. 8.29.06, P. 81-82. "Various staff members including myself, have told Wayman that these 100 day deadlines is unrealistic, that investigations cannot be completed within the 100 days and that the investigators only have 55 days where they have such a large volume of work to complete. And it has been told to him many times that investigators are working extra hours from home to complete the investigation." Arb. 8.29.06, P. 248.

On two separate occasions, Ms. Cardullo traveled on Sunday for training in D.C. and one time she went to Charleston, WV for a Compliance Review. Arb. 8.29.06, P. 93-94, 96-97. Her supervisor required her to travel on Sunday, despite the fact that she was not compensated. Arb. 8.29.06, P. 96-98. Her supervisor traveled with her on the trip to

West Virginia, Arb. 8.29.06, P. 104, therefore, there is direct evidence that the supervisor had actual and/or constructive knowledge of her Sunday travel and overtour work during that trip.

She left her home early to get to a distant worksite on several occasions. Arb. 8.29.06, P. 98-99. She would drive in a government vehicle. Arb. 8.29.06, P. 100. She would leave her house between 5:00 a.m. and 6:00 a.m, Arb. 8.29.06, P. 100-101, whereas she normally left at 7:00 a.m. to go straight to the office. Arb. 8.29.06, P. 101. On these trips, she would work in the hotel after the end of the day for approximately 3 hours. Arb. 8.29.06, P. 102-103. She sent emails to her co-workers and supervisors when she was conducting on-site visits. Arb. 8.29.06, P. 103. She was not compensated for any of this overtour work. Arb. 8.29.06, P. 104.

On some occasions, she worked during federal holidays, e.g. President's Day. Arb. 8.29.06, P. 104-105. She testified in an arbitration regarding telework that she would work longer on telework, because she did not have to stop for the train. Arb. 8.29.06, P. 105-106. Sometimes, she worked beyond her tour of duty near the end of the year because she needed to complete work before going on leave. Arb. 8.29.06, P. 117-118; *see also* UE 2.

Employees were consistently told by management that there was no money for overtime. Arb. 8.29.06, P.193. On other occasions, Ms. Cardullo was told that a GS-13 employee is not entitled to overtime compensation and that they don't get overtime for travel. Arb. 8.29.06, P.201. If given a choice between comp. time and overtime, Ms. Cardullo would have selected overtime compensation because given the amount of work

she has to complete she does not get to use her accumulated leave anyway. Arb. 8.29.06, P. 204-205, 222-223.

Dr. Donald H. Johnson

Dr. Donald H. Johnson works in the enforcement branch of FHEO at the HUD office in Chicago, IL. Arb, 8.30.06, P. 68-69. *See* UE 9. Dr. Johnson has worked for HUD for almost nineteen years. Dr. Johnson was hired as GS-11 EOS and became GS-12 EOS in 2000. Arb, 8.30.06, P.72-73. Dr. Johnson always received good performance appraisals. Arb, 8.30.06, P.74-78; *See* UE 10.

Dr. Johnson worked a fixed schedule; typically arrived at work at 9:00 a.m. and his tour of duty ended at 5:30 p.m. Arb, 8.30.06, P.78-79. Employees were required to sign out of the building after certain times. Arb, 8.30.06, P.80-81. Dr. Johnson regularly came to work prior to the start of his tour of duty to work on cases. Arb, 8.30.06, P.85-87.

Since February 2006, Dr. Johnson has been supervised by Mr. Gordon Patterson. Prior to that, his supervisors were Mr. Maurice McGough, Ms. Ivory Smith and Ms. Cheryl Smith. Arb, 8.30.06, P.87-89. Dr. Johnson's supervisors had actual knowledge of the work being performed. Arb., 8.30.06, P.107-108, 133-134. Dr. Johnson's supervisors could have checked to see that he was working early. Arb. 8.30.06, P.130.

Employees were provided large caseloads and told to get it done. Arb. 8.30.06, P.109. Dr. Johnson testified that Maury McGough is the program director and wants the work done because he has pressure on him to close cases within 100 days. Arb. 8.30.06, P. 134. Dr. Johnson testified that the attitude in the office was that "[y]ou've got to get your stuff done if you're going to get your 'outstandings' and your 'highly successfuls.'" Arb. 8.30.06, P. 134.

Dr. Johnson religiously arrived at work one half hour early at least two times per month. Arb, 8.30.06, P.94-96. Dr. Johnson regularly worked more overtour hours during the first and third quarters, which represent rating periods and the end of the fiscal year, respectively. Arb. 8.30.07, P.96-99. All of the overtour work performed by Dr. Johnson was Agency work and for its benefit. Arb. 8.30.06, P.132-133.

Gordon Patterson admonished Dr. Johnson for working late about a month before the August 30, 2006 hearing. Arb. 8.30.06, P. 134-135. At this time they discussed this case. Arb. 8.30.06, P. 135. They discussed needing to travel for Dr. Johnson to testify. Arb. 8.30.06, P. 135-136.

Mr. Patterson gave conflicting messages, saying that everything has to be done within 100 days, but then saying that nobody is to work overtime. Arb. 8.30.06, P. 136-137. Mr. Patterson gave the order that nobody is to work overtime between Feb-Apr 2006, after the grievance was filed. Arb. 8.30.06, P. 137. After giving the order about no overtime he increased their workload. Arb. 8.30.06, P. 137.

Dr. Johnson studies cases on disability in the law library, because he is the chairperson of the Disabled Employees Advisory Committee and would work late doing so. Arb. 8.30.06, P. 286-288. Gordon Patterson should have known Dr. Johnson was working late because Johnson put notes on Patterson's desk. Arb. 8.30.06, P. 138. Maury McGough knew Dr. Johnson was working late because he would see Dr. Johnson leave and say good-bye. Arb. 8.30.06, P. 139. Cheryl Smith should have known that Dr. Johnson was working late because she passed his workstation and could see him working when she was leaving for the day. Arb. 8.30.06, P. 133-134, 139. Ivory Smith should have known Dr. Johnson was going to be working long hours because he told Dr. Johnson,

"Whether you like it or not, you have seniority in program operations; I'm going to need you." Arb. 8.30.06, P. 139. During the relevant time period Dr. Johnson's desk was along the main corridor so supervisors would walk past his desk when they left the office. Arb. 8.30.06, P. 296-297.

Between 2000 and 2001, Dr. Johnson earned compensatory time. Arb, 8.30.06, P.90. After 2001, however, Dr. Johnson did not put in for compensatory time or credit hours because he felt the bureaucracy was "a pain." Arb. 8.30.06, P. 139-140. Dr. Johnson did not request overtime pay because he was told there was no money for overtime by Barbara Knox, Gordon Patterson, and Maury McGough. Arb. 8.30.06, P. 140-141. Cheryl Smith and Maury McGough had turned down Dr. Johnson's overtime requests. Arb. 8.30.06, P. 243-245.

Dr. Johnson estimates that he was only compensate for about 10% of the overtime he worked. Arb. 8.30.06, P. 141. Dr. Johnson was promised 6 credit hours for the 50 hours of work he performed as the chairperson of the Disabled Employees Advisory Committee in 2004, but was never given the credit hours. Arb. 8.30.06, P. 144-145. Even when the Agency promised to compensate him in some way, they failed to do follow through on their promise.

UE 15 is a case management log that Mr. Johnson designed to report his work progress and this document supports his testimony. Arb. 8.30.06, P. 146-147. The document contained times and dates where Mr. Johnson would indicate the case progress. Arb. 8.30.06, P. 147-148. Dr. Johnson left a copy of the case management log with the dates and time on them on Gordon Patterson's desk on a regular basis. Arb. 8.30.06, P. 148. Patterson would see the case management log and had discussed it with

Dr. Johnson. Arb. 8.30.06, P. 148-151. This is evidence that Mr. Patterson should have known the times that Dr. Johnson was working overtour hours. Gordon Patterson told Mr. Johnson to stop giving him the case management logs, because Dr. Johnson was no longer to work overtime. Arb. 8.30.06, P. 154. Patterson told Dr. Johnson that he was told "from above" that Mr. Johnson was not to work anymore overtime. Arb. 8.30.06, P. 154-155.

Dr. Johnson gets an hour lunch break (1/2 hour paid and 1/2 hour unpaid). Arb. 8.30.06, P. 169. Dr. Johnson worked through lunch more often in the first quarter to make sure his evaluations reflect his work and in the third quarter to make sure the administrative and agency goals are met. Arb. 8.30.06, P. 170-171. Union Exhibit 12 indicates that in the first two quarters there are three incidents of working through lunch and during the last two quarters Dr. Johnson worked through lunch ten times per month at a half an hour each. Arb. 8.30.06, P. 171.

Mr. Richard Anthony sat across from Dr. Johnson and would have seen him working late or through lunch. Arb. 8.30.06, P. 176-177. Dr. Johnson testified that it is likely that his supervisor should have known that he was working through lunch saying: 'Well, I'm going to preface -- I'm going to say yes, but with condition. He was there from 12 to 1, but we have an 11 to 2 spread where you can take lunch. So whether or not he -- whether or not he knew for certain, I don't know, other than my workload is, I think, getting done at that period." Arb. 8.30.06, P. 172. Dr. Johnson did have work related meetings with Gordon Patterson, Maury McGough, and Ivory Smith during traditional lunch hours. Arb. 8.30.06, P. 173. Supervisors would come to, or pass by, Mr. Johnson's desk during the lunch period. Arb. 8.30.06, P. 297-298. Dr. Johnson would show them he was

drinking a Coke at his desk and say, "This is a great lunch and I got to get back to it, bye." Arb. 8.30.06, P. 298-299. Dr. Johnson has never been compensated for any of his lunchtime work. Arb. 8.30.06, P. 172-173.

Dr. Johnson would work from home and while in the taxi back and forth to work. Arb. 8.30.06, P. 173-174; see also UE 12. Salim Jiwali (Dr. Johnson's regular taxi driver) would see Dr. Johnson working in the taxi. Arb. 8.30.06, P. 174. Dr. Johnson can read while in the car without the lights bothering him or causing seizures. Arb. 8.30.06, P. 284-285. Dr. Johnson's fiancé (Katherine Scharko) would see Dr. Johnson working at home in the evenings since 2003. Arb. 8.30.06, P. 174-176. Most of work Dr. Johnson performed while at home was done in the evenings. Arb. 8.30.06, P. 177. Dr. Johnson would email work from his home email to the government email system. Arb. 8.30.06, P. 179-181. Dr. Johnson's supervisors should have known he was working in the evenings from home because of the output on the cases he was working on. Arb. 8.30.06, P. 179-181. Dr. Johnson was not compensated from the work performed at home. Arb. 8.30.06, P. 181.

Dr. Johnson traveled to Minneapolis, MN twice on weekends in 2000 for HUD inspections. Arb. 8.30.06, P. 189-190. Dr. Johnson left at approximately 12:30 pm and arrived at approximately 6:00 pm both times. Arb. 8.30.06, P. 190-191. He was not compensated for this Sunday travel. Arb. 8.30.06, P. 194.

Dr. Johnson made 6 trips in 2005 during the week training other EOS on on-sites. Arb. 8.30.06, P. 190-192-193. One of the trips was a follow up without the trainees. Arb. 8.30.06, P. 193. Additionally, Dr. Johnson took one trip to Lisle, Illinois. Arb. 8.30.06, P. 193. He left his residence for Lisle at approximately 6:30-7:00 am. Arb. 8.30.06, P. 193. Dr. Johnson would normally leave his residence between 7:00 -7:45 am. Arb. 8.30.06, P.

195. Dr. Johnson returned to his residence from Lisle at 7:00 pm. Arb. 8.30.06, P. 195. Dr. Johnson was not compensated for the extra time for this Lisle trip. Arb. 8.30.06, P. 195.

Dr. Johnson normally goes to a restaurant for breakfast before work and then walks to office. Arb. 8.30.06, P. 195-196. The commute from his residence to the restaurant is anywhere from 35 minutes to an hour and 10 minutes depending on traffic (averaging between 35-45 minutes). Arb. 8.30.06, P. 195-196. The walk from the restaurant to the office is about 10 minutes. Arb. 8.30.06, P. 196.

Dr. Johnson went to three Catholic Charities complexes and both times left his house around 6:30 am to go to the HUD office to meet up with the EOS's. Arb. 8.30.06, P. 199. Dr. Johnson returned to his residence at 4:30 pm. Arb. 8.30.06, P. 200.

For the Morningside onsite inspections Dr. Johnson left his home at 6:30 am to meet up with the director. Arb. 8.30.06, P. 200. Next, Dr. Johnson went and ate breakfast and then his taxi driver picked him up and drove him to Morningside. Arb. 8.30.06, P. 200-201. Dr. Johnson would get back from Morningside between 4:00-4:30 p.m. Arb. 8.30.06, P. 201. It is about a 45 minute drive from the HUD office to the Morningside inspection site. Arb. 8.30.06, P. 201. Dr. Johnson would return to the office and write up notes he took on Morningside working late into the evening. Arb. 8.30.06, P. 201-202.

UE 16 is a note written by Dr. Johnson that indicates he was taking work home and corroborates Dr. Johnson's testimony. Arb. 8.30.06, P. 203-204. Dr. may have laid a copy of the note on his (Patterson?) chair. Arb. 8.30.06, P. 204.

Dr. Johnson testified that employees were told not to enter all their work into TEAPOTS. Arb. 8.30.06, P. 205. Dr. Johnson doesn't think it is possible to manage his workload and close cases within 100 days by working a 40 hour week. Arb. 8.30.06, P. 214.

Dr. Johnson was not given a choice between comp. time and overtime when he worked compensatory time between 2000 and 2001. Arb. 8.30.06, P. 214. He testified that, given the choice, he would not have elected for the compensatory time. Arb. 8.30.06, P. 214.

Mr. Curtis Leon Jackson

Mr. Curtis Leon Jackson is a series 360, GS-13, employed in the Kansas City Regional Office. Arb. 12.13.06, P.55. Prior to that, he worked as a GS-12 for seven years with various temporary promotions into supervisory positions. Arb. 12.13.06, P.56. During 2004, as the acting supervisor in the Program Compliance Branch, he supervised numerous series 360 employees and observed the working habits within the office. Arb. 12.13.06, P.56-57.

His current first line supervisor is Ms. Michele Green and second line supervisor is Ms. Myrtle Wilson. Arb. 12.13.06, P.57. Prior to that his first line supervisor was Ms. Jackie Tomlin, until she retired in 2003, and his second line supervisor was Mr. Rob Hardew. Arb. 12.13.06, P.57-58. He performed uncompensated overtour work because there was not enough time to complete the caseload during normal business hours and the Agency told him there was no overtime or compensatory time available. Arb. 12.13.06, P.59-60. He similarly observed other co-workers perform overtour work without compensation. Arb. 12.13.06, P.60-62.

Based on his personal interactions with supervisors during periods beyond his tour of duty, Mr. Jackson testified that supervisors did have knowledge of the practice of overtour hours being performed in the office. Arb. 12.13.06, P.63-64, 94-95. Ms. Green even denied his requests for compensatory time. Arb. 12.13.06, P.97-101. The supervisors benefited from maintaining highly efficient offices. Only in recent months did the Agency begin telling employees to cease working beyond tour of duty hours. Arb. 12.13.06, P.64-65.

There was a tacit agreement that employees could take "'wink' time" for excess hours worked. Arb. 12.13.06, P.65. But there was no written record and not surprisingly, most employees never took the "wink" time earned because the workload continued to increase and employees consistently worked overtour hours to complete their job duties. Arb. 12.13.06, P.65-66, 90-91.

The office maintained very high performance standards, e.g. requiring employees to turn cases within 70 days. Arb. 12.13.06, P.67-69. The work assignments could not be completed within the 40 hour workweek. Arb. 12.13.06, P.71. Since early 2004, employees supervised by Ms. Green have been working overtour hours without any compensation. Arb. 12.13.06, P.91.

Contrary to Ms. Green's testimony, Mr. Jackson contends that the FHEO office in the Region ranks in the top two of all offices throughout the nation since 2002. Arb. 12.13.06, P.71-72. Contrary to Ms. Green's testimony, the practice in the office is that employee's must complete leave forms for exceeding the lunch period, breaks and/or arriving late. Arb. 12.13.06, P.73-75. Mr. Jackson explained that Ms. Green specifically requires employees to complete leave forms and only knows of a couple rare occasions

where employees took extended lunch breaks with no consequence. Arb. 12.13.06, P.75-77. Employees, such as Mr. Nelson, rarely leave the office for lunch and Ms. Green frequently reminds employees of her policy on time. Arb. 12.13.06, P.75-76. The Union contends that Ms. Greene's testimony that the performance level in the office is not that great either exemplifies the high standards employees are under to complete increasing workloads or further calls into question the credibility of the Agency's witness. Mr. Jackson testified that there is a "Get it Done" attitude in the Agency, specifically under Ms. Green, where employees are urged to do whatever it takes to complete the work without excuses or complaints. Arb. 12.13.06, P.93-94.

Ms. Phyllis Ann Bell

Ms. Phyllis Ann Bell currently works at the Enforcement Division of HUD, under the FHEO component. Arb. 9.6.06, P.46. She has been a series 360, GS-12 since October 2004 and was a GS-11 for a year before that. Arb 9.6.06, P.46-47. She works with Ms. Barbara Harris, Ms. Jessyl Woods, Ms. Darlene Freeman, Ms. Melva Mateen, and Ms. Patricia Robinson. Arb 9.6.06, P.48.

She works under a 4/10 schedule with a tour of duty from 7:00 to 5:30 four days per week. Arb 9.6.06, P.48-49. Her performance appraisals are good; she regularly receives fully and/or highly successful. P.50. She regularly stayed late to work three times per week and did work at home on Wednesdays and Thursdays. Arb 9.6.06, P. 49-50. At one time she worked excess hours during several months on weekends and at home "in order to get above water," after having taken extended leave for personal reasons. Arb 9.6.06, P.66-67. She performed HUD work on weekends, both in the office and at home, mostly between 2003 and 2005. Arb 9.6.06, P.60-61. She would work as many as eight hours per

weekend approximately three times per month. Arb 9.6.06, P.62-63. She worked during her AWS day off. Arb 9.6.06, P.66. She was not compensated for any of her work performed beyond the tour of duty. Arb 9.6.06, P.55-56.

