IN THE MATTER OF ARBITRATION BETWEEN:

AFGE, COUNCIL 222, AFL-CIO, NFFE, LOCAL 1450,	)	
Union,	)	FLSA Overtime/Comp time
and	)	Arbitrator Sean Rogers
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,	)	
Agency.	)	

UNION'S REPLY BRIEF

The Union, AFGE Local 222, by and through its undersigned attorneys, hereby submits its reply brief and states in support thereof:

During the course of this case the Union has claimed that the Agency violated the FLSA, as codified at 29 U.S.C.A. §§ 207(a)(1) and 215(a)(2), as well as the CBA and other government wide laws, rules and regulations.

1. The overtime claims for Grievants are for work performed over more than 80 hours per pay period.

The Union concedes that Grievants are not entitled to any suffer or permitted overtime compensation for hours worked in excess of eight per workday. However, the Union notes that those Grievants are entitled to overtime compensation for all hours in excess of 40 per week or 80 per pay period. Therefore, if a full time employee worked 9 hours on the first day of the workweek and then worked his/her regular 8 hour tour of duty throughout the rest

of the pay period, that employee is still entitled to 1 hour of overtime compensation for working more than 80 hours in a pay period.

Pursuant to 29 CFR 785.18, rest periods of short duration, running from 5 minutes to about 20 minutes, are common in business as they promote the efficiency of the employee and are customarily paid for as working time. Those rest periods that are compensated **must be counted as hours worked.** Compensable time of rest periods **may not be offset against other working time such as** compensable waiting time or on-call time. *See Mitchell v. Greinetz*, 235 F. 2d 621 (C.A. 10, 1956); *See also Ballard v. Consolidated Steel Corp., Ltd.*, 61 F. Supp. 996 (S.D. Cal. 1945).

All of the overtime claims made by the Union are for work. The Agency misconstrues the testimonial evidence of the Grievants when it states that they included time spent on personal matters in their claims. *See* Agency's brief 110-114. Each Grievant specifically stated that claims only included time spent on HUD related work. The Agency confuses the purpose of the testimony that employees were at work early or in the office late and did some personal matters. This evidence does not prove overtime claims, but corroborates habit evidence about the typical arrival and departure times of the employees. The Agency highlights testimony in which Grievants admit that some of the time spent in the office before or after hours was spent on personal matters, but ignores the fact that the Grievants discounted those periods of time when making claims of overtime. Only time spent working on HUD related matters was included in those claims.

2. The Agency cannot hold the Union witnesses to a credit hour policy that is not known or understood by any of the employees, including supervisors.

The Agency contends that employees are required to follow the overtime policies promulgated by the Agency requiring the use of HUD forms to notify the Agency of over-tour work. But the Agency's policies are based upon the FEPA, not the FLSA. They apply to exempt employees who do not have a right to overtime pay with an election of comp time, and who are not entitled to compensation for Suffered and Permitted overtime. If the grievants were properly exempted, their actions would have been in compliance with these policies, and they would not have a claim for suffered and permitted overtime as FLSA Exempt employees. But the grievants were not properly exempted. They were working under policies that only allowed for ordered and approved overtime, even though they are entitled to compensation for suffered and permitted overtime under the FLSA.

The Union contends that in fact, the Agency officially orders overtime hours in advance merely by assigning work that cannot be performed in 40 hours per week or 80 hours per pay period. The employees at HUD were induced, encouraged, and expected to work overtime in meeting the demands of their jobs. See *Anderson v. United States,* 136 Ct.Cl. 365 (1956); *see also, Byrnes v. United States,* 163 Ct.Cl. 167, 330 F.2d 986 (1963); *Adams v. United States,* 162 Ct.Cl. 766, 1963 WL 8610 (1963).