Ms. Bell has first hand knowledge of other employees working overtour hours during the grievance period. She observed her co-workers leaving the building after 6:00 p.m., including Ms. Jessyl Ann Woods, Ms. Barbara Harris, Ms. Melva Mateen, and Ms. Diane Whitfield. Arb 9.6.06, P.50-51. She observed Ms. Woods performing HUD work past her tour of duty three times per week on average since 2002: “She would be writing our determinations or assembling her cases in order, writing the F[I]R, which is logging in the interviews that she had previously performed.” Arb 9.6.06, P.52-54.

She traveled with Ms. Woods on occasion, to Farmers Branch in the Dallas area and to Wichita Falls for overnight trips, working approximately 10-11, sometimes even 12 hours per day. Arb 9.6.06, P.56-60. When Ms. Woods and Ms. Bell traveled together to do onsite visits they worked as a team to accomplish the work of the Agency. Arb. 9.6.06, P.116-117. Both investigators worked the entire time during onsite visits; when one employee conducted an interview, the other would take measurements, assist with taking notes and/or collecting documents. Arb 9.6.06, P.88-93. Her supervisor did have actual or constructive knowledge of her working late during onsite trips. Arb 9.6.06, P.94-95. She did not fill out the authorization forms because those are only used if you know in advance that you will be working the extra time. Arb 9.6.06, P.96-98. Frequently, during onsite trips, the extra work is not planned, but due to necessity of the job.

Ms. Bell has seen Ms. Woods, as well as supervisors, including her own, working in the office on Saturdays. Arb 9.6.06, P.61-62. Employees were not required to sign in to

enter the building prior to 12:00 p.m. on weekends in the Forth Worth office, though the Agency failed to provide these records so there was no way for the Union to check them. Arb 9.6.06, P.65-66.

She has asked for authorization to work on weekends and at home, but her supervisor told her there was no funds available. Arb 9.6.06, P.79-80. She was not aware of any written rules from the Agency regarding what must be done to get permission to work overtour hours, nor did she receive any training in that area. Arb 9.6.06, P.104-106. It was never made clear to her that she must get authorization to work over her regular hours. Arb 9.6.06, P.87-88. She has never received pre-approval from her supervisor to work extra time. Arb 9.6.06, P.74-75.

On one occasion she did receive credit hours for working extra hours, in 2004. Arb 9.6.06, P.78-79; *See* EE 37. *See also* EE 38. But, when she received the credit hours in 2004, she was on a compressed work schedule, Arb 9.6.06, P.108-109; *See* EE 28, and therefore, pursuant to the CBA, Ms. Bell was not even entitled to credit hours for that time worked, nor was she entitled to credit hours for work performed on weekends. *See* JE 1, page 81, Section 1704(2)(a)(2). Furthermore, the form, which was not even for credit hours but was for overtime, Arb 9.6.06, P.112-116, was approved after the work was performed. *Id.* at 111-112; *see also* EE 36.

The <u>first</u> time she was told to stop coming to work on weekends was a couple months before she testified at the hearings. Arb 9.6.06, P.81-82. On the one hand, the Agency told the employees there are no funds available for overtime, but on the other hand, the Agency made sure employees knew to do whatever it takes to get the job done. Arb 9.6.06, P.84-85.

Ms. Jessyl Ann Woods

Ms. Jessyl Ann Woods is employed with the U.S. Department of Housing and Urban Development in the Fort Worth HUD office, in the Office of Fair Housing and Equal Opportunity, Enforcement Division. Arb. 8.31.06, p. 5. She has been a GS-360-12 since October 2003; she went from a GS-9 to a GS-11 in October 2002. Arb. 8.31.06, p. 6. She is vice president of the local union. Since 2001 she has had 25% official time. Arb. 8.31.06, p. 13-14. While she regularly uses her official time during the workday, her supervisors have not reduced or adjusted her work or caseload to take this into account. Arb. 8.31.06, p. 14-15; *see also* UE 11.

In December 2005, Ms. Woods was unable to take a planned vacation because her supervisor, Mr. Rayford L. Johnson, did not respond to her requests. Arb. 8.31.06, p. 8-9. Mr. Johnson was her supervisor since early 2004. Prior to that she was supervised by Mr. Thurman Miles between 2002 and 2004. Arb. 8.31.06, p. 10-11.

There is a scan pad at the elevator door on each floor and at the stairwells, but no access requirements to enter the building. Arb. 8.31.06, p. 12-13, 19-20. The Agency only provided limited records of these scan documents. HUD has work space on the twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, and twenty-eighth floors. Arb. 8.31.06, p. 13. There were no “Sign-In/Sign-Out Records," but she did review the "Scan-In/Scan-Out Records" for the office, though it was not floor specific and only contained information for January-March between 2002 and 2005. Arb. 8.31.06, p. 15-17.

The Arbitrator should draw an adverse inference based on the Agency’s partial production of those documents. Arb. 8.31.06, p. 113-114. Purportedly, the Agency contends it was only able to obtain data for months between January and March of each

year, but no data for any other months. Arb. 8.31.06, p. 113-114. It is most convenient that data for the third and fourth quarters of the fiscal year are most material as time periods that federal employees performed significant amounts of their overtour work. Arb. 8.31.06, p. 113-114.

Her tour of duty was fixed from 9:30 to 6:00 p.m. Arb. 8.31.06, p.22. She regularly arrived at 9:30 a.m. Arb. 8.31.06, p. 22-24. She always worked until at least 6:00 p.m. (unless she used leave) and sometimes until 7:30 or even 8:30 in the evening. Arb. 8.31.06, p. 55; see also UE 19.

She frequently went to work early to perform certain tasks because there were a large number of cases; her caseload was heavy. As many as three times per week, she would arrive early to complete various tasks: "Working on case files, reviewing documents, reviewing e-mails, answering and responding to e-mails." Arb. 8.31.06, p.24-25, 54. Her co-workers and supervisors would be there when she came in early. Arb. 8.31.06, p. 25-28.

She did more overtour work in 2004 because there was a lot of work to do: "We had older cases that we were trying to get closed, and so the supervisor asked us if, you know, we would like to earn some credit hours to complete some of the files that we had. So I agreed to work some comp time." Arb. 8.31.06, p. 34. She also earned a significant number of comp. time working the help desk and emergency support in the wake of the Katrina disaster. Arb. 8.31.06, p.35.

Other than those special projects, employees were consistently told that there was no comp time and there was no overtime money. Arb. 8.31.06, p.35.

She printed out the screen shots off of her HUD laptop at work. UE 18. There are documents from various drives and folders, including the G drive on the Agency's LAN network. Arb. 8.31.06, p. 41-48.

Based on her memory and the scan documents provided by the Agency, she concluded that she arrived early two to three times per week. Arb. 8.31.06, p.58-59; *see also* UE 18-20. The building security does maintain sign out logs for the end of the day, but the Agency did not produce those records. Arb. 8.31.06, p. 70-72. She stayed late around four times per week, usually on Mondays, Tuesdays, Wednesdays, and/or Fridays[10]. Arb. 8.31.06, p. 73-75. She never worked late on Thursdays because she went to choir practice, which started at 7:00 p.m. Arb. 8.31.06, p. 92. She was never compensated for these extra after-hours work. Arb. 8.31.06, p. 93, 103.

When she printed out work product, the network printer produced a cover sheet that identified the date and time the document was printed and the individual's ID number. Arb. 8.31.06, p. 81-82; see also UE 21. On at least one occasion she was at the office at 9:54, in the evening, printing documents. Arb. 8.31.06, p. 91.

Her supervisors had actual and/or constructive knowledge of the over-tour work because they always told employees to "do whatever you have to do to get a case closed or to get the job done." Arb. 8.31.06, p. 109. Sometimes her supervisors were there as late as 7:00 p.m. and observed her working beyond her tour of duty. Arb. 8.31.06, p. 94, 101-102. On occasion, she sent her supervisor e-mails after her tour of duty. Arb. 8.31.06, p.94-95. The supervisors have access to the information on the computer drives

[10] Her co-workers, Ms. Kaeron Masters High, Ms. Phyllis Bell and Ms. Michelle Ferrell can corroborate her testimony because they all worked late too. Other employees can corroborate her testimony that she was still there after 6:30. Her son can also. Arb. 8.31.06, p.76-79; *see also* UE 19.

and the logbooks at the building entrance. Arb. 8.31.06, p. 95, 195-196. Her supervisor observed her working through lunch. Arb. 8.31.06, p. 105-106.They never told her not to come in early or stay late. Arb. 8.31.06, p. 103.

All of the work was assigned and turned in to Mr. Johnson, her supervisor. Arb. 8.31.06, p. 123. The very fact that the work was being completed, sometimes between Fridays and Mondays, exemplifies the actual and/or constructive knowledge of work being performed. TEAPOTS has all of the information from the employees' personal logs. Arb. 8.31.06, p. 189. The supervisors can access case information in TEAPOTS, which includes all the overtour work performed. Arb. 8.31.06, p. 190-191. The supervisors have administrative rights to computer systems and access to all Agency documents. Arb. 8.31.06, p. 196.

She worked through lunch two times per week. Arb. 8.31.06, p. 103. Barbara Harris and Phyllis Bell can corroborate her testimony, according to Woods. Arb. 8.31.06, p. 104.

She took work home on Fridays to do on weekends. Arb. 8.31.06, p. 106. She worked as much as 5 or 6 hours on the weekend. Arb. 8.31.06, p. 108. Due to the pressure to close cases, she has worked at the office on weekends approximately two times per month. Arb. 8.31.06, p. 111. There is no scan data for the time periods she performed her weekend work at the office. Arb. 8.31.06, p. 112-113; *see also* UE 20. Woods worked on weekends with: Phyllis Bell, Michelle Ferrell, Diane Whitfield, Nelda Mateen. Arb. 8.31.06, p. 114-115. The Intake Branch chief, Mr. Carmello Melendez, has seen her working on weekends. Arb. 8.31.06, p. 115-116.

She never requested comp time or overtime for the overtour hours because she was consistently told there was “no money” in the budget. Arb. 8.31.06, p. 117-118. The bureaucracy was another drawback to filing for comp. time; Mr. Sweeney previously denied her comp. time requests. Arb. 8.31.06, p. 117-119.

While she worked more than seven hundred overtime hours in 2003, she was only compensated for about 10% of the time. Arb. 8.31.06, p. 119; *see also* UE 17.

She did travel for HUD during the week approximately one time per month to conduct on sites. Arb. 8.31.06, p. 127-128; *see* UE 22A-F. She would travel to interview the complainants or the respondents or witnesses and review documents. Arb. 8.31.06, p. 127. Her normal commute was 45 minutes. Arb. 8.31.06, p. 129-130. On occasion she used the government vehicle. The Agency would have those records, but did not provide them. Arb. 8.31.06, p. 126-127. Her normal commute for local areas was between one hour and one hour and thirty five minutes. Arb. 8.31.06, p. 128-129. She left her house at 7:15 in the morning to pick up the rental or government vehicle. Arb. 8.31.06, p. 129. Worked through lunch, late . Arb. 8.31.06, p. 130-131. Sometimes appointments are scheduled later in the day. Arb. 8.31.06, p.131. On two separate occasions she traveled with a supervisor and one co-worker; otherwise, she traveled alone. Arb. 8.31.06, p.132.

Ms. Wood’s supervisors had actual and/or constructive knowledge of work during travel. Arb. 8.31.06, p. 134; see also UE 22A-F. The travel authorizations were approved by various Agency managers; Mr. Johnson then Mr. Miles and then Mr. Sweeney. Arb. 8.31.06, p. 134; see also UE 22A-F. She was not compensated for extra time. Arb. 8.31.06, p. 134.

She would have still worked over forty hours a week even without 25% official time. Arb. 8.31.06, p. 136.

When she received a case, Ms. Woods had five days to contact the complainant and the respondent. She then entered the information into TEAPOTS system and prepared an investigative plan. Arb. 8.31.06, p. 167. She turns that into her supervisor for review. Arb. 8.31.06, p. 167. They meet and discuss the IP and determine whether or not an on-site visit is necessary. Arb. 8.31.06, p. 167, 171.

She sends out requests for documents and other evidence. Arb. 8.31.06, p. 168. Sometimes she is required to send out second requests for such information. Arb. 8.31.06, p. 168. When she receives documents, she reviews them, labels them and organizes them into a case file. Arb. 8.31.06, p. 168. At this time, conciliation takes place and if the case is settled she drafts a conciliation agreement and processes the file for review. Arb. 8.31.06, p. 169. Some cases are administratively closed due to failure to respond by claimant. Arb. 8.31.06, p. 170. She conducts investigations of claims. Arb. 8.31.06, p. Information is continually entered into TEAPOTS. Arb. 8.31.06, p. 170, 191-192.

The final write-up consists of the final investigative report that is reviewed and often sent back for changes or further investigation. Arb. 8.31.06, p. 171. During conciliation, she had constant contact with supervisor. Arb. 8.31.06, p. 178-179.

According to the Agency, in order for an employee to work overtime, the employee is supposed to get approval from supervisors in advance. Arb. 9.7.06, P.152-153. Ms. Woods did not get approval from her supervisor because the work was assigned to her. Arb. 9.7.06, P.153. If the Agency chooses to assign more than 40 hours of work per week

then the employee has no choice but to complete the work. It is part of the job requirement and affects the performance evaluations. Arb. 9.7.06, P.16. The Agency repeatedly told employees that there was no money for overtime work and to do what it took to get the job done. Arb. 9.7.06, P.69-70.

The work needed to be completed before the Agency responds to requests for approval. Arb. 9.7.06, P.154. She asked Ms. Carter and Mr. Payne for credit hours and/or overtime. Arb. 9.7.06, P.154. She did not file a grievance when Mr. Payne told her there were no credit hours because she felt complaining was futile. Arb. 9.7.06, P.157-159.

Ms. Woods is only claiming hours for time spent on work-related activities. She admitted that she occasionally took care of personal matters during her tour of duty at work, Arb. 9.7.06, P.162-170, but most of her personal matters, as testified, were performed after her tour of duty. Arb. 9.7.06, P.181, 186, 191. She did not claim overtime work that was not work-related. Arb. 9.7.06, P.225-229. *See* UE 26-27.

Mr. Albert Grier

Mr. Albert Grier is a series 360 EOS from the Philadelphia office. Mr. Grier stated in his affidavit that he worked late approximately two times per week and was only compensated with credit hours for 75% of the total time he worked beyond his tour of duty. Arb 11.15.06, P.174-175. The records indicate that he received credit hours for almost 380 credit hours between 2001 and 2006. Arb 11.15.06, P.175. Calculating the average over five years, the records indicate that Mr. Grier was in fact only compensated for 76 hours per year, though his affidavit indicates he worked almost 100 hours per year (presuming just two hours of excess work per week for 48 weeks).

Ms. Phoebe R. Buchanan

Ms. Phoebe R. Buchanan works as senior EOS, GS-13, Step 7, in Pittsburgh Fair Housing and Equal Housing Opportunity field office. Arb. 9.7.06, P.5. She has been a GS-13 for six years and worked for HUD since 1980. Arb. 9.7.06, P.5-6. She started in Fair Housing in 1988. Arb. 9.7.06, P.6. Richard H. Payne is the team leader in the office, Elaina Spina, is the acting second-line supervisor from Philadelphia, formerly Ms. Ruby Carter, and Ms. Wanda Nieves is the director. Arb. 9.7.06, P.9-10. Her co-workers are Ms. Towcinak, Mr. Jansen, and Ms. Chernoff. Arb. 9.7.06, P.7-8.

She works a fixed schedule from 9:30 in the morning to six in the evening, but regularly spends a lot of time after work completing tasks. Arb. 9.7.06, P.29-30. Sometimes she came to work before her tour of duty started for various conferences, headquarter's reviews, or to go into the field. Arb. 9.7.06, P.31-33. Prior to getting the scanners in the lobby, employees signed in at the guard station to come into the building on weekends. Arb. 9.7.06, P.36.

She testified that all work assigned is subject to deadlines due to the requirements of the programs: “All my reviews basically have a ten-day to 14-day turnaround time.” Arb. 9.7.06, P.13-14. One of the criteria for performance appraisals is that work was completed within the proper timeframe. Arb. 9.7.06, P.16-17. Due to substantial regulatory changes in the procedures of the programs, the workload has substantially increased. Arb. 9.7.06, P.14-16.

She testified that the work simply cannot be completed in 40 hour workweeks. Arb. 9.7.06, P.17-18. Mr. Payne assigns work to the employees, but it is based on the territories that each EOS is assigned to handle. Arb. 9.7.06, P.18. Ms. Carter was

provided copies of the territorial assignments and employees submitted periodic reports, progress reviews, on issues and accomplishments. Arb. 9.7.06, P.18-20. There was a lot of direct interaction between Ms. Buchanan and Ms. Carter. Arb. 9.7.06, P.20-22. She regularly corresponded with Ms. Carter about work after 6 p.m. Arb. 9.7.06, P.74.

Ms. Buchanan explained that between 10 and 25% of the time, she handles phone calls or in-person intakes because FHEO is the focal point of filing Title VIII Complaints. Arb. 9.7.06, P.22-25. If she only worked 40 hours per week than she would not be able to complete the other primary duties of her job, mainly compliance reviews and investigations, which would detrimentally affect her performance appraisals. Arb. 9.7.06, P.25-27. While the workload has increased over the past six years, the staffing levels have practically remained the same. Arb. 9.7.06, P.26-28.

To prepare for her testimony, she reviewed various documents including screen shots of her G drive, e-mails, travel vouchers, leave records and NFC data. Arb. 9.7.06, P.37-38. She compared the screen shots of her G drive and e-mails with the NFC data to determine calculations of overtime performed since 2000. Arb. 9.7.06, P.38-39; See also Union Exhibits 24-26. She concluded that only a small percentage of the late work was represented by screen shots and e-mail documents. *See* Arb. 9.7.06, P.39-43 for examples of work performed beyond her tour of duty.

The NFC data shows how much compensatory time or credit hours she earned for each year between 2000 and 2005. Arb. 9.7.06, P.43-44. The document reflects that she received zero credit hours after 2000 because, as Mr. Payne explained, she was not permitted to do credit hours. Arb. 9.7.06, P.44-45. Nonetheless, she most definitely worked excess hours and deserved credit hours for that time. The screen shot documents

of her G drive between 2000 and 2005 shows the most recent time the file was saved. Arb. 9.7.06, P.54-57; *See also* UE 26. Union Exhibit 27 is the original compilation of Ms. Buchanan's review of relevant documents. Arb. 9.7.06, P.57-59. She specifically left certain documents from UE 26 off the UE 27 list because she did not feel comfortable claiming the time spent on those assignments, despite the fact that they were work related. Arb. 9.7.06, P.59-60.