The United States Code provides that: "**If requested by an employee**, the head of an agency may grant an employee compensatory time off for overtime

hours, in lieu of payment." (Emphasis Added) *See* 5 U.S.C. § 6123(a)(1). If employees were not entitled to payment, there would be no need to allow them to elect compensatory time in lieu of payment. Furthermore, there are conditions in federal agencies where exempt employees are expected to work uncompensated overtime. In those cases, however, there is another statute and/or regulation that covered those exempt employees; overtime under FEPA was not the exclusive remedy. *See Aletta*, 70 Fed.Cl. at 608. The employees in this matter have only one remedy - overtime compensation under the FLSA or FEPA, whichever is greater.

Most Union witnesses testified that they did not have informal arrangements with their supervisors to take compensatory or credit hours equal to extra time worked. They were not fully compensated for all overtime hours worked. Furthermore, the Agency regularly violated its own policy under the CBA regarding the use of compensatory or credit hours prior to any annual leave and should therefore be precluded from now relying on those provisions of the CBA. *See* Union's Closing Brief page 71

3. The testimony and documentary evidence supports the Union's position that Grievants performed suffered or permitted overtime without proper compensation.

Each employee must prove that "he has in fact performed work for which he was improperly compensated" and "produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688 (1946); D*ept. of Labor v. Cole Enterprises, Inc*, 62 F.3d 775,779 (6th Cir. 1995). The fact that a

claimant is unable to prove the precise extent of the uncompensated work ***does not*** preclude recovery. D*ept. of Labor v. Cole Enterprises, Inc*, 62 F.3d 775,779 (6th Cir. 1995); *Fegley v. Higgins*, 19 F.3d 1126 (6th Cir. 1994); *Herman v. Palo Group Foster Home, Inc*. 976 F.Supp. 696, 701 (WD MI 1997); *Reich v. Waldbaum, Inc*., 833 F.Supp. 1037 (S.D.N.Y. 1993); *Herman v. Hector I. Nieves Transp. Inc.*, 91 F.Supp.3d 435 (D. Puerto Rico 2000). Claimants are not required to produce actual records or logs, but may establish the amount of overtime worked through their own testimony. *Bueno v. Mattner*, 829 F.2d 1380 (6th Cir. 1987). Testimony of a relevant sampling of employees may be sufficient to prove the claims of all similarly situated employees. *Herman*, 91 F.Supp.3d 435. The use of representational examples (rather than every overtime employee) is permissible. *Reich v. Southern New England Telecommunications Corp*., 121 F.3d 58 (2nd Cir. 1997).

Where claimants establish that they performed overtime work for which they were not compensated and the amount and extent of that work as a matter of just and reasonable inference, the burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the claimants' evidence. If the defendant fails to produce such evidence, the court may then award damages to the claimants, even if the amount is only approximate. *Mt. Clemens Pottery*, 328 U.S. at 687-688; *Metzler v. IBP, Inc.*, 127 F.3d 959, 965-66 (10th Cir. 1997); *Bueno*, 829F.2d at 1387. Under Mt. Clemens Pottery, an employer cannot complain about the employee’s calculation method unless it

introduces specific evidence to the contrary of the hours actually worked or evidence that undermines the reasonableness of the estimate. *Waldbaum*, 833 F.Supp. at 1045.

The burden of proof is on the Union to show that Grievants were suffered or permitted to perform overtime and received only partial compensation for other work. The Union has met that burden. The Agency frequently questioned the materiality of Union documentary evidence with regard to that burden of proof. But the materiality of those documents is only relevant to the amount of overtour work performed. The burden of proof with regard to that element is on the Union to show the amount of overtour worked by a just and reasonable inference. With that understanding, the Union contends that the documentary evidence is very material to the extent it corroborated testimonial evidence regarding the amount of overtour hours. In other words, the documents are only material after the Grievants testify about their work habits. The Union's claims are not based solely on testimonial evidence, or solely on the documents, but rather the just and reasonable inference of the amount of work performed based on the combination of both types of evidence.

The crux of the Union's position is that the Agency records, primarily time and attendance sheets are not reliable and accurate. However, there are various other records including screen shots, e-mails, affidavits and sign in and out sheets at the guard stations that are accurate and reliable. When these records corroborate the testimony of witnesses - that frequently between 2001 and 2005 investigators and other employees performed overtime work due to the volume of

cases and limited number of staff - then there is a just and reasonable inference of the amount of overtour work performed.