The G drive is the main drive on the HUD system to which work is saved. Arb. 9.7.06, P.61. The documents show Ms. Buchanan's HUD number. Arb. 9.7.06, P.61-62; *See* JE 26. Just because the last entry for a particular day is 5:58 p.m. does not mean that Ms. Buchanan left at that time. Arb. 9.7.06, P.63. The documentary evidence is intended to corroborate and supplement the testimony of the employees.

If she came to work early, she usually saw the FHEO staff. Sometime she even sent e-mails to the managers at the Philadelphia Office prior to the start of her tour of duty. Arb. 9.7.06, P.64-65. None of that time was compensated. *Id.* She worked over her tour of duty the Friday before testifying and her supervisor had actual knowledge of the overtime work. Arb. 9.7.06, P.66-67. She testified that in her office: "You have a job to do, you do what you need to do to get it done. It's been a given rule that we know that -- not to look for, you know, any extra re-numeration for what we do. I take a lot of pride in the work that I do. And we just do it." Arb. 9.7.06, P.68-69. There was general rule not to request overtime compensation because there was no money. Arb. 9.7.06, P.69-70.

She skipped lunch a lot of times. Arb. 9.7.06, P.235-237. UE 26 does not indicate any work performed from home; only in the office. Work was performed in 2006 without compensation that is not included in UE 26. Arb. 9.7.06, P.240-242.

She has only received limited compensatory time for FHIP or FHAP panel reviews that come from headquarters. Arb. 9.7.06, P.69-70. The Agency always told the employees there was no money to compensate for extra hours of work. Arb. 9.7.06, P.70.

If given the choice between overtime and compensatory time Ms. Buchanan would have selected overtime pay at time and a half. Arb. 9.7.06, P.221-222. The hours off for compensatory time are not useful to Ms. Buchanan because the workload would cause her to fall behind. She rarely takes vacation days as is. Arb. 9.7.06, P.221-223.

The supporting documentation shows a breakdown of all extra work performed from the third quarter in 2000 to the present, based on screen shots and other evidence. Arb. 9.7.06, P.80-83. The data is condensed for all five years, based on month, and then used to calculate the number of overtime work performed on a quarterly basis. Id. The data represents work performed at home, at the office, during lunch, on weekends and during travel. Arb. 9.7.06, P.80-89.

She testified that the numbers in UE 30, representing the number of overtime hours worked in the office between 2000 and 2005, made up 50% of the total overtime work performed. Arb. 9.7.06, P.87-89. The numbers for lunch, late work at home and weekends at home are the best-faith recollection of the total number of hours worked. Arb. 9.7.06, P.89-90. She also worked past her tour of duty during travel. Arb. 9.7.06, P.89-90, 91-92. The calculations discounted for the normal travel time from home to work. Arb. 9.7.06, P.91.

Her smoke and bathroom breaks were de minimus pursuant to the CBA. Arb. 9.7.06, P.92-93; *See also* CBA, Article 18, Section 18.05 at P.94. She combines her two breaks with her lunch break. Arb. 9.7.06, P.93-94.

She worked beyond her tour of duty while conducting reviews on travel. Arb. 9.7.06, P.113-114, 116-117. The calculations in UE 31 only show travel time, and the hours of work performed beyond her tour of duty on travel are not included in the calculations for UE 30. Arb. 9.7.06, P.114-115. On a couple of occasions, she traveled on Sundays. Arb. 9.7.06, P.101-104; *see also* UE 31. On some trips, she completed her training or work Friday afternoon and stayed overnight so as not to travel too late. Arb. 9.7.06, P.105-109. She worked through lunch because walk-in customers would be waiting for service. Arb. 9.7.06, P.111. She was never told by any management officials in Philadelphia not to work through lunch, or come in early or work at home. Arb. 9.7.06, P.110-111.

She worked from home because there was work to do and it was her job to do it[11]. Arb. 9.7.06, P.112. Her supervisor had constructive or actual knowledge because she would tell him she was working at home and he had access to her "G" drive and could see that she accessed files from her laptop at home. Arb. 9.7.06, P.111-113. She was not compensated for the weekend travel or the weekend work that she performed. Arb. 9.7.06, P.118.

The following non-FHEO employees witnessed and observed Ms. Buchanan working late in the office: Ray Hluska, Richard Nemoytin, Charlene Gillcrese, Renee Prescott, Cheryl Campbell, Anna Marie Eyler, John Bates, Constanza Carroll, Amy Genevie and Sharon Scott. Arb. 9.7.06, P.122-128. She was driven home by Margaret Serapiglia or her daughter when she stayed to work really late at night, i.e. after 9:00 p.m. Arb. 9.7.06, P.129-130. In fact, she received corroborating statements from Ms.

[11] Her daughter, Ms. Tiffany Buchanan, observed her working on weekends. Arb. 9.7.06, P.118-119.

Sarpegilla, Ms. Scott and Ms. Gillcrese with regard to her testimony. Arb. 9.7.06, P.131. *See* UE 32.

Ms. Durbin-Dodd

Ms. Durbin Dodd's tour of duty was approximately 7:30 to 4:00. Arb. 9.20.06, P.95. She worked more than her tour of duty without receiving compensation. Arb. 9.20.06, P.95-97. If she was in the office after her tour of duty then she was working. Arb. 9.20.06, P.96-97.

The Agency did not take any affirmative actions to prevent the overtime work from being performed; employees were never told, until very recently, by their supervisors that they needed to go home or that they could not perform agency work in the office after hours. The Agency was happy to accept the work and maintain the high standards on the short changed staff.

The mere assertion by the Agency that it told employees that they could only work 40 hours per week does not shelter it from liability for the overtime work performed. The Agency has an affirmative duty to exercise its control and ensure that the work is not performed. It cannot blanketly deny all overtime and then sit idly by accepting the work product of employees performing excess work.

Furthermore, the mere fact that the Agency assigns more work than can be performed by employees within the 40 hour workweek is sufficient to prove its actual or constructive knowledge of the work being performed. Employee performance was based on closing a certain number of cases. The work load and unit production standards resulted in overtime work for many employees. These employees knew that there were adverse consequences if the work was not completed, including being removed from

teleowkr schedules and receiving poor performance reviews. It was reasonable for the employees to think that the priority was to do what was necessary to get their work done.

2. Witness Testimony Corroborates Employees' Testimony That Overtime Work Was Performed.

The Union witness testimony was corroborated by other testimony, including family, friends and co-workers. Mr. David Marshall is currently employed at U.S. Department of Housing and Urban Development in Philadelphia, PA, as a management analyst with the Real Estate Owned, which is part of the Home Ownership Center (HOC). Arb. 9.6.06, P.7-8. Prior to August 6, 2006, he was an Equal Opportunity Specialist at the GS-11 level. Arb. 9.6.06, P.8. He was part of the Enforcement Branch at the Office of Fair Housing, Equal Opportunity, FHEO, between September 2004 and August 2006. Arb. 9.6.06, P.9. He worked with various Grievants, including Ms. Vivienne Cardullo, Mr. Randy Cross, Mr. Al Grier, Ms. Corliss Pearson-Hawk, Ms. Paula Coplan, Kenny in Charleston, West Virginia, and Dave Keller in the D.C. Field Office. Arb. 9.6.06, P.10-11.

Mr. Marshall testified that he worked with Ms. Cardullo on several occasions between 2002 and 2006 in the office and on-site. Arb. 9.6.06, P.11-12, 15-17. He even went on-site with her on four different occasions. Arb. 9.6.06, P.11-12. The documentary evidence supported the testimony of Mr. Marshall, specifically with regard to the four dates that he worked with her on-site. The dates are accurate because he retrieved the information from the HTMS travel system on the Agency computers. See Arb. 9.6.06, P.17.

When going on-site, Mr. Marshall would drive to Ms. Cardullo's house and they would leave her house and travel onsite in the GSA car at approximately 6:00 a.m. in the morning. Arb. 9.6.06, P.20-21, 22. For instance, between Feb. 9th and 13th in 2004, the

two went to Fairmont, West Virginia. Arb. 9.6.06, P.23. They regularly worked past their tour of duty and met at night to complete the work during the on-site visits conducted between 2002 and 2005. Arb. 9.6.06, P.24-26, 26-28.

At all times, he worked at a cubicle within 30-60 feet of her work station. Arb. 9.6.06, P.12-13. The supervisor's office was fairly close and the door was usually open when he was in the office. Arb. 9.6.06, P.14-15. Ms. Cardullo's standard tour of duty was 8:00 a.m. to 4:30 p.m. Arb. 9.6.06, P.22. He regularly observed Ms. Cardullo working through lunch; on average once per week. Arb. 9.6.06, P.31-32, 39. Ms. Cardullo told him that she worked at home on weekends and on one occasion he received an e-mail from her very late at night with regard to a case they were working on together. Arb. 9.6.06, P.34-38. He could easily see Ms. Cardullo working in her cubicle. Arb. 9.6.06, P.41-42.

Mr. Thomas Volpini, Jr., Ms. Cardullo's boyfriend since approximately 2000, provided direct testimony that support her claims of uncompensated suffer or permit overtime work. Arb 9.6.06, P132-133. He testified that, on occasion, she stayed late working on cases at the office in Philadelphia. Arb 9.6.06, P.134-135. He observed her working from home, after 4:30 in the afternoon, a couple times per month. Arb 9.6.06, P.136-137. Sometimes he would observe her working as many as three hours, until 7:30 in the evening. Id. He had knowledge of her performing work after her tour of duty other ways as well: "sometimes he helped her by reading data that she would input into the computer, other times he called her and she told him she was working on cases, sometimes doing some interviews, and other times he has observed her work on days she used sick leave." Arb 9.6.06, P.137-140, 141. Not only has he observed her work at her house, but she has performed HUD work at his house, as well. Arb 9.6.06, P.143-144. He

has observed her performing this work not only on weekdays, but weekends and holidays also. Arb 9.6.06, P.140-142. The latest he ever saw her working was until 1:00 in the morning. Arb 9.6.06, P.142-143. In his opinion, she worked beyond her tour of duty to ensure the cases got done in the time allotted. Arb 9.6.06, P.142.

Ms. Kaeron Masters High is employed at the U.S. Department of Housing and Urban Development in the Public Housing Division, located on the twenty-sixth floor in the Fort Worth, Texas office, where she works with Ms. Woods. Arb. 8.31.06, p. 214-216. She is a Public Housing Revitalization specialist, GS-12, step 7. Arb. 8.31.06, p. 215. She works four-ten compressed work schedule and her AWS day is Friday. Arb. 8.31.06, p. 216. She regularly worked from 8:30 a.m. to 7:30 p.m. and sometimes as late as 8:45 in the evening since 2002. Arb. 8.31.06, p. 217-218. She corroborated Ms. Woods' testimony that she would leave the building with Ms. Masters High after 7:30 p.m.; they left together three-fourths of the time since October 2002. Arb. 8.31.06, p. 219-221. Ms. Linda Banks, from Labor Relations, would observe Ms. Woods leaving late. Arb. 8.31.06, p. 222-223. She would call Ms. Woods, who indicated she had to finish work and would just grab (ie, eat) lunch at her desk (ie, while working). Arb. 8.31.06, p. 224.

Ms. Woods told her that she worked on weekends at the office and on rare occasions Ms. Masters High would come in to the office and see her on weekends. Arb. 8.31.06, p. 224-225. She also called Ms. Woods on her HUD and cell phone on weekends while Ms. Woods was at the office. Arb. 8.31.06, p. 226. When Ms. Masters High went to lunch with Ms. Woods it never lasted beyond one hour. Arb. 8.31.06, p. 227. She called Ms. Woods at her desk prior to 9:30 a.m. sometimes. Arb. 8.31.06, p. 233.

There was even direct testimony from Mr. Salim Jiwani, a cab driver since 1991, whose most regular customer, Mr. Don Johnson, worked at the HUD building in Chicago, IL. Arb 9.6.06, P.123-124. He testified that during the relevant time period he regularly picked Mr. Johnson up between 7:10 and 7:40 in the morning and dropped him off at work between 7:45 and 8:00 in the morning. Arb 9.6.06, P.124-125. Sometimes he picked him up even earlier, as early as 6:30 in the morning. Arb 9.6.06, P.125.

He observed Mr. Johnson carrying files and folders, often reading and writing during the drive when he looked in the rear view mirror; they never "shmooze or chat." Arb 9.6.06, P.125-127. One time, he drove Mr. Johnson to Lisle, IL, about 45 minutes from Chicago, and waited for almost four to five hours and then drove Mr. Johnson back to his office in the city. Arb 9.6.06, P.127-129. Every trip was on weekday. Arb 9.6.06, P.130. His testimony corroborates the testimony of Mr. Johnson that he worked overtour hours before work and during travel.

3. Documentary Evidence Corroborates Witness Testimony That The Employees Worked Overtime.

Documentary evidence shows the Agency had knowledge of the increase in workload during a time period when staffing consistently declined. Arb. 12.13.06, P.51-54; *See* UE 83. The evidence supports the Union's position that employees were assigned more work than could be accomplished in 40 hours per week or 80 hours per pay period. The Union presented the following documentary evidence to corroborate the testimonial evidence of the witnesses that suffer or permit work was performed:

Union Exhibit 1 are TOUCHCOM Access Control reports that indicate what time and where HUD Employees accessed their office space. This information is relevant because it would indicate if an employee was going to or leaving the work station at

various time throughout the day, including before and after the tour of duty. The Agency only provided limited records, though, precluding the Union from using this information for many offices and/or for various time periods.

Union Exhibit 2 is a set of screen shots, which show the dates and time when documents on a computer were modified. Many of the time stamps are beyond the normal tour of duty of the employees and corroborate the representational testimony that Grievants did work beyond their tour of duty.

Union Exhibit 3 is documentation that shows the driving records of HUD owned vehicles, as well as gas purchased for them by employees that were required to use them for work. The document lists the time and date that employees checked out cars, and the mileage that was put on them. This evidence is probative because it specifically provided spaces for employees to indicate arrival and/or departure times beyond the tour of duty.

Union Exhibits 4 A, B and C are sets of documentation related to a FHEO training seminar in Washington, D.C. The training seminar took place from Monday December, 11th to Friday December 15th, 2000. Vivienne Cardullo attended the conference and traveled on Sunday and late on Friday. These documents are material to her travel claims.

Union Exhibit 5 is documentation related to Vivienne Cardullo's weekend and after hours overtime work. Ms. Cardullo departed for the training seminar listed in UE 4 on Sunday December, 10th. Mr. Wayman Rucker and Ms. Wanda Nieves, her supervisors, signed off on the document, which is material to their actual knowledge of her travel claim.

Union Exhibit 6 is a series of emails from Vivienne Cardullo to Wanda Nieves, Wayman Rucker, and Ruby Carter. Many of the emails have time stamps that are beyond

her normal tour of duty and corroborate her testimony that supervisors knew or should have known about her overtour work. The e-mails exemplify work performed both before and after her tour of duty. Many of the emails include text regarding overtime, as well as requests for comp. time.

In Union exhibit 7, which is part of a transcript from an arbitration hearing on Tuesday, May 20th, Vivienne Cardullo testified that she works beyond her tour of duty: "when I'm working form home and it's 4:30, which is the time I would normally leave work, the office, if I'm not at a convenient place to stop, I just continue working. And the last two cases that I have completed, I actually worked until 1:00 in the morning." *Id.* She did not receive any compensation for her overtime.

Union Exhibit 8 was not accepted.

Union Exhibit 9 is Don Johnson's professional resume and lists all of his accomplishments at HUD, as well as in his academic career.

Union Exhibit 10 consists of five HUD performance appraisals for Don Johnson. In all "Critical Element" categories, Mr. Johnson received at least a "Fully Successful" rating, and in many cases received ratings of "Highly Successful" or "Outstanding." The above mentioned ratings show that Mr. Johnson was a competent employee, and that he met or exceeded the goals that the Agency set for him.

Union Exhibit 11 is a chart listing field offices and information pertaining to whether the office maintains sign in/out and/or scan in/out records. There are no sign in/out or scan in/out records for the Chicago regional office where Mr. Don Johnson worked.

Union Exhibit 12 is a series of charts that show Mr. Don Johnson's overtime tallies from 2000-2005. The majority of Mr. Johnson's overtime work was for staying late

"beyond his tour of duty," however, the charts also indicate that he came in early and worked through lunch on some occasions.

Union Exhibit 13 is Mr. Don Johnson's NFC data from January 2000 until the third pay period of 2001. The NFC data indicates that Mr. Johnson earned and used comp. time and credit hours during that time period.

Union Exhibit 14 is a series of screen shots that show the lists of the names of files, as well as the dates and times last modified. The date modified section shows that many of the files were saved before or after a normal tour of duty.

Union Exhibit 15 is the Case Management Log that Mr. Don Johnson reghularly provided to his supervisor. The information in the case log shows the amount of work performed on each case. The document corroborates Mr. Johnson's testimony that his supervisors did know or have reason to know that he performed overtour work.

Union Exhibit 16 is a Memorandum titled "Work Taken Home To Be Done There." In this document, employees are asked to take work home with them to complete.

Union Exhibit 17 is NFC Data for Ms. Jessyl Woods. The NFC Data is from January 2000 until the 23rd Pay Period of 2005. Ms. Woods earned some comp. time and credit hours during that time period.

Union Exhibit 18 are screen shots from Ms. Woods' computer. The date modified properties on the screen shots indicate that Ms. Woods often worked beyond her tour of duty.

Union Exhibit 19 is a series of charts, with overtime tallies for Jessyl Woods, showing overtour work performed between 2002 until 2006.

Union Exhibit 20 are elevator scan records from the Fort Worth office. The records indicate that Ms. Woods arrived to work before her tour of duty.

Union Exhibit 21 is series of record for employee HO8142 (Jessyl Woods), that indicate that she was printing documents beyond her tour of duty.

Union Exhibit 22 is travel records, and receipts for Jessyl Woods. The only thing that this exhibit proves is that Ms. Woods traveled a lot; it alone is not material.

Union Exhibit 23 is a witness affidavit from Mr. David Marshall with regard to overtour work performed by Vivienne Cardullo.

Union Exhibit 24 is NFC Data indicating that Ms. Phoebe Buchanan earned comp. time and credit hours between 2001 and 2005.

Union Exhibit 25 is a chart showing the amount of comp. time and credit hours earned for an unlisted employee, likely Ms. Phoebe Buchanan. The chart indicates that Ms. Buchanan earned no credit hours between 2001 and 2005, but did earn comp. time in some of those years.