The Agency did nothing to rebut the Union testimony except call the Grievants biased[1] and cite limited instances of personal activities performed while at the office (without any contemporaneous records of one incident). The Agency's argument did nothing to dispute the fact that overtour work was performed, but rather argued that the magnitude of the damage was not as high as claimed. The Agency's argument concedes that employees did work overtour hours.

Once the Union established that employees performed suffered or permitted overtime and proved the amount of that work by a just and reasonable inference, the burden shifts to the employer to show the actual number of hours worked, or rebut the amount shown by the Union. The Agency failed to meet this burden. Due to the lack of reliable records, the Agency did not present any evidence of actual number of overtour hours worked. The Agency employed tactics to purposefully conceal the true number of hours worked, i.e. only recorded eight hours per day on time sheets, and avoided knowledge of overtour hours.

The crux of the Agency's argument was that the time and attendance sheets signed by the Grievants were certifications that all time worked was recorded and compensated. But the certification did nothing to put the Grievants on notice that suffer or permit overtime claims were expected to be included on

[1] The Agency's own witnesses testified that Grievants were credible, good workers and did the work if they said they did it.

these time sheets. In fact, to date, the Grievants are still classified as exempt, and therefore not entitled to overtime under the FLSA. The Agency's certification sheets would be meaningless for exempt employees, unless the work was ordered and approved. The Union submitted a certification form a different Agency that specifically precludes suffer or permit overtime not recorded on the time sheets as demonstrative evidence of and Agency precluding suffered and permitted overtime from their time sheets. The Agency's certification was very different. The Agency's timekeepers were instructed of the policy to record eight hours per day. The supervisors admitted that they worked overtour hours when they were Grievants and did not record those hours on the time sheets, yet signed them as accurate.

The Agency was very quick to highlight the bias of Union witnesses, while stating that the Agency witnesses were not similarly prejudiced. That is simply not the case with regard to numerous Agency witnesses that testified. Many of the Agency's witnesses were not the first line supervisors of the Grievants that testified, nor did they observe the day to day duties of the employee to credibly testify about their overtour work habits. This limits the materiality of their testimony. Some of the supervisors who testified were recently promoted to supervisory positions. Before their promotion, they were members of the bargaining unit who were covered by the Grievance. They admitted to working suffered or permitted overtime themselves while in the bargaining unit. Now that they are supervisors, they may wish to continue to rise through HUD's ranks. This in itself may prejudice the Agency witnesses.

Any informal arrangements between supervisor and employees cannot be considered the equivalent of an election of compensatory time. The employees were not being given the option between overtime premium compensation and compensatory hours. The employees were repeatedly told that there was no money for overtime compensation. At the same time, these employees were urged to do what it takes to get the job done. There was no option; it was take it or leave it.

4. The Agency did have actual and/or constructive knowledge of overtime work being performed.

The overtime claims in this matter were for work which the Agency suffered or permitted work. The Agency supervisors knew or had reason to know that the work was being performed and not properly compensated. There was testimony about the staffing problems, volume of work and performance standards or goals that the Agency maintained. The mere fact that not all cases are assigned does not rebut the Union's position that too many cases are being assigned per FTE to complete the work necessary to conduct an investigation in 80 hours per pay period. The REAP/TEAM data supported the Union's contention that HUD was maintaining efficiency despite being understaffed and overworked and it knew it. Employees were expected to do more work than could be completed in 80 hours per pay period, as testified to by the investigators and employees that were actually working in the positions during the time period. Surely an investigator that worked in the office in 1970 or 1980 or even 1995 would not know whether the work being assigned in 2002-2004 could be performed in 80 hours per pay period. The cases filed then during those time

periods and the policies and regulations in place for completing case reviews paled in comparison to the expectations of employees today. Even the number of bases for investigation has increased.

Some supervisors that testified were members of the Bargaining Unit at some time covered by the grievance, and thus are themselves grievants. Those employees testified that they worked overtour hours and their supervisors knew or should have known about the work. Those same employees were ultimately promoted to management positions. Those employees worked overtour hours themselves, and their supervisors had actual or constructive knowledge of that work. It is inconceivable that these new supervisors should not know that the employees now under their supervision are doing exactly what these supervisors themselves used to do when they were in the bargaining unit. The employees at HUD are all aware of the staffing issues, the regulated statutory time periods for closing cases and the increases in complaints that resulted in more work for all employees between 2000 and 2006. Furthermore, is it just coincidence that HUD promoted employees that claimed to have worked overtour hours? The more reasonable conclusion is that HUD supervisors are very aware of the overall work efficiency of employees and know which employees are putting in the extra time. The Grievants in this matter were regularly taught that working overtour hours was the way for career mobility.

Some of the supervisors that testified admitted that employees only requested a portion of the overtour hours in the form of credit hours or

compensatory time. This fact, in itself, confirms that those supervisors knew employees performed more overtour work that was uncompensated.

A majority of the overtour compensation was completed between 2001 and 2005. Despite that fact, the Agency presented witness testimony from many supervisors who were only promoted after 2005, and could therefore only testify about supervisory lack of knowledge in 2005 and 2006. Any testimony regarding that time period is not representational of the policies in place between 2001 and 2005, before the Agency started making changes pursuant to the instant grievance and ultimately hired outside counsel to resolve previous violations. Specifically, the Union disputes that the Agency gave Grievants any instruction regarding suffer or permit overtime and advance supervisory approval prior to early 2006. Any such instruction did nothing to rebut the Agency liability for work performed, but is merely an attempt to limit on-going liability[2]. The Agency had actual or constructive knowledge of the overtour work performed between 2001 and 2005.

The Agency cannot avoid liability for work performed for its benefit by turning a blind eye to the reality that that work was performed. The Agency had every tool at its disposal to oversee the work performed by the Grievants – i.e. checking the time sheets, the guard station sign in and out sheets, checking access times on system files, and observing employees in their offices.

Every action taken by the Agency between 2001 and 2005 was undertaken to avoid liability for overtime pay under the FLSA and the CBA. The

[2] The Union contends that even with such an instruction, the Agency does not escape liability if it fails to prevent overtour work from being performed.

Agency maintained employees as exempt, despite OPM regulations and the Union's protestations. The Agency intermittently promoted and enforced Title V overtime policies, while only providing credit hours or compensatory time as compensation. The Agency repeatedly told employees that there was not any money for overtime, but that they should do whatever it takes to get the job done. The Agency promoted employees that worked overtour hours without seeking compensation if their supervisor had actual or constructive knowledge of the work. Supervisors frequently worked flexible tour schedules and left before subordinate employees.

5. Grievants are entitled to compensation for all overtime performed from three[3] years prior to the date the grievance was filed until the date of the Arbitrator's opinion.

A separate FLSA violation accrues for each pay period that an employee was wrongfully paid (exempted). *Henchy v. City of Abscon*, 148 F.Supp.2d 435 (D.N.J 2001). The government has argued that the limitations found in the contract should limit the back pay period. At least one court has decided that the back pay period of the FLSA takes precedence over contract language concerning the filing of a grievance. Louis *v. Geneva Enterprises, Inc.*, 128 F.Supp.2d 912 (N.D.CA. 2000). The limitations period in an FLSA action is contained in 29 U.S.C. §255(a). An FLSA claim must be filed within **two years** of the accrual of the claim, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

[3] The Union understands that there is a mandatory two year statutory period, but uses three years because it believes it proved that the Agency acted willfully.

The employee bears the burden of proving that a violation was willful to benefit from the three-year recovery period. Jarrett v. ERC Properties, Inc., 211 F.3d 1078 (8th Cir. 2000). Proof of willfulness requires a showing that the employer either knew, or showed reckless disregard for whether, its conduct was prohibited under the FLSA. Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962 (6th Cir. 1991).