Union Exhibit 26 is a series of screen shots from Phoebe Buchanan's computer that show the properties of files on the G: drive. Under the "Date Modified" section, many of the times are indicative of overtour hours.

Union Exhibit 27 is a hand written chart that lists dates and times of overtour hours. This exhibit was used in conjunction with Union Exhibit 26 to corroborate the testimony of Ms. Buchanan with regard to working overtour hours.

Union Exhibit 28 is a series emails that Phoebe Buchanan sent. All of the emails are time stamped after her tour of duty and many of them are addressed to both her team leader, Richard Payne and Ruby Carter, her supervisor.

Union Exhibit 29 is a hand written chart indicating dates and times of overtour work.

Union Exhibit 30A is a series of charts that indicate Ms. Phoebe Buchanan's overtime work by year, and category.

Union Exhibit 31 is a series of Phoebe Buchanan's travel vouchers and other records. Some of the records indicate overtour hours.

Union Exhibit 32 is a witness affidavit of Ms. Mary Margaret Serapiglia. Ms. Serapiglia stated that Ms. Buchanan often worked overtime at home.

Union Exhibit 33 is a series of emails between Union officials and an Agency representative. The emails indicate that the Agency has not been handling the grievance in good faith. Many of the emails focus on requests for information and the Agency's responses as to why the information cannot be produced. This exhibit shows that the Agency has not been forthcoming in providing necessary information to the Union.

Union Exhibit 34 is a memorandum to Ms. Barbara Edwards from Ms. Carolyn Federoff with regard to the travel claims in the instant grievance. Based on this exhibit, the Agency was aware that its policies were in violation of the FLSA in 1992. Furthermore, the Agency did nothing to correct the problems mentioned in this memorandum, which indicates that the Agency has not been dealing with the Union in good faith.

Union Exhibit 35A is a memorandum from Ms. Carolynn Federoff to Mr. Norman Mesewicz, dated July 31, 2002, about Labor-Management Relations. Ms. Federoff pointed out on page 5-6 that many employees are required to travel on Sundays to participate in training. This exhibit indicates that the Agency was aware that HUD employees were traveling and/ or working on Sundays for HUD related activity.

Union Exhibit 35B is a memorandum from Ms. Carolynn Federoff to Mr. Norman Mesowicz, dated November 19, 2003, about Labor-Management relations. Ms Federoff points out on page 3 that employees are still required to travel on Sundays to attend training sessions. The documents shows that the Agency took no corrective action between 2002 and 2003.

Union Exhibit 35C is a memorandum from Ms. Carolyn Federoff to Mr. Norman Mesowicz, dated July 8, 2003, regarding Labor-Management relations. Section 2 of the memo indicates that the Agency never provided information on staffing levels and ceilings by program and office location requested by the Union in 2003. The Agency never turned over the requested information to the Union, prompting Ms. Federoff to request the information again: “please provide this information before August 1, 2003.” Section 14 of this exhibit also highlights that Sunday travel for training was still an on-going issue; the Agency never took any corrective action.

Union Exhibit 35D is a memorandum from Ms. Carolyn Federoff to Mr. Norman Meowicz, dated October 27, 2004. Ms. Federoff noted on pages 4 and 6 that Union has advised management about continued off-duty travel by HUD employees.

Union Exhibit 35E is a memorandum from Ms, Carolyn Davis to Ms. Carolyn Federoff, dated November 18, 2004. The document indicates status updates on all of the points brought up in the 2004 Labor Management Relations meeting. Section 14 indicates that the agency has requested the managers stop requiring their employees to continue traveling on Sundays. Sections 38, 40, and 52 of the memorandum also indicate that the agency requested that management restrict off duty travel to alleviate the problem.

Union Exhibit 35F is a memorandum from Ms. Carolyn Federoff to Mr. Norman Mesowicz, dated November 6, 2005.

Union Exhibit 36 is an e-mail from Ms. Frieda Edwards to Ms. Carolyn Federoff, dated March 29, 2006, that indicates the Agency had knowledge that it was understaffed in FHEO based on the TEAM/REAP data.

Union Exhibit 37 is an IG audit memorandum, entitled Assessment of HUD's Progress in Implementing the REAP and TEAM Components of its Human Resource Management System, dated December 3, 2002. The document exemplifies the fact that the Agency used REAP data for staffing decisions.

Union Exhibit 38 is an FHEO monthly performance report from May 2005. The material data in this report indicates that the Kansas City office was one of the top performing offices in HUD.

Union Exhibit 39 is a copy of signed National Supplement 49 between HUD and the Union. Section 4 highlights the times and manner in which credit hours are earned and spent. The Agency failed to follow its own policies.

Union Exhibit 40 is a policies and procedures guide for alternative work schedule programs, dated June 1998. The document exemplifies that supervisors within HUD were not following the policies set forth by the administration to ensure that T&A records were accurate.

Union Exhibit 41A is a copy of the signed Supplement 59 between HUD and the Union. Section 15 requires "management…to review all position descriptions identified in the realignment for conformance with the new FLSA, and to exempt from coverage only those employees meeting the criterion exemptions."

Union Exhibit 41B is a memorandum from Ms. Carolyn Peoples to Ms. Barbara Edwards that highlights the FHEO realignment from 2003.

Union Exhibit 41 C is a packet, dated August 2004, which lists the names of employees, titles, office location, series, grade, and organization following the realignment in 2003. The packet is divided by region and city.

Union Exhibit 42 is a copy of HUD's Title VIII Complaint Intake, Investiagion, and Conciliation Handbook. Section 2.3 of this document states that employees should "attempt to reach the complainant by phone, making attempts (at home and business numbers) during regular business hours and non-business hours." By encouraging employees to contact complainants during non-business hours, the Agency has given a directive to work overtour hours to accomplish their work tasks. This exhibit is relevant, because it shows that agency knowingly encouraged its employees to work beyond their tour of duty to complete cases.

Union Exhibit 43 is an undated memorandum sent to administrative officers at HUD from Mr. Zakiyaah Day that highlights new FLSA determinations and notifies the Agency that all GS-10 and below employees are being classified to Non-Exempt status effective October 30, 2005.

Union Exhibit 44 is an FLSA Non-Exempt Employee Fact Sheet that highlights the rules and regulations applicable to Non-Exempt Employees.

Union Exhibit 45 is a copy of two emails from Ms. Jessyl Woods to Mr. Rayford Johnson, her supervisor. The first email states that Ms. Woods "just completed the draft for the…case." The email is dated August 4, 2004 and is time stamped 7:38 pm. The second email is dated August 3, 2004, time stamped at 7:16 pm: "[Ms. Woods is] going to

try to come back to the office after training for a couple hours to finish up [her work]." Both documents exemplify the fact that her supervisor had actual and/or constructive knowledge of her overtour work.

Union Exhibit 46 is the NFC Data for Ms. Vivienne Cardullo.

Union Exhibit 47 is a chart of Ms. Deborah Dodd's travel from 2002-2004.

Union Exhibit 48A-L is a series of travel records for Ms. Deborah Dodd.

Union Exhibit 49 is a HUD FLSA Evaluation for series 360 employees at the GS-11 level. This document shows that the Agency found this job at this grade to be FLSA non-exempt. The document is also evidence of Agency's willful violations of the FLSA and failure to act in good faith.

Union Exhibit 50 is a HUD FLSA Evaluation for series 360 employees at the GS-12 level. This document shows that the Agency found this job at this grade to be FLSA non-exempt. The document is also evidence of Agency's willful violations of the FLSA and failure to act in good faith.

Union Exhibit 51 is a HUD FLSA Evaluation for series 360 employees at the GS-13 level. This document shows that the Agency found this job at this grade to be FLSA non-exempt. The document is also evidence of Agency's willful violations of the FLSA and failure to act in good faith.

Union Exhibit 52 is an email from Mr. Gordon Patterson to Mr. Don Johnson. Mr. Patterson states in the email that he saw a previous email from Mr. Johnson that was time stamped at 6:56 p.m. and informed Mr. Johnsons not to work unauthorized overtime. The document exemplifies the fact that Mr. Johnson's supervisor had actual and/or constructive knowledge of his uncompensated overtour work.

Union Exhibit 54 was a series of 26 witness affidavits from Grievants that are representative of the class of similarly situated employees. The affidavits provided information related to their individual claims of uncompensated suffer or permit overtime and under-compensated overtour work. The affidavits also provided corroborating evidence for the Grievants that provided live testimony.

Union Exhibit 55A is an e-mail from Mr. Mike Snider to Mr. Norman Mesewicz requesting TEAPOT records for each 360 GS 11-15 employee, scan records for HUD employees that used cars from the Miami garage, travel records from the SATO travel company, and scan in, scan out times for employees at the Pittsburgh HUD office.

Union Exhibit 55B is an email from Mr. Hershel Goodwin to Mr. Norman Mesewicz to record a conversation previously held. The email indicates that the Union requested TEAPOTS data, garage records, NFC data, and other information from the Agency.

Union Exhibit 55C is a signed request for information pursuant to §7114(B) from the Union to the Agency dated September 13, 2006. The Union requested T&A records, as well as HUD forms 25018 and 25020 for Mr. Rayford Johnson and Mr. Wayman Rucker from Jan 2005 to present.

Union Exhibit 55D is a request for information from the Union to the Agency for various agency reports, FTE information, and travel data for employees.

Union Exhibit 56 is an email from Mr. Shlomo Katz. It represents the Agency's response to the Union's request for information.

Union Exhibit 57 are screen shots of Ms. Durbin's computer files. Many of the times modified are highlighted as being before and after her normal tour of duty hours.

Union Exhibit 58 is an audit report from the Office of the Inspector General regarding HUD's staffing policies. The audit determined that the Agency's hiring policies were not consistent with the program requirements and needs of the Agency. This information indicates that HUD was short-staffed and needed more employees. Based on this report, it is conceivable that HUD was overworking employees because the Agency did not have an adequate amount of staff to handle the work.

Union Exhibit 59 is a printout from HUD's website about the Resource Estimation and Allocation Process (REAP). The print out describes what REAP is and how it is used. REAP information is important because it indicates how the agency evaluates its staffing needs and determines the efficiency of the organization.

Union Exhibit 60A is a memorandum from Ms. Kim Kendrick to all FHEO employees about improving customer service in handling initial inquiries, complaint intake, investigations, and conciliation. On page 5 of this memorandum, Ms. Kendrick establishes clear expectations for the timeline for handling cases in the FHEO office. This memorandum corroborates the testimony of witnesses that employees were being directed to complete large amounts of work in a clearly delineated timeframe – by adhering to this memo some employees might be put in a position where they would work overtour hours to complete the work.

Union Exhibit 60B is a print out from HUD's website that explains the official policies of the Agency regarding Annual, Sick, and Other Leave time. On page four, the official policies regarding compensatory time are established. The policy states that "management may not mandate the use of compensatory time in lieu of overtime for employees whose salary is less than the maximum payable rate for a GS-10 or for

employees covered by the Fair labor Standards Act." Additionally, the policy states that "bargaining unit employees who are exempt from the FLSA or whose salary is more than the maximum payable rate for a GS-10 shall be given the option of either overtime pay or compensatory time off." The Agency failed to follow its own policies on comp. time.

Union Exhibit 61A is a management plan for the FHEO from FY 2006. The goal highlighted in this report is to have the most FHAP complaints closed within a specified period of time. This memorandum corroborates the testimony of witnesses that employees were being directed to complete large amounts of work in a clearly delineated timeframe.

Union Exhibit 61B is a copy of Section 3 of the Managers guide to Human Resources. Section 3 deals with Overtime. In the FLSA piece of this section, it states that supervisors are "responsible for ensuring that nonexempt employees do take it upon themselves to work before horus, during lunch periods, or after hours on job-related duties. Such work, though it may be unauthorized is payable under the provisions of FLSA."

Union Exhibit 62 is a HUD training policy guide from 2003. Section 4-7 of this document highlights the Training Class policy. The policy states that employees are not to work more than 8.5 hours a day while at training, and they are not to be assigned overnight class work unless they are given a break during the day. Additionally, credit hours and comp time are not authorized for employees attending these conferences.

Union Exhibit 63 is a print out of HUD work listings.

Union Exhibit 65 is a print out of Darlene Winter's title, office, phone number, and location.

Union Exhibit 66 is a PD for a series 360, GS-12 non-exempt employee.

Union Exhibit 67 is a PD for a series 360, GS-13 non-exempt employee.

Union Exhibit 68 is a PD for a series 360, GS-13 non-exempt employee.

Union Exhibit 69 is an informational packet from the AFGE NINSC that defines suffered or permitted overtime. According to page one of this exhibit, suffered or permitted overtime is defined as time in which an employee "did not receive appropriate compensation or offsets for the additional work (e.g., cash, extended lunches, credit hours, longer breaks, late arrivals, early departures, or compensatory time)." The document further provides that "by definition 'suffered or permitted' overtime does not appear on INS Time and Attendance Records. This you on chance to receive pay for undocumented work." The rest of the packet is screen shots of a database system used by the AFGE NINSC to gather information from its employees about their "suffered or permitted" overtime work.

Union Exhibit 70 is an email from Mr. Snider to Mr. Mesewicz requesting TEAPOTS information. Additionally, Mr. Snider requested records from the SATO travel company, which could be used to prove that employees were traveling outside of their tour of duty.

Union Exhibit 71 is a series of emails between Patricia Platt and her manager, Christopher Opfer, time stamped at 10:00p.m. and 8:55p.m., showing that she was working beyond her tour of duty.

Union Exhibit 72 is a witness affidavit from Mr. Kirk Ashmeade that corroborates Cathy Burton's testimony that her supervisor witnessed her working through lunch and working after her tour of duty.

Union Exhibit 74 is a set of two emails sent from Mr. David Nelson to his supervisor, Ms. Michelle Green. Both emails are time stamped after 5:00 pm, which is beyond his tour of duty. The content of the second email is a request for HTMS for local travel.

Union Exhibit 75 is an addendum to a witness affidavit for Ms. Nanette Locke, as well as copies of emails that she sent to various people within the Agency. The addendum to the affidavit states that her flexitour schedule typically began no later than 8:30 a.m. Some of the emails are time stamped after her tour of duty and the text of other e-mails indicate that overtour work was performed. The addendum affidavit also indicates the tour of duty of the employee and various types of documentary evidence corroborating that she performed work beyond her tour of duty. Arb. 12.13.06, P.34-36.

Union Exhibit 76 is a series of witness affidavits that corroborate the testimony of witnesses, e.g. Diane Whitfield's claim that she worked beyond her tour of duty. There are also supplemental affidavits that corroborate testimony of Ms. Whitfield working overtour hours during lunch and call into question the credibility of the Agency's witness, Ms. Lorraine Stell. Arb. 12.13.06, P.36-42.

Union Exhibit 77 is an email from Ms. Michelle Ferrell to Mr. Carmelo Melendez, time stamped at 5:47 p.m.

Union Exhibit 78 is an addendum to the affidavit for Mr. Albert Grier that indicates that his flexitour normally began no later than 8:30 a.m. between 2001 and 2005, and no later than 7:00 a.m. for the last year. The documentary evidence supports the Union's witness testimony that Mr. Grier worked overtour hours. Arb. 12.13.06, P.43-44. It similarly calls into question the credibility of Mr. Rucker. Id.

Union Exhibit 79 is a series of emails sent from Mr. Eddie Wartts to his supervisor after his tour of duty. This indicates that Mr. Wartts was working overtour hours and his supervisors had actual and/or constructive knowledge of the overtour work being performed. Arb. 12.13.06, P.45-46

Union Exhibit 80 is a series of emails from Ms. Theresa Williams, many of which are time stamped beyond her normal tour of duty. Additionally, a flyer in this exhibit for a conference on Civil Rights shows that the she participated in activities beyond her tour of duty on evenings and weekends.

Union Exhibit 81 is documentary evidence of work performed beyond the tour of duty. Arb. 12.13.06, P.47-49. The Agency had actual or constructive knowledge that the work was suffered or permitted. Id.

Union Exhibit 82 is a supplemental affidavit for Mr. Albert Grier. The affidavit exempl,fiies the fact that employees were assigned more work than could be accomplished within 8 hour workday causing employees to work beyond their tour of duty. The affidavit indicates that his supervisor had knowledge of his workload and of this HUD business travel. Mr. Grier stated that his supervisor, Mr. Rucker had “access to all of the relevant records that indicate the time of travel, and signs off on…travel vouchers.”

Union Exhibit 83 is a copy of Memorandum from Michael Hill (Seniro Advisor the Deputy Secretary) to The Deputy Secretary – The subject is workforce planning task force: Optimal Organization of HUD. The first sentence in this memo states “over the past twenty years, the department has encountered a constant decline in staff-roughly 50%-while, at the same time, its programmatic responsibilities increased significantly.” This

statement is relevant, because it implies that HUD employees are being given more work than they can complete within their normal tour of duty.

The Agency's materiality arguments with regards to the Union documentary evidence must fail. The Union's documentary evidence must not be read alone without the context of the testimonial evidence. But without exact records, which the Agency painstakingly concealed over years of continuing FLSA violations, the Union is only under a minimum burden of just and reasonable inference showing that the work was performed and uncompensated. In order to prove its damages, the Union's burden is even less burdensome; the best guestimate of employees taken with the documentary evidence is sufficient to prove the amount of uncompensated overtime. In other words, if one employee testified to performing 3 hours of uncompensated overtour hours per week and the documentary evidence corroborated the testimony then the Arbitrator can reasonably conclude that the employee did work three hours overtime per week. At that point, it is very simple to check the Agency's own NFC data to see if the employee was compensated with any form of overtime, even compensatory time or credit hours.

B. Agency Witnesses Further Corroborated Union Witness Testimony That GS-360 Unit Employees Did Perform Overtime Work Without Receiving Proper Compensation.

The testimony of Agency witnesses further corroborated the evidence provided by the Union.

Mr. Gordon Patterson

Mr. Gordon Patterson is a supervisor in the Department of Housing and Urban Development in the Chicago regional office. Arb. 11.1.06, P.67. He supervises Bob Thomas and six other series 360 employees in Chicago: Don Johnson, Shirley Lambert, John Meade, Farrah Tunk, Kim Nevels, and Joe Davis. Arb. 11.1.06, P.67-68. He had

very little previous experience as a supervisor, serving as a supervisor for two years in 1996 and 1998, and then returned in February of this year. Arb. 11.1.06, P.68.

His testimony as a supervisor was only relevant as it related to the time period after February 2006[12]. Arb. 11.1.06, P.68, 80-81. This is extremely important because in or about February 2006 the Agency hired counsel, which took actions to prevent further violations of the FLSA. Any testimony about office policy after February 2006 is not material to the policies practiced between 2000 and 2005, when the majority of the claimed overtime was performed.

Mr. Patterson testified that he did not recall Mr. Thomas ever coming to tell him that he was going to work over-tour. Arb. 11.1.06, P.69. But that is not even relevant because there is no requirement under the FLSA that the Agency know about the suffer or permit overtime prior to it being performed.

Mr. Patterson normally comes into the office between 7:10 and 7:15 in the morning and leaves around 4:40 to 4:45. Arb. 11.1.06, P.69. Mr. Patterson does not have a direct line of sight to Mr. Thomas' cubicle and would not know if he was working prior to 8:00 a.m. on any given day. Arb. 11.1.06, P.70-71.

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

[12] There was some testimony about time period when Mr. Patterson was a bargaining unit employee; he performed suffer or permit overtime, did not report the time and signed the T&A sheets, despite never being compensated for the hours worked. The Union maintains all claims for supervisors that were part of the bargaining unit at sometime since June 2000. *Id.*

In staff meetings he informed the staff that they are not to work unauthorized overtime or over-tour hours. Arb. 11.1.06, P.73. His supervisor, Mr. Maury McGough, instructed him to relay the information about not working unauthorized overtime and seeking approval in advance. Arb. 11.1.06, P.102-103.

He stated: “Basically, just that if they have -- if they need to work overtime or over-tour hours, that they should always ask in advance, and that they were not to work unauthorized overtime or over-tour hours.” Arb. 11.1.06, P.75. But under the FLSA, suffer or permit overtime is not unauthorized and the Agency could have prevented the overtime work from being performed if it hired more FTEs or assigned less than 40 hours of work per week. The Agency attempted to avoid compliance with the FLSA by misleading employees about their rights to overtime compensation under 5 CFR 551.

Mr. Patterson admitted that he had actual knowledge of Mr. Johnson working beyond his tour of duty without being compensated. Arb. 11.1.06, P.73-77, 135-138, 142-144; see also UE 15. “And I verbally instructed him that I had previously instructed everyone during the staff meeting not to work unauthorized overtime or over-tour hours, and informed him that I had noticed that on his e-mail and informed him not to do that.” Arb. 11.1.06, P.76-77. He also admitted to constructive knowledge that other employees worked beyond their tours of duty without being compensated. Arb. 11.1.06, P.128-129. The Agency always maintained control and possession of the e-mail system and could easily check to see when employees were accessing e-mails at any given time during the day. Arb. 11.1.06, P.89-P.91. The Agency similarly controls the network system and can access any information on the shared drive. Arb. 11.1.06, P.92-96. Mr. Patterson, and all

other Agency supervises before him, could have easily checked to see when each employee was accessing the shared drives.

Furthermore, the Agency's instructions not to work unauthorized overtime falls wholly short of its burden to prevent suffer or permit work from being performed if the Agency does not wish to accept the benefit of the work. These actions were in the course of litigation as the Agency attempts to make efforts to limit and future damages. The instructions allegedly provided in staff meetings since February 2006 have no material nexus to the uncompensated overtour suffer or permit work performed since 2000.

He admitted that prior to February 2006 he worked uncompensated overtime hours. Arb. 11.1.06, P.105. His testimony about the work performed during his overtour hours matches the testimony of Union witness, who repeatedly stated they worked extra to spend time in the evening trying to get a hold of folks to complete cases and sent work home from the office computers. Arb. 11.1.06, P.106-107, 114. He even traveled on Sunday for training and/or work. Arb. 11.1.06, P.109-110.

Performance goals and ultimately, performance ratings, were based on the 100 day deadline. Arb. 11.1.06, P.118-120. This created an incentive for employees, fostered by the Agency, to do whatever it took to get the cases completed within 100 days. Even Mr. Patterson violated the Agency's policy when he worked uncompensated overtour hours to get his work done. Arb. 11.1.06, P.130-131. And the result of his unwavering violations was to be promoted to supervisor. Employees learn to work hard and work often to receive rewards.

He was not able to rebut any testimony by Mr. Thomas regarding his overtour work performed after his tour of duty. Arb. 11.1.06, P.121-122.

Ms. Brenda Sue Shavers

Ms. Brenda Sue Shavers has been the Atlanta Program Center director since July 2005. Arb. 11.7.06, P.6. Prior to that position, she worked as the senior advisor to the assistant secretary of Fair Housing from October 2002 and was in the Chicago HUD office, from 1998 until 2002. Arb. 11.7.06, P.6-8. She worked as an EOS in 2002. Id. All of her testimony was limited to time period that Ms. Shavers supervised these individuals. All of that time was after the start of the instant arbitration and under legal advice of counsel.

Ms. Shavers testified that she did work beyond her normal tour of duty hour, but was required to get permission to work overtime by identifying the activity she was working on. Arb. 11.7.06, P.7-8. Ms. Shavers testified that she did not have any independent recollection of Mr. Anthony. Arb. 11.7.06, P.9-10. She had no basis to provide any testimony about whether or not he worked overtour hours, though Mr. Anthony testified that he worked before his tour of duty every day and worked after his tour of duty three times per week in 2002. Arb. 11.7.06, P.12-13.

Ms. Shavers tour of duty in the Chicago office was from 9:00 in the morning until at least 6:00 p.m., though she regularly stayed late and came in early on occasion. Arb. 11.7.06, P.12-14. She testified that she did not see many people in the office after 6:00 p.m. Id. When she came in early she never checked to see who was in the office. Arb. 11.7.06, P.13. She has no basis to provide any information on whether Mr. Anthony was there early or not. She admitted her memory of events in the afternoon was better than of the morning.

Ms. Shavers explained that the practice in Atlanta was that employees must have prior permission to work past their tour of duty. Arb. 11.7.06, P.18-19. But this practice

has only been in place since 2006 and violates the FLSA as it applies to non-exempt employees performing suffer or permit overtime.

There are employees that performed overtour work without receiving compensation. Arb. 11.7.06, P.19-24. She testified that Ms. Platt worked one day on her CWS day in 2006: “She wanted to attend a Fair Housing Month program, I believe. I believe it was a Fair Housing Month program in April she wanted to attend, and it was taking place -- it was a program she wanted to attend that was taking place on a Friday.” Arb. 11.7.06, P.30-32.

With regard to travel, Ms. Shavers testified that employees were compensated for overtour work hours performed during travel: “If they have to work outside their tour of duty, they would be compensated for it if they accurately reflected the time of travel. But each individual investigator schedules their -- does their own travel arrangements, and most of them schedule it so they don't have to do over. But if they do, it would be a part of their travel request.” Arb. 11.7.06, P.33-35. That was simply not the case and many employees were not compensated for overtour travel.

Ms. Shavers testified that Ms. Bello, the branch chief for Programs and Compliance, communicated the overtime directive to her employees: “no one was allowed to be in the office after their tour of duty without permission, that all overtime had to be preapproved.” Arb. 11.7.06, P.35-38. But this directive was as a result of the instant litigation and did nothing to correct the previous violations of the FLSA.
Employees on telework schedules complete weekly accomplishment reports for the supervisors. Arb. 11.7.06, p. 41.

Ms. Shavers testified about Ms. Burton not coming to work on time during telework days and not completing work while on telework. "She was in fact taken off of telework for failure to comply with telework policies and for being nonproductive." But that was after the grievance was filed and well into the course of the instant proceedings. This shows that the Agency did discipline employees for failing to complete their work and corroborates the Union's witnesses testimony that there was an atmosphere were employees worked overtour hours under the fear of reprimand for not completing their work.

Ms. Shavers admitted she had actual knowledge of Ms. Burtons performing overtour work without being compensated: "I denied your comp time, I notice you were in the office, you were not authorized." Ms. Shavers had actual knowledge of Ms. Burton traveling on Sundays in 2004. Arb. 11.7.06, p. 51. Ms. Shavers was not even the first line supervisor of Ms. Thompson Burton. Her testimony is not as material as that of the first-line supervisor, Ms. Bello, who had more material knowledge about Ms. Burton's daily work activities. The Agency, therefore, did nothing to rebut the Union testimony.

Ms. Shavers is eligible for comp. time. She was not given the choice between comp time and overtime; "that decision is made from headquarters." Ms. Shavers testified, "My policy for documenting and requesting and approving to work beyond the tour of duty is the same for all employees that fall under my immediate and under my supervision; That any time outside of the tour of duty must be requested in advance and must be approved." Arb. 11.7.06, p. 83.

Ms. Shavers admitted that when she was an EOS, she worked beyond her tour of duty approximately 50% of the time she stayed late and her supervisor, Mr. Maury

McGough, had actual and/or constructive knowledge. None of Ms. Shavers testimony was for time periods prior to May 2002.

Ms. Ruby Carter

Ms. Ruby Carter was the program center director for the Office of Fair Housing and Equal Opportunity and was responsible for staffing in Philadelphia and Pittsburgh between 2001 and January 2006, when she retired. Arb. 11.15.06, P.5-6.

Ms. Carter testified that the overtime policy was for employees to request to the supervisor that they want to do overtime by submitting a form for approval in advance. Arb. 11.15.06, P.6-7. The forms were sent to headquarters in Washington, DC, because it was the only office that could approve overtime. Id. But this policy was only instituted after the instant proceedings.

For employees in the Pittsburgh office, such as Ms. Buchanan, the paperwork was sent to the Philadelphia office for approval. Arb. 11.15.06, P.9-10. During the relevant time period, Ms. Wanda Nieves, the director of the fair housing office for the entire Philadelphia region, and Ms. Carter were the only management officials that could approve overtime requests. Arb. 11.15.06, P.10.

Ms. Carter did not recall any requests to work overtour hours by Ms. Buchanan. Arb. 11.15.06, P.10-12. Ms. Carter testified that she was in frequent contact with Ms. Buchanan's team leader, Mr. Richard Payne: "He would keep me apprised of how they're completing their assignments because that was his responsibility to track everybody and to keep -- make sure everybody was completing their assignments that they've been assigned." Arb. 11.15.06, P.21-22. The Agency was aware of the work being performed by the employees, even if it did not want to believe the work was being performed after

hours. At some point, employees simply stopped requesting compensation, but continued to work the excess hours to accomplish Agency goals. Arb. 11.15.06, P.24-25.

She admitted Ms. Buchanan is very honest and credible; if she said she worked past her tour of duty than she did. Arb. 11.15.06, P.25-26. In fact, in December 2003, Ms. Buchanan sent a work related e-mail to Ms. Carter and her team leader almost 1 hour after her tour of duty. Arb. 11.15.06, P.26-27; *See* UE 28, p.2. She did not get compensated for that time. *See* JE Two, excerpted as UE 24. Similar events occurred in June 2004. P.30-36; *See* UE 28, p.5-6. *See also* JE Two, excerpted as UE 24. Ms. Buchanan also traveled on weekends for work and training. P.36-38; *See* UE 31.

The Agency always told employees there was no money for overtime and compensatory time. Arb. 11.15.06, P.41-43; *see also* EE 61. But that is not an excuse to violate the FLSA. Employees would have to travel for mandatory training and often on the weekend. There are examples of travel for mandatory training on Sundays. Arb. 11.15.06, P.44-48; *See* UE 31, p.12-14; *See also* JE 2 (UE 24).

The Agency required employees to attend the Mandatory Fair Housing Training. The training, however, was not mandatory, but rather was for priority volunteers, but only offered on Sunday. Arb. 11.15.06, P.48-50.

Ms. Carter was Ms. Cardullo's second line supervisor. Arb. 11.15.06, P.52-53. On occasion, she received worked related e-mails from Ms. Cardullo. Arb. 11.15.06, P.53-54. Mr. Wayman Rucker was her first line and Ms. Nieves was her third line supervisor. Arb. 11.15.06, P.54. Various e-mails sent from Ms. Cardullo exemplified her working late. Arb. 11.15.06, P.54-58; *See* UE 6, p.26, 44, 70. She probably worked late because "she was a hardworking employee and took her job seriously" and received good performance

appraisals. Arb. 11.15.06, P.58. There was always work to do and always deadlines to meet. Arb. 11.15.06, P.58.

Ms. Carter admitted that she never thought the region was overstaffed; "we always thought we were understaffed." Arb. 11.15.06, P.59-60. The larger offices, Chicago, San Francisco and Atlanta, had more cases than offices in other regions. Arb. 11.15.06, P.60.

The Agency failed to negate any employees' overtime claim. The Agency contends that certain employees took smoke breaks and /or performed during the day, performed personal matters. *Id.* at 440-449. But these breaks were de minimus, typically lasting less than 10 minutes and there is no Agency policy that requires employees to sign in and out for smoke breaks. *See Donovan v. Bel-Loc Diner, Inc*., 780 F.2d 1113, 1115 n. 1 (4th Cir. 1985) ("to qualify as a bona fide non-compensable break, the respite must be uninterrupted and at least thirty minutes in duration…"). The code promotes short breaks for employees because it benefits the employer. Additionally, the Agency's claim about employee's personal use of the computer is a ridiculous attempt by agency to punish employees for de minimus use. *Id.* at 449-458.

<u>Ms. Michelle Green</u>

Ms. Michelle Green was the Director of Enforcement Branch since July 2004. Arb. 11.15.06, P.79-80, 85. Her official job title was supervisory EOS, but her working job title was enforcement branch chief with responsibility for compliance and enforcement. Arb. 11.15.06, P.84.

Prior to July 2004, Ms. Green was in a non-supervisory, GS-14 position as a program analyst and served as the lead in the FHAP division. Arb. 11.15.06, P.86. Ms. Green was a bargaining unit employee from approximately June 2000 to July 2004. Arb.

11.15.06, P.86. She was a GS-360 EOS for almost ten years between 1990 and 2000. Arb. 11.15.06, P.87.

When Ms. Green was in a non-supervisory position her tour of duty was 8:00 a.m. to 4:30 p.m., plus or minus fifteen minutes, for the entire time she worked at HUD. Arb. 11.15.06, P.87-88. She worked roughly 30 minutes to one hour over her tour of duty per week without compensation. Arb. 11.15.06, P.88-89. She did not report the extra time on her time and attendance records, which she did certify as being accurate. Arb. 11.15.06, P.89-90. The record was only certified for the minimum numbers of hours for pay, i.e. 40 per week or 80 per pay period. Arb. 11.15.06, P.89-90.

Ms. Green testified that her understanding was that “there's a ceiling for the overtime pay, and my normal hourly pay already exceeds that, so therefore, it really wouldn't even pay for me to get overtime pay unless I just wanted the money or something.” Arb. 11.15.06, P.90-91. It is not worth it to get overtime premium pay because the rate is lower than the hourly rate. Arb. 11.15.06, P. 91. The Agency was able to avoid compliance with the FLSA by misleading employees about their rights under the law.

Ms. Green testified that her manager knew she worked late, despite the fact that she did not report the time on her T&A sheets. Arb. 11.15.06, P.91-92. You can see time by checking scan records into the building and out in the garage. Arb. 11.15.06, P.93-95. Ms. Green would work late on her computer if she was reviewing a case and needed to draft a memo or an e-mail to an investigator. Arb. 11.15.06, P.96-97.

Mr. Wayman Rucker

Mr. Wayman Rucker was the first line supervisor of Mr. Albert Grier from 2000 to the present. Arb. 11.15.06, P. 172. Mr. Grier had a telework tour of duty: “Monday, Tuesday and Wednesday, it's from 8 a.m. to 4:30 p.m. Arb. 11.15.06, P.172-173. On Thursday and Friday, it's from 7:30 a.m. to 4:00 p.m.” Arb. 11.15.06, P.169-170, 172. Mr. Rucker admitted that Mr. Grier did ask for credit hours for working beyond his tour of duty. Arb. 11.15.06, P.173-174. This shows that Mr. Rucker had actual knowledge of his employee working overtour hours.

The affidavit of Mr. Grier indicated that he worked excess hours at least 11 times per month performing work at home on evenings, weekends, federal holidays and/or his CWS day between 2000 and 2005. Arb. 11.15.06, P.182-185. Mr. Rucker corroborated Mr. Grier’s testimony that he traveled to distant work sites on average three times per year between 2001 and 2006. Arb. 11.15.06, P.185-186. Mr. Rucker cannot dispute that Mr. Grier came into work early. Arb. 11.15.06, P. 192-193.

Mr. Rucker testified that Mr. Grier is a hard worker and a credible individual. Arb. 11.15.06, P. 194. Mr. Rucker further testified that it is possible Mr. Grier is honest and was compensated but only for 75 percent of the time that he worked late. Arb. 11.15.06, P. 195. Mr. Rucker testified that hew was in the office when Grier arrives for work. Arb. 11.15.06, P. 205. This testimony does nothing to rebut Mr. Grier’s affidavit.

Mr. Maurice McGough

Mr. Maurice McGough was the Director of the Chicago Field Office, Region 5 in FHEO at HUD from June 2000 to the present. Arb. 9.20.06, P.109-110. He has been the direct supervisor of numerous series 360, Equal Opportunity Specialists, Arb. 9.20.06, P.110-111 and served as acting Program Operations Branch Chief from April 2001 until

February 2006. Arb. 9.20.06, P.111-112. Mr. McGough admitted that he had personal knowledge of Mr. Johnson staying late. Arb. 9.20.06, P.113. Mr. McGough claims he told Mr. Johnson to go home because he was working past core hours. Arb. 9.20.06, P.112-114. He instructed Gordon Patterson, Mr. Johnson's current direct supervisor, to inform Mr. Johnson that he cannot work beyond his core hours. Arb. 9.20.06. p. 113.

Mr. McGough testified that Mr. Patterson had previously instructed Mr. Johnson to only work his core hours. Arb. 9.20.06 P.114-115. But that contradicts his other testimony with regard to his knowledge of Mr. Johnson working past his core hours. In fact, Mr. McGough approved every request for compensatory time or credit hours, whether it was pre-approved or retroactive. Arb. 9.20.06, p. 116-118. Only Mr. McGough and Ms. Barbara Knox, Regional Fair Housing Director, were authorized to approve comp time. Arb. 9.20.06, p. 117-118.