The Agency's argument that Grievants are only entitled to compensation for overtime performed 45 days prior to the date the grievance was filed must fail. *See* Agency's brief at 136-141. The Union will address each of the Agency's points in order.

First, the contract between the parties codifies the statutory regulation for employees to notify the Agency of violations within 45 days of the date the employee knew or should have known about the matter being grieved. The codification does not, as the Agency argues, define any statutory limitation on damages. The time period is a deadline that must be met in order for any damages to be recovered. The Agency's argument is flawed by the plain language of the contract: "within 45 days of the date when the party became aware *or should have become aware* of the matter being grieved…." The contract specifically provides for a situation where the Grievant is injured but does not file until day 100 because he should not have become aware of the matter until day 55. That grievant would still be entitled to recover damages for the injury suffered on day 0, more than 45 days prior to the date of filing. Therefore, the recovery period for damages is not dependant on the 45 day filing

deadline, except to the extent that the complaint must be filed within that time period.

Second, the statutory damage period is not dependant on the date of the arbitrator's decision, except to define the outer bounds of the damage period. The relevant time period for determining the statutory damage period under the Portal to Portal Act, as well as the Back Pay Act, is two or three years prior to the date of filing the grievance, Dec. 2003 and Oct. 2005, respectively. Under the Agency's reading of the Portal to Portal Act and the cases, the grievants would be bound by the efficiency of an arbitrator to timely determine liability and damages in such FLSA cases. The Agency would avoid all liability by preventing any further overtime claims after the date the grievance was filed and ensuring that the arbitrator's decision was issued more than three years after the filing date. That would not fulfil the intent of the Acts - to make employees whole for violations of the law and other rules and regulations.

The cases cited by the Agency deal with administrative complaints, such as those filed under Title VII, not negotiated grievance procedures in the CBA. Furthermore, the cases address jurisdictional issues (when civil cases can be filed after administrative determinations), not the statutory damage period based on actual filing date. In *Unexcelled Chem. Corp.*, the respondent, the U.S., attempted to argue that its civil case, filed more than two years after the initial injury, was timely filed because the statute of limitations should be tolled until after the administrative determination by the Department of Labor that liquidated damages was owed. *Unexcelled Chem. Corp.*, 345 U.S. 59, 65-66 (1953). The

Court disagreed and ultimately concluded that the date of the injury was when the minors were employed; the two year statute of limitation began running at that time. *Id.* But the facts of this matter more closely resemble the Courts' conclusions. The instant grievance was filed within three years of the date of the injury. Furthermore, the grievance was filed under the negotiated provisions of the contract, not an administrative enforcement statute requiring investigation by a federal agency. In other words, the instant matter is covered by Section 7, not section 6 of the Portal to Portal Act. *Id.*

Furthermore, the other cases cited by the Agency, like *Abbott* and *Aguilar*, similarly do nothing to support its claim that the damage period in this matter is limited to the 45 days prior to the filing of the grievance. The Portal to Portal Act and the Back Pay Act provide for make whole relief and explicitly allow for three years of damage prior to the filing of the action. In *Abbott*, the plaintiffs first filed their civil suit more than six years after the injury and three years after a settlement agreement between the Union and the U.S. The court dismissed the suit because the two year statute of limitations had past and there was no tolling based on the pending administrative proceedings. But those are not that facts in this matter. The instant grievance was filed within three years of any claimed damages. There has not been any settlement agreement regarding damages or the back pay period. Furthermore, there is no jurisdictional issue as to whether the instant matter was filed timely. The issue in *Abbott* was whether administrative proceedings tolled the statute of limitation to file. The Grievants in this matter do not require any tolling because the grievance was filed timely,

within three years of any claimed injury. The issue in this matter is whether Grievants are entitled to damages for overtime performed three years prior to the date the grievance was filed. They are under both the Portal to Portal Act and the Back Pay Act.