Investigators were expected to complete cases within 100 days of filing. Arb. 9.20.06, p.118-119. There has been a greater emphasis over the last several years in attempting to achieve that goal. Arb. 9.20.06, p.119. The performance appraisal standards, EPPES's, for each individual employee, including supervisors and management, were based on closure rates and aged cases; meeting the 100 day goal was not always practical. Arb. 9.20.06, p.119. There is a Management plan goal for what percentage of cases must be completed within the statutory timeframe; "Well, we always met the Management plan goal. And, and that was 65 percent one year, which it was. We met that 65 percent. This year that goal is 60 percent. And we will meet that goal." Arb. 9.20.06, p.120. This testimony corroborates Union testimony that there was an atmosphere were 360s were pressured to get their work done in a certain time frame.

Mr. McGough supervised Mr. Johnson at two separate occasions between 2000 and 2006; once before and once after Ms. Ivory Smith was his supervisor. Arb. 9.20.06, P.128-130. He could not testify to Mr. Johnson's actual tour of duty. Arb. 9.20.06, P.131.

Mr. McGough testified that Mr. Johnson is non-exempt. He testified that no EOS in his office was coded as exempt:

> To the extent that I understand that, non exempt employees are not necessarily entitled to overtime pay. And the exempt employees have to be compensated in any time they work over their tour of duty. Okay. Exempt employees do not have to be compensated for time worked beyond 40 hours a week. Non exempt do.

P.133-140.

Mr. McGough testified that exempt employees do not need to follow procedures for pre-approval of compensatory time or credit hours. Arb. 9.20.06, P.140-141. Mr. McGough further testified that he never determined rules for exempt employees because he did not think any of his employees were exempt. Arb. 9.20.06, P.143-144. He testified that non-exempt employees are only entitled to compensatory time; no choice between comp. time and overtime. Arb. 9.20.06, P.147. The Agency could not possibly have complied with the requirements of the FLSA if the supervisors on the ground did not know the exemption status of their employees and the applicable overtime policies.

Mr. Patterson told Mr. McGough, as early as February 2006, that Mr. Johnson had been working outside his tour of duty. Arb. 9.20.06, P.149-150; UE 15. Mr. McGough had access to Mr. Johnson's files on the "G" drive, where he could determine certain information, such as the date the document was last modified. Arb. 9.20.06, P.152-157. He also had access to Mr. Johnson's e-mails. Arb. 9.20.06, P.156; UE 52. He knew or should have know that Mr. Johnson worked beyond his tour of duty; "If I bothered to, I

could have looked at the time [the e-mail was sent].” P.164-166. He never made sure Mr. Johnson was compensated for the late work he performed. Arb. 9.20.06, P.157-160.

The fact that the Agency has been more diligent in ensuring that employees do not work beyond their tour of duty since the filing of the grievance, exemplifies the fact that it failed to meet the burden of preventing employees from performing the overtour work prior to 2006. Arb. 9.20.06, P.161-162.

Mr. McGough testified that Dr. Johnson is an honest and credible man. Arb. 9.20.06, P.169. He testified that he saw Mr. Johnson working after 5:30 p.m., but never asked him when he started. Arb. 9.20.06, P.176-177. Mr. Johnson, the erratic and slow employee, never received less than fully successful performance evaluation. Arb. 9.20.06, P.224-225.

Mr. McGough testified the workload of an individual investigator could range from 6 cases to 15. Arb. 9.20.06, P.189. That totals approximately five closures per month per investigator. Arb. 9.20.06, P.190-193. He testified that an employee who closed 6 out of ten cases within 100 days but let the remaining four age to almost 300 days would be a poor case manager resulting in lower performance ratings, despite the fact that the investigator met the 60% office goal. Arb. 9.20.06, P.192-193. These performance goals ensured employees worked overtour hours to receive good performance ratings.

Aging reports are generated periodically to provide to management. Arb. 9.20.06P.197-199. He testified that they use the date the case is assigned to the investigator to evaluate employee, but use the date the case was filed for purposes of the 100 day time limit. *Id.* This causes even more strain on the employees because cases

can be assigned more than 20 days after the date of filing, leaving only 80 of the 100 days to meet the statutory deadline.

Staffing levels decreased in the last six years, while work load increased. Arb. 9.20.06, P.200-202. The REAP data represents amount of work each employee should complete based on staffing levels. *Id.* The Region is understaffed by as many as six employees. *Id.* Primarily, the staffing shortage is in the EOS series. Arb. 9.20.06, P.202-204. He testified that Mr. Johnson has a light case load compared to other investigators, Arb. 9.20.06, P.216-218, which means other investigators, therefore, must have heavier case loads than can be handled, particularly because the office is already understaffed and exceeding the REAP levels.

Ms. Federoff confirmed that the e-mail is the Agency's system and the Agency has the power and the right to go into employees' e-mail systems. Arb. 12.11.06, P.7. Though there was an agreement through bargaining negotiations over the standards of reviewing e-mail, Arb. 12.11.06, P.7-8. *See* EE 74, there is no limitation on management's right to access e-mails, only restrictions on monitoring e-mail. Furthermore, there is no mechanism for showing cause. Arb. 12.11.06, P.8-10. The Agency, not surprisingly, has disciplined employees for misuse of the e-mail system. Arb. 12.11.06, P.9.

Ms. Federoff testified:

> I am aware that in some circumstances employees have gone into the "Rights" section of their e-mail and have discovered that there are other persons who are named as having the access to their e-mail system. And in at least one occasion, Mary Steineger…found that her supervisor, if memory serves me, her supervisor was listed as a person who had access to her e-mail. However, when she discovered this, she asked that it be -- that the supervisor be removed, and the supervisor was removed from that list.

Arb. 12.11.06, P.10-11.

Ms. Federoff further testified that: “As a general rule, supervisors do not have access to employees' e-mail. However, the technology exists to give them that access.” Arb. 12.11.06, P.12-13.

C. Supervisors Did Know or Have Reason to Know that the Uncompensated Overtime Work was Being Performed for the Benefit of the Agency.

The testimonial evidence of employees and supervisors, alike, corroborates the Union’s position that the Agency had actual or constructive knowledge of the overtour work being performed. It is clear that the Agency suffered or [permitted the employees’ overtime work t be performed, *i.e.*, they were performed with HUD’s knowledge, despite not being specifically requested by the Agency. *See Holzapfel*, 145 F.3d at 523 (once it is established that the employee has engaged in “work,” the question becomes whether the work was “suffered or permitted” by the employer). Section 7(a) of the FLSA states that: “no employer shall employ any of his employees” for more than 40 hours in a workweek unless the employee is compensated at least at one and one-half times her regular rate. 29 U.S.C. 207(a). “Employ” is defined as “to suffer or permit to work,” 29 U.S.C. 203(g), thereby giving the term “employ” a scope that is the “broadest . . . that has ever been included in any one act.” *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61 (2d Cir. 2003), *quoting U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945); *see also Brock v. Superior Care Inc.*, 840 F.2d 1054, 1058 (2nd Cir. 1988) (definition of “employ” is necessarily broad in accordance with the remedial purposes of the FLSA).

The relevant interpretive regulations explain the concept of suffer or permit set forth in the statute: “Work not requested but suffered or permitted is work time. . . . The reason [such work is performed] is immaterial. [If] the employer knows or has reason to believe

that [the employee] is continuing to work . . . the time is working time." 29 C.F.R. 785.11 (emphasis added).

The Agency, therefore, cannot persuasively argue that its employees are not entitled to compensation for work that it did not request to be performed. "[A]n employee must be compensated for time she works outside of her scheduled shift, even if the employer did not ask that the employee work during that time, so long as the employer 'knows or has reason to believe that [the employee] is continuing to work' and that work was 'suffered or permitted' by the employer." *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 718 (2nd Cir. 2001), *quoting* 29 C.F.R. 785.11; *see also Zheng*, 355 F.3d at 66 ("An entity suffers or permits an individual to work if, as a matter of economic reality, the entity functions as the individual's employer."); *Holzapfel*, 145 F.3d at 524 ("[O]nce an employer knows or has reason to know that an employee is working overtime, it cannot deny compensation even where the employee fails to claim overtime hours. An employer need not have actual knowledge of such off-site work; constructive knowledge will suffice."); *Barfield v. New York City Health and Hospitals Corp.*, 432 F. Supp. 2.d 390, 395 (S.D.N.Y. 2006), *citing, Holzapfel*, 145 F.3d at 524 for the proposition that constructive knowledge is sufficient.

Various Circuit Courts have similarly set out this well-established principle of suffer or permit. In the Eleventh Circuit, the court noted "[t]he reason an employee continues to work beyond his shift is immaterial; if the employer knows or has reason to believe that the employee continues to work, the additional hours must be counted." *Reich v. Dep't. of Conservation and Natural Resources, State of Alabama*, 28 F.3d 1076, 1082 (11th Cir. 1994), c*iting* 29 C.F.R. 785.11. "The term work is not defined in the FLSA, but it is settled

that duties performed by an employee before and after scheduled hours, even if not requested, must be compensated if the employer 'knows or has reason to believe' the employee is continuing to work." *Mumbower v. Callicott, et al.*, 526 F.2d 1183, 1188 (11th Cir. 1975), q*uoting* 29 C.F.R. 785.11. *See also Davis v. Food Lion*, 792 F.2d 1274, 1276 (4th Cir. 1986) ("suffer or permit" requires a showing that the employer had actual or constructive knowledge of the overtime work).

In this case, there can be no doubt that the Agency knew about the overtime work performed by its employees. The employees regularly forwarded work product, investigative plans and case reports to their supervisors for review throughout the workweek. The Agency controlled the time sheets, as well as the e-mail and networked hard drive systems of the employees. Thus, the Agency knew not only that overtime hours were being worked by the Grievants, but the precise number of those hours, and was in possession of such knowledge shortly after the hours were worked. It had access to scan records, sign in/ out records, emails, networked hard drives and observation. It could have compensated these employees if they were nonexempt at the time – which they were not – and now must compensate them.

Indeed, the Agency's own work rule itself acknowledges that overtime work, albeit unauthorized[13], could be performed. Moreover, the Agency can hardly claim that it did not suffer or permit such work when it benefited financially from it. Therefore, irrespective whether HUD specifically directed the employees to work the overtime hours, those hours are compensable suffer or permit work.

[13] The Union notes that regular suffer or permit overtime is authorized.

1. The Agency Knew or Should Have Known That Overtime Work Was Being Performed Based on the Prevailing Business Conditions.

Though the Agency was shortstaffed, and the same output was still expected out of the employees, there simply was too much work to get done and not enough time in an eight hour work day to complete it all. *See* Arb. 9.6.06, P.68-69; Arb. 9.20.06, P.202-204. There is testimony to support the contention that the Agency, at times, was working at ½ the ideal capacity, which shows the extent of the shortage. Even Agency testimony supported the Union's position that the workload was too large for the number of investigators at the Agency.

The Agency knew that it was understaffed and knew that the work was still getting done, and therefore should have known that the overburdened employees would have to work additional hours. As the court in Cunningham noted, "[b]ecause the whole equals the sum of its parts, when Cunningham's [the Complainant's] continued part-time hours as superintendent were added to his new full-time assignment to the Northwestern Temporary project, Gibson [the employer] had to know that Cunningham required overtime hours in order to complete his duties." *Cunningham v. Gibson Elec. Co.*, Inc**.**, 43 F.Supp.2d at 976. Accordingly, the Agency reasonably should have inferred that requiring the Agency employees to handle the same, or even greater, work load with a staff almost ½ the ideal capacity for the Agency would require that those employees work overtime to effectively perform their jobs. Employees were left with the choice of working some extra hours and receiving successful performance evaluations or leaving work incomplete at the end of each workday and getting poor performance appraisals and eventually terminated. Understandably, many chose to work overtime to get the necessary work done.

There was simply too much work to get done and not enough time in an eight hour work day to complete it all. But the work was done and for the benefit of the agency.

a. The Agency was working efficiently despite having less FTEs than the REAP baseline.

Mr. Charles Brandt is the branch chief of the productivity analysis and support branch, which is part of the budget management and systems development division in the Office of Budget, which is part of the office of the chief financial officer of the Department of Housing and Urban Development. Arb. 9.21.06, p. 107.

“REAP is the Resource Estimation Allocation Process system. It is the department's work measurement system. It enables -- it's designed to enable -- allows the department to determine how many people or FTE full-time equivalent staff years the department needs and where.” Arb. 9.21.06, p. 107-108. REAP studies are conducted every two or three years. Arb. 9.21.06, p. 109.

There are three steps to performing a REAP study: 1) determining what the functions or processes involved in the organization are; 2) attempting to break those down into tasks or steps of each of the functions; and 3) then determining how long it should take to do each of those steps. Arb. 9.21.06, p. 108-109. The Agency then determines how many FTE’s are needed based on the workload for the year. Arb. 9.21.06, p. 108-109.

The tasks being studied are mostly process oriented for the field office and mostly policy oriented for the headquarters. Arb. 9.21.06, p. 111-112. The tasks are rated on scale of importance based on numerical ranges: one time it ranged from 1 to 3 where “one being definitely mission related to three being not as mission related.” Arb. 9.21.06, p.113-114.

The REAP studies are done in two rounds. Arb. 9.21.06, p.115. The FTE number is called the REAP baseline number. Arb. 9.21.06, p.116.

TEAM is the Total Estimation and Allocation Mechanism system. Arb. 9.21.06, P.137. REAP is the baseline for how much time the task performed should take and TEAM data shows the actual time taken. Arb. 9.21.06, P.137. The TEAM data is used to analyze REAP numbers and determine if any adjustments need to be made. Arb. 9.21.06, P.137-138. The primary purpose of REAP is budgetary. Arb. 9.21.06, P.140. Hiring decisions are made based on REAP data. Arb. 9.21.06, P.140-141. To determine if HUD is understaffed, overstaffed or right staffed one would look at the TEAM/REAP data. Arb. 9.21.06, P.145-149.

TEAM data is used to estimate and validate resource allocation. Arb. 11.1.06, P.6. The TEAM data only records hours worked that are compensated. There is no such thing as uncompensated hours. Arb. 11.1.06, P.5

An employee on leave during any pay period would enter those hours in the “other activities” time code on TEAM. Arb. 11.1.06, P.31-32. Only compensated hours are entered into TEAM. Arb. 11.1.06, P.32. Data is entered into TEAM over a two week period every quarter. Arb. 11.1.06, P.33. While the system does not prompt employees to enter 80 hours per pay period, the supervisors and a program coordinator review the entries for accuracy. Arb. 11.1.06, P.33.

The Agency claims that some of the work performed falls under the category of “nice to do,” but not necessary. Arb. 9.21.06, p.118. The employees, however, did perform that work for the benefit of the Agency. Employees cannot be punished for completing tasks assigned even if they are not as important. REAP data estimated the

number of FTEs the department would require if they did everything that they were supposed to do. Arb. 11.1.06, P.7; *See* UE 36. It measured office efficiency.

The TEAM numbers are always less than the REAP numbers because the Agency is never appropriated or authorized the REAP staffing levels. Arb. 11.1.06, P.29-30. The Agency's REAP data was recently criticized by OMB, GAO and Congress. Arb. 11.1.06, P.15-21. *See* UE 59-61. HUD's excessive hiring caused Congress to request an IG review. Arb. 9.21.06, P.169. During the review, the IG concluded the hiring actions were not based on the REAP. Arb. 9.21.06, P.1170. The report explained that hiring decisions are based on position priorities: priority one positions were positions identified as related to the secretary's priorities, Arb. 9.21.06, P.173, while priority two positions were positions that would support priorities of individual program areas. Arb. 9.21.06, P.173. There are also non-priority positions. Arb. 9.21.06, P.173-174. At FHEO, twenty-eight out of 94 new hires were in non-priority positions. Arb. 9.21.06, P.174.

It would be a valid conclusion for regional director to presume the office was understaffed if the FTE is 550 and the REAP data show 600 as the baseline. Arb. 9.21.06, P.150. Employees are not allowed to enter more than 8 hours per day into the TEAM data system because there is no such thing as uncompensated hours. Arb. 9.21.06, P.154. The data must add up to 80 hours per pay period for each employee. Arb. 9.21.06, P.156. TEAM collects actual time, usage and workload accomplishments. Arb. 9.21.06, P.160. Teapots is a data information system at FHEO included in the calculations for TEAM. Arb. 9.21.06, P.160-161.

The only reasonable conclusions based on the REAP data from 2000 is that the Agency, either, did not complete all work or did all work with less employees than REAP

numbers recommended. Arb. 11.1.06, P.10-11. The Union contends the bargaining unit employees completed the work without the recommended number of REAP FTEs. To do this, employees regularly worked beyond their tour of duty and the Agency had knowledge of this overtour work based on the TEAM/REAP data.

b. Employees at HUD were understaffed and pressured to meet deadlines.

As can be seen by the REAP data, HUD was understaffed. Testimony from other Agency supervisors corroborates the Union's position that the Agency was understaffed. Ms. Michelle Green was the Director of Enforcement Branch in the Kansas City office since July 2004. Arb. 11.15.06, P.79-80, 85. The Enforcement Branch is one of four divisions: There's a enforcement, there's compliance, there's intake and there's the FHAP division. Arb. 11.15.06, P.80. Between compliance and enforcement, Ms. Green testified that she is understaffed by two to three investigators. Arb. 11.15.06, P.81-82. With regard to the office ability to complete work, she stated: "Yes, quite a lot of it. We can handle it, but we deal with what we have." Arb. 11.15.06P.83. This quote exemplifies that the amount of work assigned was being performed by less employees for a number of years.

The efficiency target is a fairly new measure of performance in Enforcement used by the Agency to measure employee work. Arb. 9.20.06, P.184-185. The target for FY 2005 was 75%; 65% for FY 2006. Arb. 9.20.06, P.184-188. *See* UE 38. The Agency takes the following actions to ensure the goals are met:

> We do a number of things to ensure that our goals are met. We try to provide as much technical assistance and training individual investigators as possible. We try to assign cases to individual investigators in such a way that cases are assigned according to their strength. We try to expedite resolution of any obstacles that might stand in the way of, of completing a case within the prescribed amount of time. We provide direct oversight on difficult, on difficult cases. We assign difficult

> cases to program experts, if that seems to be appropriate, if a given investigator seems to be in over their head on a case. We might reassign it to an investigator that has recognized expertise in that area of the law.

Arb. 9.20.06, P.187-189.

Employees are held to performance standards in the form of deadlines. The Agency requires investigators to turn in cases within 70 days due to the fair housing regulations stated goals. Arb. 11.15.06, P.126-127. Ms. Green testified that employees complained that there was too much work to do and not enough time. Arb. 11.15.06, P.133-134.