6. Grievants are entitled to make-whole relief including all damages allowed under law.

Upon proof of a violation of §207(a)(1), an Agency is liable for the amount of unpaid overtime compensation. 29 U.S.C. §216(b). If any Title 5 overtime was paid for the overtime work, then the employee is entitled to the difference between the Title 5 overtime and the FLSA overtime. Sums paid for occasional periods when no work is performed due to vacation, holiday, illness, payments for traveling and other reimbursable expenses, and other payments to an employee which are not made as compensation for hours of employment are not included in determining an employee's "regular rate" under §207(a)(1). 29 U.S.C. §207(e)(2).

For purposes of the FLSA, the regular rate of pay, by its very nature, must reflect all payments which the parties have agreed shall be received regularly during the work week, exclusive of overtime payments. It is not an arbitrary label chosen by the parties, but is instead an actual fact. *Herman v. Anderson Floor Co., Inc.*, 11 F.Supp.2d 1038, 1041 (E.D. WI. 1998). Where an approximate award based on reasonable inferences forms a satisfactory surrogate for unquantified and unrecorded actual work time, an approximated award is permissible under the FLSA. *Alvarez v. IBP, Ins.* 339 F.3d 894 (9th Cir. 2003).

A. Grievants are entitled to liquidated damages even if the Agency proved it acted in good faith.

In addition to recovering the wrongfully withheld FLSA overtime, an award of liquidated damages in an amount equal to the unpaid back wages is mandated in the case of a violation of the statute. Thus the FLSA provides for a doubling of any overtime award. This doubling of the wrongfully withheld overtime is called **liquidated damages**.

29 U.S.C. §216 provides:

> (b) Any employer who violates the provisions of section 206 or section 207 of this title [hours of work over 40 per week] 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 an additional equal amount as liquidated damages**.

(Emphasis added.)

The trier of fact must award liquidated damages unless the Agency meets its substantial burden of proof to avoid liquidated damages. *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). Thus, the trier of fact's decision whether to award liquidated damages does not become discretionary until the employer carries its burden of proving good faith. In other words, liquidated damages are mandatory absent a showing of good faith. *Greene v. Safeway Bernard v. IBI Inc. of Nebraska*, 154 F.3d 259 (5th Cir. 1998); *EEOC v. First Citizens Bank of Billings*, 758 F.2d 397, 403 (9th Cir.), cert. denied, 474 U.S. 907, 106 S.Ct. 228, 88 L.Ed.2d 228 (1985).Stores, 210 F.3d 1237 (10th Cir. 2000); *Nero v Industrial Molding Corp*., 167 F.3d 921 (5th Cir. 1999). Before

a trier of fact may exercise its discretion to award less than the full amount of liquidated damages, it must explicitly find that the employer acted in good faith. *Williams v. Tri-County Growers, Inc*., 747 F.2d 121, 129 (3rd Cir. 1984); *Joiner v. City of Macon*, 814 F.2d 1537, 1539 (11th Cir. 1987); see also, *L-246 Utility Workers v. Southern Cal. Edison Co*., 83 F.3d 292 (9th Cir. 1996).

The employer bears the burden of showing good faith and there is strong presumption in favor of doubling the award. *Herman v. RSR Sec. Services Ltd*., 172 F.3d 132 (2nd Cir. 1999); *Shea v. Galaxie Lumber & Construction Co. Ltd*, 152 F.3d 729 (7th Cir. 1998); *Herman v. Hector I. Nieves Transp. Inc*., 91 F.Supp.3d 435 (D. Puerto Rico 2000). Liquidated damages are not meant to be punitive; rather, they are compensatory in nature to provide adequate compensation to employees whose proper wages were illegally withheld. *Herman v. RSR Sec. Services Ltd*., 172 F.3d 132 (2nd Cir. 1999). Congress provided for liquidated damages to compensate employees for losses they might suffer by reason of not receiving their lawful wage at the time it was due. R*eich v. Southern New England Telecommunications Corp*., 121 F.3d 58 (2nd Cir. 1997); M*arshall v. Brunner*, 668 F.2d 748, 753 (3rd Cir. 1982); *Martin v. Cooper Electric Supply Co*., 940 F.2d 893, 907 (3rd Cir. 1991). See also *Cox v. Brookshire Grocery Co*., 919 F.2d 354, 357 (5th Cir. 1990); *Lindsey v. American Cast Iron Pipe Co.,* 810 F.2d 1094 (11th Cir. 1987).