Ms. Green testified about her knowledge of the FHEO report, Union Exhibit 38, titled, "Regional Directors' Monthly Performance Report," that shows enforcement activity and efficiency targets. Arb. 11.15.06, P.144-145. Historically, Kansas regional office is the top performer, Arb. 11.15.06, P.145-146, despite being understaffed according to the REAP baseline.

2. Supervisors Witnessed Employees Performing Overtime Work.

Ms. Phyllis Bell's first line supervisor, Mr. Rayford Johnson, had actual knowledge of the overtour work performed in the Fort Worth office. Arb 9.6.06, P. 49. Despite the fact that he left around 4:30 everyday, he had actual knowledge of the over tour work being performed, because employees would tell him that they stayed late to finish work and/or send him e-mails after the tour of duty. Arb 9.6.06, P.54-55. Ms. Bell knows that Mr. Johnson observed her and Ms. Woods, a co-worker, perform overtour hours. Arb 9.6.06, P.63-65. She reviewed the investigative plan with Mr. Johnson prior to conducting the investigation. Arb 9.6.06, P.107. He never told them to make sure they get compensated with time, to go home and cease working beyond the tour of duty and/or to make sure they

change the certified time and attendance records to reflect hours worked beyond the 80 per pay period. Arb 9.6.06, P.64-65.

Ms. Green, Director of Enforcement Branch in the Kansas City office, testified that sometimes employees, like LXL, traveled as many as three hours each way in the same day to conduct an onsite investigation resulting in a workday in excess of 8 hours. Arb. 11.15.06, p. 103-105. She testified that employees would be compensated with credit hours if they requested it; most of the time investigators did not request the compensation. Arb. 11.15.06, P.105-107. These facts exemplified her actual knowledge of the work being performed. Arb. 11.15.06, P.108.

Ms. Green further explained that investigators regularly stay after their tour of duty to perform excess work without pre-approval. Arb. 11.15.06, P.115-117. It has been going on for years. Arb. 11.15.06, P.116. She testified that she has given verbal directives to stop performing excess work after tour of duty without pre-approval, i.e. filling out request for credit hour form prior to working the excess hours. Arb. 11.15.06, P.117-119.

Mr. Wayman Rucker, supervisor in Philadelphia, testified that Mr. Grier was the type of employee that would work extra without asking for compensation. Arb. 11.15.06, P.177-178. Mr. Rucker also testified that he recalled looking at emails from Ms. Cardullo that were sent to him beyond her tour of duty. Arb. 11.15.06, P.196-197. With that actual knowledge, if the Agency did not want to accept the benefit of the work performed by its employee, then Mr. Rucker had an obligation to inquire into the hours of work. Management must seek employee out and instruct not to work extra. At some point, the Agency was obligated to refuse the benefit of the work or ensure that employees were only assigned duties and tasks that can be accomplished within 40 hours per workweek.

Affidavits from Agency supervisor, Mr. Robert Kelly, indicate that he approved and had actual knowledge of overtour work performed by three specific employees between 1988 and 2004. Arb. 12.13.06, P.21-31; *See* UE 73. There are email documents that show that the Agency supervisors had actual knowledge of the overtour work being performed. Arb. 12.13.06, P.32; *See* UE 74.

Documentary evidence supporting the testimonial evidence of Mr. Grier is also material to the actual knowledge possessed by the Agency. P.50-51; *See* UE 82. The supplemental affidavit calls into question the credibility of Mr. Rucker, specifically with regard to his testimony about his actual or constructive knowledge of the work being performed. *Id.*

During the period when Mr. Jackson was a supervisor he observed various employees perform uncompensated overtour hours during lunches, on weekends and late on evenings beyond the tour of duty. Arb. 12.13.06, P.68-69, P.78-79.

This evidence exemplifies the actual knowledge that Agency supervisors had during the relevant time period.

3. The Agency Did Not Fulfill Its Duty to See That Overtime Work Was Not Being Performed, Nor Did it Refuse To Accept the Benefits of This Overtime Work.

It is established OPM policy that supervisors are considered to have had the opportunity to prevent work from being performed unless: (1) they did not know or have reason to believe that work was being performed; (2) the work occurred so seldom that it was impossible to prevent; or, (3) they tried by every reasonable means to prevent work from being performed, including directing the employee not to perform unintended work, by counseling the employee about adverse consequences that may result from performing

such work, or by taking other management actions to control the employee's work, e.g., taking escalating disciplinary actions. *See also* **OPM decision number**: F-7404-05-01 at http://www.opm.gov/flsa/decision/74040501.pdf at 9-13 for discussion of whether employer suffered or permitted overtime and supervisors had the opportunity to prevent employees from performing overtour work. In that matter, OPM concluded the employer did suffer or permit work, despite facts that employees were ordered not to work overtime, but that it was possible that people could have worked off the clock to "get the job done." *Id.* at 11. There was also evidence that employees "knew they wouldn't be paid" for that work. *Id.*

In this case, the Agency's work rule that employees will not be paid overtime compensation for unauthorized overtime hours worked is not a prohibition on the performance of unauthorized overtime work; rather, it is a disclaimer that any such work will be compensated at the overtime rate. The rule, therefore, tacitly accepts that such overtime work might be performed, while simultaneously attempting to disengage the Agency from any overtime liability. But the Agency had every opportunity to issue and enforce a work rule against the performance of unauthorized overtime hours, yet continually did not exercise its inherent control to prevent such hours from being worked. Rather than, for example, disciplining employees who worked any unauthorized overtime hours, the Agency continued both to allow the employees to work those hours and to garner the financial benefits from that work. Its actions were not nearly sufficient to evince reasonable diligence to comply with the overtime provisions of the FLSA.

The Eleventh Circuit faced a similar set of facts in *Reich,* where no officer had ever been disciplined for violating a work rule which did prohibit overtime hours from being

worked. The court properly concluded that the employer had suffered or permitted the work to be performed because the employer "had a duty to do more than to simply continue to apprise the officers of the policy. The [employer] had an obligation to 'exercise its control and see that the work [was] not performed if it [did] not want it to be performed.'" *See Reich,* 28 F.3d at 1083 *citing* 29 C.F.R. 785.13. "In reviewing the extent of an employer's awareness, a court 'need only inquire whether the circumstances . . . were such that the employer either had knowledge [of overtime hours being worked] or else had the 'opportunity through reasonable diligence to acquire knowledge.'" *Id., quoting, Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 512 (5th Cir. 1969).

The same is true, here, where the work rule forewarns employees that they will not be paid for unauthorized overtime, yet the Agency does not discipline any employee for performing the extra work. *See also U.S. Dep't of Labor v. Cole Enterprises, Inc.*, 62 F.3d 775, 779-80 (6th Cir. 1995) ("[I]t is the responsibility of management to see that work is not performed if it does not want it to be performed. The management 'cannot sit back and accept the benefits without compensating for them.'") *quoting* 29 C.F.R. 785.13; *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981) ("An employer who is armed with [knowledge of an employee's overtime work] cannot stand idly by and allow an employee to perform overtime work without proper compensation."); *Mumbower*, 526 F.2d at 1188 ("The employer who wishes no such work to be done has a duty to see it is not performed. He cannot accept the benefits without including the extra hours in the employee's weekly total for purposes of overtime compensation.") *citing* 29 C.F.R. 785.13); *see also Holzapfel*, 145 F.3d at 525 (distinguishing a situation where an officer is specifically told not to work unauthorized overtime hours -- "Officer Holzapfel was not told

to limit his activities to two hours per week, but rather was simply told that he would not be paid for more hours than that"); *Barfield*, 432 F. Supp. 2d at 394 *citing Holzapfel*, 145 F.3d 525, for the proposition "that an employee might be entitled to overtime where he was told that he would not be paid overtime but was not told to limit his hours"); *Moon v. Kwon*, 248 F. Supp. 2d 201, 228 (S.D.N.Y. 2002), *quoting* 29 C.F.R. 785.13.

In this case, the Agency failed to meet its burden of diligently seeking out overtour work and preventing it. The Agency believed that the Grievants were all exempt employees and only entitled to overtime compensation that was ordered and approved. The Agency, therefore, was not concerned with preventing the overtour work from being performed because it believed it could accept the benefits of the work without any overtime liability. In reviewing the extent of an employer's awareness, "a court need only inquire whether the *circumstances* ... were such that the employer either had knowledge of overtime hours being worked or else had the opportunity through reasonable diligence to acquire knowledge. Knowledge of its supervisors is imputed to the employer." *Cunningham v. Gibson Elec. Co., Inc.*, 43 F.Supp.2d 965, 975 (N.D.Ill.,1999), *citing Reich v. Department of Conservation & Natural Resources,* 28 F.3d 1076, 1083 (11th Cir.1994). The Agency's position would provide an incentive to management officials to "turn a blind eye" in order to avoid potential liability. Any employer "who is armed with knowledge that an employee is working overtime cannot stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation." *Cunningham v. Gibson Elec. Co*., Inc., 43 F.Supp.2d at 975, citing *Newton v. City of Henderson,* 47 F.3d 746, 748 (5th Cir.1995) (internal

brackets omitted), *quoting, Forrester v. Roth's I.G.A. Foodliner, Inc.,* 646 F.2d 413, 414 (9th Cir.1981).

The Agency should be required to take every step necessary to ensure that overtime work is not being performed; otherwise it is bound by the provisions of the FLSA. If the employer has the power and desire to prevent such work, he [or she] must make every effort to do so. *Reich v. Stewart* 121 F.3d 400, 407 (8th Cir. 1997), citing *Mumbower v. Callicott,* 526 F.2d at 1188 (citations omitted).

In some cases, the employees failed to even report the excess hours worked due to fear of humiliation or embarrassment from their supervisors. Employees did not want to be construed as slow workers or incapable of handling their workloads.

The case law on point provides that an employer cannot take shelter in instructions to employees to not work more than forty hours per week knowing or having reason to know that the employee actually works more. *See Reich v. Stewart*, 121 F.3d 400 (8th Cir. 1997); *Wirtz v. Bledsoe*, 365 F.3d 277 (10th Cir. 1966). Even where the employer did not order the employee to perform the work, the employer is liable for compensating the employee for time spent working for the behalf of the employer if the benefit is accepted and it does not act to stop performance of the work it does not want performed. Contrary to the Agency's position, there is no burden on the employee to seek approval to allow the employer time to prevent the work from being performed. Furthermore, the applicable provision of the CBA does not even require pre-approval for FLSA overtime. *See* CBA, Article 18, Section 18.02 at P.93. An employer must compensate an employee for suffer or permit work notwithstanding an agreement or instruction to obtain authorization prior to

performing overtime work. In this case, the work was regular and recurring overtime work; it was ordered when it was assigned. *See* CBA, Article 18, Section 18.01 at P.93.

Case law supports the Union's position that the employer cannot claim that they do not have to compensate overtime that was not specifically authorized. In *Reich v. Stewart*, the Eighth Circuit explained, "the term 'work' is not defined in the FLSA, but it is settled that duties performed by an employee before and after scheduled hours, even if not requested, must be compensated if the employer 'knows or has reason to believe"' the employee is continuing to work and the duties are an "integral and indispensable part" of the employee's principal work activity….The employer who wishes no such work to be done has a duty to see it is not performed. *Reich v. Stewart*, 121 F.3d at 407. Further, in *Cunningham*, the court specifically held that, 'it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so." *Cunningham,* 43 F.Supp.2d at 975.

III. Remedy

The Union moves for Judgment for the following categories of damages:

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

A. The Grievants Are Entitled To Capped Overtime And Compensatory Time Damages.

The Grievants are entitled to all make-whole relief for the Agency's violations of the FLSA. This is not just limited to the uncompensated suffer or permit damages, but includes capped overtime damages and compensatory time damages. The relevant portion of the FLSA, 29 U.S.C. ə 216(b) states:

> 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 code clearly provides for employees to be made whole with the unpaid overtime compensation.

Any overtime payments to Grievants during the relevant time period were capped by the Agency. The Agency utilized the overtime provisions under Title 5, rather than the FLSA counterpart. While both provide an overtime hourly rate of one and one-half times the employee's basic hourly rate, *see* 5 U.S.C. §§5501-5541 et seq., Title 5 overtime 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.[14] 5 U.S.C. §5542(a)(2). The result of the Title 5 cap is that employees at higher graded positions than the GS-10, step 1 level 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.

[14] 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.

Under the theory of make-whole relief, the Grievants are entitled to damages for any overtime payment that were capped below the 1.5 overtime rate. But for the Agency's failure to properly classify the employees, any overtime the worked would have been worked at the true time-and-a-half rate, under the FLSA, as opposed to the capped rate, Title 5. 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.

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. э 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. э 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. э 5543(a)(2). The decision whether to award compensatory time in lieu of overtime pay for employees covered under э 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. ə 551.531(a)) is significantly different in that employees may elect compensatory time. In promulgating 5 C.P.R. ə 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. ə 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. ə 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. ə 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. ə 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. ə 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 compensatory time damages, as explained above, as a matter of law.

For those hours worked in which the employee received compensatory time without being given the choice of overtime pay, the proper damages are calculated using an overtime rate of .5 to be multiplied by the straight hourly rate, plus the greater amount of liquidated damages or interest. *See Social Security Administration, Memphis, TN* and AFGE, Local 3438, 59 FLRA No. 99 (January 9, 2004) (Employees …working outside of their tour of duty get their election of overtime or comp time pay and damages are .5 times pay for forced comp time).

In this case, the employees were never given choice of comp time or overtime wages and were specifically told that there was no money for overtime compensation. Accordingly, the Agency violated 5 C.F.R. § 551.321 by denying employees their right to elect overtime, and thereby forcing them to accept involuntary compensatory time, if any compensation at all. The employees, therefore, should be compensated for the overtime to which they were entitled.

Furthermore, unlike Title 5 Overtime, under the FLSA non-exempt employees cannot lose compensatory time at the end of the fiscal year. The Grievants, thus, are entitled to damages for any compensatory time earned, but not used, at the overtime rate applicable when the comp. time was earned. See

B. <u>The Grievants Are Entitled To Suffer Or Permit Overtime Damages.</u>

The employees are entitled to overtime compensation for all hours worked in excess of forty hours per week and/or eight hours per workday, regardless of whether the

Agency provided compensatory time or credit hours. For those hours worked in which the employee received no form of compensation, the proper damages are calculated using an overtime rate of one and a half times (1.5) to be multiplied by the straight hourly rate, or regular rate of pay, of the employee, plus the greater of liquidated damages or interest pursuant to the Back Pay Act. *See* 5 U.S.C. 5596(b)(2). The actual compensation that the employees did receive must be converted to an equivalent hourly rate in order to compute the overtime compensation. The regular rate of pay is the "hourly rate actually paid to employees for the normal, non-overtime [sic] workweek for which he is employed." 29 C.F.R. Sec. 778.108 (1996).

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, at home on evenings and weekends and at the office before or after regularly scheduled hours.

The Agency 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.

C. The Grievants Are Entitled To Liquidated Damages and A Three Year Statute Of Limitations.

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," *See Martin v. Cooper Elec. Supply Co.,* 940 F.2d 896, 907 (3rd 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." *See 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. *See 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).

If the Agency failed to prove it acted in good faith then liquidated damages are mandatory; however, even if the Agency proved it acted in good faith, the Arbitrator can still award liquidated damages in his own discretion. 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. 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 . . . ." *See 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 (2nd 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*, 121 F.3d at 71 (citations omitted).

The Union further claims that it is entitled to the greater of interest or liquidated damages, though not both. *See e.g., Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697, 707 (1945).

1. The Agency Failed To Prove It Acted In Good Faith.

The Act originally granted liquidated damages as a matter of course in FLSA cases. This was modified in the Portal-to-Portal Act, 29 USC 9 260, which allowed an employer to avoid payment of liquidated damages by demonstrating that it acted in good faith. The regulations, as amended, 29 CFR 578.4(b)(1), mirrored the burden of good faith in the Portal-to-Portal Act:

> In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

29 U.S.C. § 260 (1999).

To satisfy Section 260 of the Act, a FLSA-liable employer bears the difficult burden of proving both subjective good faith and objective reasonableness, "with double damages being the norm and single damages the exception." *Herman,* 172 F.3d at 142, *citing, Reich,* 121 F.3d at 71; *see also Dole v. Elliott Travel & Tours,* 942 F.2d 962, 968 (6th Cir.1991). Where the employer fails to meet that burden, "liquidated damages are mandatory." *Local 246,* 83 F.3d at 297 (citations omitted). The Agency must “take steps necessary to ensure[its] [ ] practices complied with [FLSA]." *Herman,* 172 F.3d at 142. *See Alvarez v. IBP, Inc*., 339 F.3d 894 C.A. 9 (Wash. 2003).

As previously started, 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; *See 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.” *See Brock v. Wilamowsky*, 833 F. 2d 11, 19 (2nd 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*, 121 F. 3d at 71. 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).

In this matter, there is ample evidence to support the Union’s position that the Agency failed to act in good faith. Union Exhibit 62 is material to the question of whether

the Agency acted in good faith. According to the document, the Agency was still relying on grade, in violation of the FLSA and related OPM regulations, to classify its employees as exempt. Arb. 12.11.06, P.29-35. During the course of this proceeding, the Union conducted searches within other agencies to determine how they classify certain series of employees, including 360s. Arb. 12.11.06, P.42-44. The Department of Labor provided the Union with FLSA classification evaluation forms with the PD's for GS-360-12 and GS-360-13 employees classified as non-exempt. Arb. 12.11.06, P.48-50. *See* UE 66-68. Ms. Federoff, in fact, specifically told Mr. Mesewicz to contact other agencies about the FLSA status of similarly situated employees. Arb. 12.11.06, P.52. Similarly, the Agency conducted a review of every series 360 position in HUD and provided the Union with the classification fact sheets, exemplifying the fact that GS-11/12/13 employees are non-exempt. To date, however, the Agency has not changed the exemption status of any employees in the series 360 positions at GS-11 and higher grades.

The Agency argument that it acted in good faith ignores that the Union first notified the Agency of the issues involved in the grievance in 1994 and still the Agency did not correct the misclassifications for nearly ten years after that. This certainly does not constitute "plain and substantial evidence of at least an honest intention to ascertain what the Act requires and to comply with it," sufficient to rebut the strong presumption in favor of double damages. *See Brock,* 833 F. 2d at 19. Furthermore, the Agency has been similarly derelict in its diligent handling of the matters since the filing of the grievance in 2003. The Agency failed to demonstrate good faith by showing that it had "reasonable grounds for believing that . . . [the] act or omission was not a violation of the Fair Labor Standards Act. . . ." *See Walton v. United Consumers Club, Inc*., 786 F.2d at 310. This is

specifically so after the Union repeatedly told the Agency to contact other Agencies with similar issues. The Grievants, therefore, are entitled to liquidated damages.

In *NTEU and Federal Deposit Insurance Corporation,* the Authority overruled a decision by the Arbitrator that the defendant, Agency, did act in good faith**.** *See NTEU and Federal Deposit Insurance Corporation,* Federal Labor Relations Authority, 0-AR-2826; 53 FLRA No. 134, 53 FLRA 1469, February 27, 1998. In determining that liquidated damages were not warranted, the Arbitrator found that the Agency "marginally . . . met its burden to show requisite good faith and reasonable grounds" under 29 U.S.C. § 260 for exempting such employees. *Id.* at 19. In that regard, the Arbitrator considered two inquiries that were made by an Agency personnel specialist to the Office of Personnel Management, prior to May 1995, regarding exempt and non-exempt criteria under the FLSA. The Arbitrator found these inquiries did nothing to alleviate the good faith burden, but nonetheless, concluded that the Agency's failure to change the exempt status of those examiners and liquidators who the Agency conceded were improperly classified as exempt did "not rise to unreasonable actions sufficient to justify imposing liquidated damages." *Id.* at 18-19. Despite this evidence, the Authority overruled the Arbitrator's conclusion that the Agency acted in good faith.

In applying section 260, good faith requires "a showing that the employer subjectively acted with an `honest intention to ascertain what the . . . Act requires and to act in accordance with it.'" *Kinney*, 994 F.2d at 12, *citing, Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 464 (D.C. Cir. 1976). To meet this burden, "[a]n employer `must affirmatively establish that he acted in good faith by attempting to ascertain the Act's requirements.'" *Martin v. Cooper Electric Supply Co.*, 940 F.2d 896, 907 (3rd Cir. 1991),

citing, Williams v. Tri-County Growers, Inc., 747 F.2d 121, 129 (3rd Cir. 1984). The reasonableness requirement "imposes an objective standard by which to judge the employer's conduct [, and i]gnorance alone will not exonerate the employer under the objective reasonableness test . . . ." *Martin*, 940 F.2d at 907-908, *citing, Tri-County Growers,* 747 F.2d at 129. It is clear from the testimony of Mr. Mesewicz that the Agency did not conduct any inquiry into its compliance with the FLSA, even after the Union notified the Agency of its violations. The Agency cannot claim ignorance because Ms. Federoff, as early as 1994, notified HUD of its violations. Arb. 12.11.06, P.52. The Agency further failed to change the exemption status of any series 360, GS-11/12/13/14/15 employees, despite its own classification determinations. *See* UE 49-51.

In this case, the Arbitrator should find that: (1) the Agency failed to make <u>any</u> inquiries into its compliance with the FLSA; and (2) it took <u>no</u> affirmative steps to ascertain and correct its employees' exemption status in the face of court decisions and regulatory changes to the FLSA. Ultimately, the Arbitrator should conclude that the Agency did not act in good faith.

With respect to the first factual finding, the inquiries made by an employer concerning compliance with the FLSA are clearly relevant to determining whether the employer acted in good faith and reasonably. *see Martin,* 940 F.2d at 909. In *Renfro v. City of Emporia, Kansas*, 948 F.2d 1529, 1541 (10th Cir. 1991) (Renfro), the court concluded that the employer failed to meet its burden of good faith "because the only inquiry made by the employer was a phone call to an individual at DOL whose position was unknown." *Id.; See also Mireles v. Frio Foods, Inc.,* 899 F.2d 1407, 1415 (5th Cir. 1990) (discussions with those not involved with enforcing the FLSA fails to demonstrate

good faith). The Renfro court specifically stated it was significant that the employer never requested a written opinion from DOL. *Renfro,* 948 F.2d at 1541. Even where opinion letters are sought by an employer, reliance on those letters does not satisfy the good faith and reasonableness standard unless there is a "showing that the employer received advice on the specific compliance issue in question, not just that he sought advice about the statute." *Kinney*, 994 F.2d at 12. Thus, the failure to request any specific advice is evidence that the employer did not act in good faith. *Id.*

In this case, the only attempts made by the Agency to ascertain its employees' exemption status were undefined conversations with unknown employees at unknown agencies, Arb 9.6.06, P.177, and the Agency's own classification review conducted during the course of the instant proceedings. The Agency never requested a written opinion letter from DOL or OPM with regard to the proper exemption status of its series 360 employees.

With respect to the second finding above, at least one reviewing court has ruled that an employer's failure to take affirmative steps to ascertain its employees' exemption status, particularly where there have been changes in regulation or the employer has information calling into question its employees, status, demonstrates that the employer lacked good faith in complying with the responsibilities imposed by the FLSA. *See Bankston v. Illinois,* 60 F.3d 1249, 1255 (7th Cir. 1995). In this case, the Agency maintained the status quo despite the protests of the Union and regulations and court decisions that raised substantial doubt about the appropriate classification status of its employees. Any inquiries made by the Agency during the course of these proceedings was too little too late; the OPM regulations were revised almost twenty years ago.

Following industry practice does not support a conclusion that an employer acted appropriately in exempting its employees from the FLSA. Specifically, "[i]n lieu of any affirmative attempt by an employer to determine the legality of its wage payment practices, the employer's adherence to customary and widespread practices that violate the Act's over-time pay provisions is not evidence of an objectively reasonable good faith violation." *Martin,* 940 F.2d at 910; *see also Brock*, 833 F.2d at 19-20. In this case, the Agency failed to show how they took steps to be more certain of the exemption status of its employees. The lack of such an inquiry indicates a lack of good faith in complying with the responsibilities imposed by the FLSA. *See* 29 C.F.R. § 790.15; *Bratt v. County of Los Angeles,* 912 F.2d 1066, 1072 (9th Cir.1990), *cert. denied,* 498 U.S. 1086, 111 S.Ct. 962, 112 L.Ed.2d 1049 (1991) (noting that, in order to establish good faith, a defendant must "prove that it had an honest intention to ascertain what the [FLSA] requires and to act in accordance with it.") Moreover, the failure by the Agency to conduct an inquiry into the changes to the regulations exemplified the lack of good faith. The Agency never presented any evidence showing a good-faith, reasonable belief that the employees were not covered by the FLSA.

Mr. Norman Mesewicz has been the Deputy Director of the Labor Employees Relations Division (LERD) at HUD Headquarters for almost eight years. Arb 9.6.06, P.155, 160. The function and mission of the LERD is threefold: Labor Relations, Employee Relations and the Department's Drug Free Workplace Program. His duties include:

> …[T]o oversee, I supervise, I am the first line supervisor of the Chief of the Employee Relations Branch and the Chief of the Labor Relations Branch. And I also supervise the, I am the first line supervisor of the Division's secretary or Human Relations Assistant, I think is the term, precise term. I serve as the, the term in the PD is alternate ergo to the Division Director. And I, I tend to get

> involved with labor relations at the national level while the Labor Relations Branch chief handles the Headquarters operational Labor Relations.

Arb 9.6.06, P.155-158.

His supervisor is the Division Director, Ms. Carolyn Davis, and her supervisor is Mr. Emmett Aldrich. Arb 9.6.06, P. 158-159. Ms. Barbara Edwards, the Deputy Assistant Secretary for Human Resource Management, is the next in the chain of command. Arb 9.6.06, P.159.

While he never participated in regular meetings with the AFGE Council, he did work with individual members on various ad hoc issues, including participation in partnership meetings/LMR meetings every year. Arb 9.6.06, P.159-160.

He testified that he recalled objections from Ms. Carolyn Federoff concerning employees traveling outside their tour of duty during conversations in the mid 90's. During those same conversations, Ms. Federoff informed him that the Agency's FLSA exemptions violated the law, but he did not recall those conversations. Arb 9.6.06, P.162-163. He similarly did not recall the numerous conversations with Ms. Federoff concerning the arbitration awards and their FLRA affirmations regarding FLSA cases being litigated by AFGE against the Social Security Administration during that same time period, Arb 9.6.06, P.165-167, though he testified that he tried to keep current with FLSA updates in case law through the Agency's subscription to information data bases such as Cyber-Feds. Arb 9.6.06, P.163-164. The first time he ever read the SSA FLSA case decisions regarding overtime was in September or December 2005, Arb 9.6.06, P.173, more than two years after he remembered being told about the cases by Ms. Federoff and almost a decade after she actually did. *Id.*

The Agency had every opportunity to correct its FLSA violations but failed to take any action except to continue to hire and promote employees into improperly classified positions. From the mid 90's, when Ms. Federoff brought these issues to the attention of Mr. Mecewicz, until December 2005, when the Agency signed its first settlement agreement regarding GS-10 and below employees, it did nothing!

In response to the Union's initial requests for information, the Agency stated that it could not produce information on credit hours earned prior to 2004 because it was not available. Arb 9.6.06, P.174-176. But that data was available and eventually provided. The Agency failed to provide the information earlier to cover up its violations of the CBA, FLSA and other laws, rules and regulations. At some time, Mr. Mesewicz allegedly contacted other agencies, OPM, SSA, NIH, and the FDIC, to find out their FLSA exemption practices. Arb 9.6.06, P.177. He could not remember who he spoke to, so his credibility is very questionable. The Agency, however, still never took any action to conduct proper classifications.

Between the time the grievance was filed, June 2003, and the date the Union invoked arbitration, the Agency conducted a cursory review of almost 2,000 position descriptions to determine: (1) if any jobs were misclassified; and (2) if so, what the potential liability was. Arb 9.6.06, P.195-197. After the arbitration began, the Agency conducted another review of every position description for FLSA compliance. Arb 9.6.06, P.198. During the liability hearings, the Union and Agency submitted joint exhibits of position descriptions with the classifier's worksheets that were reviewed. Arb 9.6.06, P.202-205, 208-209. The PD's for GS-11, 12 and 13 employees were classified as non-exempt in December 2005. The Agency, however, has failed to change the exemption

status of any of the employees in those positions, despite the determinations of the experts, the classifiers. This is direct evidence of the Agency's failure to act in good faith to meet the requirements of the FLSA, CBA and other related laws, rules and regulations.

UE 62 is material to the question of whether the Agency acted in good faith. According to the document, the Agency was still relying on grade, in violation of the FLSA and related OPM regulations, to classify its employees as exempt. Arb. 12.11.06, P.29-35. Ms. Federoff specifically told Mr. Mesewicz to contact other agencies about the FLSA status of similarly situated employees, yet, the Agency failed to look into the possibility of its violating the Act. Arb. 12.11.06, P.52.

The Arbitrator must award liquidated damages unless the Agency overcomes its substantial burden of proof that it acted in good faith. *See Reich v. Southern New England Telecommunications Corp*., 121 F.3d 58 (2nd Cir. 1997); see also *Jarrett v. ERC Properties, Inc*., 211 F.3d 1078 (8th Cir. 2000). The Agency has not shown that it acted in good faith. Furthermore, even if the Arbitrator finds the Agency did act in good faith, an award of liquidated damages is allowed within the discretion of Arbitrator.

2. The Agency Willfully Violated The FLSA.

The Fair Labor Standards Act does not address the issue of Statute of limitations. However, the Portal to Portal Act, assigns a statute of limitations for violations of the FLSA:

> (a) if the cause of action accrues on or after May 14, 1947--may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of

action arising out of a willful violation may be commenced within three years after the cause of action accrued;

The term “willful” is discussed in the regulations for civil penalties for violations of the FLSA. Specifically, Section 9 of the Fair Labor Standards Amendments of 1989 served to amend section 16(e) of the Act by subjecting employers to civil money penalties for repeated or willful violations of Section 6 or Section 7 of the Act. The regulations define "willful" violations to include those situations "where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act." *See* 29 CFR 578.3(c)(1). The regulations further set out the parameters of willful behavior, stating "an employer's conduct shall be deemed knowing, among other situations, if the employer received advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful." 29 CFR 578.3(c)(2).

The employee bears the burden of proving the willfulness of the employer's FLSA violations. *See, e.g., Bankston,* 60 F.3d at 1253 ("[T]he plaintiffs bore the burden of showing that the defendants' conduct was willful for purposes of the statute of limitations.") If a particular employer's conduct embodies willful violation of the FLSA, then the statute of limitations is extended from the standard two-year to a three-year statute period. *McLaughlin v. Richland Shoe Co.,* 486 U.S. 128, 135, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988); *see also* 29 U.S.C. § 255(a) (1999). The determination of willfulness is a mixed question of law and fact. S*ee Reich v. Monfort,* 144 F.3d 1329, 1334 (10th Cir.1998)

The definition of willful comes directly from the Supreme Court, via *McLaughlin v. Richland Shoe Co.*, *See* 57 Fed. Reg. 49128 (1992), and provides that willfulness is that

the "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. at 135.

A number of cases have found willfulness, and thus, applied a three year statute of limitations where knowing violations or reckless disregard for the law were shown. These include:

- *Reich v. Waldbaum Inc.*, 52 F.3d 35, 39- 41 (2nd Cir. 1995) (Employer's belief that its hourly employees were bona fide executives exempt from overtime and record keeping requirements of the FLSA amounted to reckless disregard of the law);
- *Martin v. Albrecht*, 802 F.Supp. 1311, 1314-1315 (W.D.Pa. 1992) (Case involving misclassification of homeworkers as independent contractors, which held employer who "was in a position to know" about another employer's previous violations of the Act to a three year statute of limitations);
- *Martin v. Selker Brothers*, 949 F.2d 1286, 1296 (3rd Cir. 1991) (Holding employer who misclassified gas station operators as independent contractors to a three year statute since the record showed the employer knew this could result in violations of the Act.); and
- *Brock v. Superior Care*, 840 F.2d at 1062 (2nd Cir. 1988) (Temporary employment agency case, holding employers showed "reckless disregard" where a compliance officer had specifically advised them in a previous investigation that the temporary workers were employees).

Case law further explains that the three-year statute of limitations can apply where an employer disregarded the very possibility that it was violating the statute. *Herman v. RSR Sec. Servs. Ltd*., 172 F.3d 132, 141 (2nd Cir. 1999). In 2005, the United States

Supreme Court heard *IBP, Inc. v. Alvarez*, a case that addressed donning and doffing of equipment. The Court accepted the Ninth Circuit's reasoning with regard to willfulness:

> For § 255's extension to obtain, an employer need not knowingly have violated the FLSA; rather, the three-year term can apply where an employer disregarded the very 'possibility' that it was violating the statute, although we will not presume that conduct was willful in the absence of evidence. *Cox v. Brookshire Grocery Co.,* 919 F.2d 354, 356 (5th Cir.1990). We agree with the district court and conclude that "the proof demonstrate[s] [that IBP] recklessly disregarded *the possibility* that [it] was violating the FLSA. An examination of the record verifies the propriety of the district court's conclusion. IBP was on notice of its FLSA requirements, yet took no affirmative action to assure compliance with them. To the contrary, IBP's actions may more properly be characterized as attempts to evade compliance, or to minimize the actions necessary to achieve compliance. IBP "could easily have inquired into" the meaning of the relevant FLSA terms and the type of steps necessary to comply therewith. It failed to do so. The district court appropriately applied § 255's three-year statute of limitations to IBP's willful conduct.

Alvarez v. IBP, Inc., 339 F.3d 894 (9th Cir. 2003), *citing Herman*, 172 F.3d at 141-142.

It is clear, therefore, from the cases, that in order to avoid a finding of willfulness, the employer must take "efforts to keep abreast of FLSA requirements…." *Mireles,* 899 F.2d at 1416 (employer discussed regulations with Texas Employment Commission and received pertinent brochures and pamphlets). *See also United States Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Office of Marine & Aviation Operations, Marine Operations Ctr., Norfolk, Va.,* 57 FLRA 559, 564 (2001), *recons. denied,* 57 FLRA 723 (2002) (employer directed experienced labor counsel to research issue and provide written report). In this case, the Agency failed to provide any evidence to rebut the Union's position that the Agency acted recklessly and willfully violated the FLSA.

The Agency had knowledge of its failure to comply with the FLSA regarding exemption status of its employees. Ms. Federoff testified that she repeatedly notified the

Agency of its non-compliance with the FLSA, as early as 1994 and as late as 2003. Arb 9.6.06, P.162-163; Arb. 12.11.06, P.52. Ms. Federoff specifically told the Agency about developments in the rules and regulations, as well as arbitration and FLRA decisions between SSA and AFGE over similar issues. Arb. 9.6.06, P.162-167. Furthermore, in 2005, even after the Agency concluded that the positions were non-exempt, s*ee* UE 49-51, when it conducted its own review of the series 360 GS-11/12 and 13, it failed to change the exemption status of any employee. Arb 9.6.06, P.195-197, 202-205, 208-209. The Agency's actions from 1994 until the present exemplify its willful failure to comply with the FLSA. This is direct evidence of the Agency's willful violations of the FLSA.

D. <u>The Union Requests That The Arbitrator Issue An Interim Decision And Allow The Parties To Pursue Settlement Of The Amount Of Damages.</u>

Because these damages are difficult to determine, the Union requests that the Arbitrator issue an Interim Decision on damages and remand the matter to the parties for discussion and possible resolution on the amount of damages of each claim. Interim decisions are not final and may not be appealed to the FLRA, barring "extraordinary circumstances," and are used in cases in which liability and damages are not easily determined in the same hearing. *See U.S. Dep't of the Treasury, Bureau of Engraving and Printing, Western Currency Facility, Fort Worth, TX and Graphic Communications International Union, Local 48*, 58 FLRA No. 176 (July 31, 2003); *AFGE, National Council of EEOC Locals No. 216 and EEOC*, 47 FLRA No. 525 (April 30, 1993); *U.S. Dep't of Health and Human Services, Center for Medicare and Medicaid Services and AFGE, Local 1923*, 57 FLRA No. 194 (July 9, 2002).

CONCLUSION

For the foregoing reasons, the Arbitrator should grant judgment in favor of the Union. The Union requests that an Interim finding be made that the Grievants are due "capped" overtime damages, "comp time" damages and suffered or permit damages for a three-year period plus liquidated damages, along with a remand of this matter to the parties for discussion and possible resolution on the amount of damages of each claim, with retention of jurisdiction.

Respectfully Submitted,

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Certificate of Service

I certify that a copy of the foregoing was provided to the Arbitrator and appropriate Agency representative by email and by placing a copy in the U.S. mail with the first class postage attached and properly addressed as of the date indicated below.

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