The FLRA has affirmed that arbitrators have the authority to award liquidated damages against the federal government in FLSA situations. *U.S. Department of Health and Human Services, Social Security Administration,*

Baltimore, Maryland and American Federation of Government Employees, 49 FLRA No. 40, 49 FLRA 483, 489-90 (March 10, 1994), *citing*, *U.S. Department of the Treasury, Internal Revenue Service, 12 Washington, D.C. and National Treasury Employees Union*, 46 FLRA No. 97, 46 FLRA 1063, 1073 (1992) (finding a waiver of sovereign immunity under the Back Pay Act (5 U.S.C. §5596)).

Liquidated damages are the norm, not the exception. The plain language of the Portal to Portal Act supports a finding of liquidated damages:

> 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. Sec. 260. In other words, the Arbitrator can still award liquidated damages even if the Agency meets its burden of showing it acted in good faith.

B. <u>Grievants are entitled to interest or liquidated damages, whichever is greater.</u>

If the Arbitrator decides not to award liquidated damages, or if interest exceeds the amount of liquidated damages, then he should grant the Grievants double damages in the form of interest, pursuant to the Back Pay Act. Although interest is usually not recoverable against the United States, there is an explicit waiver of sovereign immunity for backpay interest under the Backpay Act. *See* 5 U.S.C. §5596(b)(2)(A). Federal employees cannot be actually awarded and paid both liquidated damages and interest on the back-pay award, as this would amount to double payment. *Parker v. Burnley*, 703 F.Supp. 925, 927 (N.D. Ga.

1988); see also, *Braswell v. City of el Dorado, Ark*., 187 F.3d 954 (8th Cir. 1999). The Union, however, requests that the Arbitrator award both, liquidated damages and interest and requests the arbitrator to require the Agency to calculate the backpay due employees under both systems and actually pay the higher (liquidated damages (usually) or interest).

The FLRA has found that payment for wrongfully withheld FLSA overtime is made pursuant to the Back Pay Act. The Back Pay Act requires backpay for the amount of pay or differentials lost by an employee due to an Agency's unwarranted or unjustified personnel action. 5 U.S.C. §5596(b)(1)(A). The failure of an Agency to pay employees monies to which they are entitled constitutes an unwarranted personnel action within the meaning of the Back Pay Act. See *Federal Employee Metal Trades Council and U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 39 FLRA 3, 7 (1991). An arbitrator can properly award backpay to remedy an unjustified or unwarranted personnel action that resulted in the loss of a differential, such as overtime pay, that employees otherwise would have received. See generally U.S. Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina and Federal Employees Metal Trades Council, 39 FLRA 987, 993 (1991). Backpay is specifically authorized for violations of the overtime provisions of the FLSA. See, International Association of Firefighters, Local 13, and Panama Canal Commission, General Services Bureau, Balboa, Republic of Panama, 43 FLRA 1012, 1026 (1992). See also, 29 U.S.C. §216(b).

Arbitrators have found that grievants have been affected by the Agency's unjustified personnel action that improperly classified them as exempt from coverage under the FLSA. In those cases, the grievants were entitled to backpay for the amount of overtime pay that they would have received but for the Agency's illegal designation that they were exempt from coverage under the FLSA. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, 44 FLRA No. 66, 44 FLRA 773, 798 (April 14, 1992) (emphasis added).

CONCLUSION

The Union requests that Arbitrator find in its favor and conclude that the Grievants did perform suffered and permitted overtime work with receiving proper compensation.

Respectfully Submitted,

__/s/_____
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was provided to the Arbitrator and the appropriate Agency representative by fax, e-mail, hand-delivery or by placing it in the U.S. mail with the first class postage attached and properly addressed as of the date and method indicated below.

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March 28, 2007
Date

/s/
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