BEFORE
SEAN J. ROGERS
ARBITRATOR:

In the Matter of Arbitration Between: **AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 222, AFL-CIO,** ***Union,*** **and** **U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,** ***Agency*.**	Issues: FLSA Overtime FLSA Half-time Alternative Work Schedules

AGENCY'S MOTION IN LIMINE REGARDING DAMAGES

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INTRODUCTION & MOTION

The United States Department of Housing and Urban Development ("HUD", "Department" or "Agency"), through its counsel, Epstein Becker & Green, P.C., respectfully submits this motion in limine regarding damages to avoid potential double recovery of wages and overtime by Union employees. This motion has two separate parts.

First, the Agency asks the arbitrator to limit the overtime entitlement of salaried employees in accordance with the fluctuating workweek method set forth in 29 C.F.R. §778.114. As discussed below, the United States Court of Appeals for the Federal Circuit has recognized the fluctuating workweek method, also called the "half-time" method, as the appropriate remedy when an employee has been denied overtime because he was wrongly treated as exempt. Indeed, any other form of remedy would result in a double-recovery by the affected employees.[1]

The second part of this motion relates to certain types of allowances that HUD allows its employees pursuant to law, regulation and/or the collective bargaining agreement. These include credit hours, compensatory time-off, and compressed work schedules, among others. Through this motion, the Agency asks that employees that already received one or more of these allowances to cover specific hours worked be precluded from receiving a windfall in the form of an additional damages award for the same hours.[2]

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[1] For the arbitrator's convenience, this part of the motion is further divided into several sections. Section I provides background information regarding the half-time method, including its legal basis--both in general and as applied to federal employees--and how it works. Section II demonstrates that half-time is the appropriate remedy in so-called "failed exemption" cases, i.e., where an employee who should have been classified as non-exempt was treated as exempt and paid a salary. Finally, by way of additional "background" and to clarify that half-time is the accepted, mainstream way to calculate the overtime pay of salaried employees, Section III of the first part of this brief demonstrates that the half-time method has been approved by every circuit court of appeals and by every state that has addressed the issue (with the exception of California and Alaska, whose unique state wage orders effectively preclude the application of the half-time method).

[2] Obviously, a hearing will be required to determine whether employees were suffered or permitted to work unpaid hours, and, if so, how many hours each employee worked and was not compensated for. The purpose of this part of the motion is merely to limit extraneous evidence that would waste the arbitrator's and the parties' time, increase attorneys fees unreasonably, and potentially result in a double-recovery by those employees whose work hours were already compensated.

STANDARD OF REVIEW

Although this matter is being decided in arbitration, each of the parties is entitled to the full substantive protections of applicable laws. The Federal Labor Relations Authority ("FLRA") has explained:

> The Supreme Court has held in the context of private sector arbitration "that 'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (*Gilmer*) (*quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (*Mitsubishi*)). Additionally, the Court found that as "'long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.'" *Id.* at 28 (quoting *Mitsubishi*, 473 U.S. at 637) (discussing the Age Discrimination in Employment Act). Consistent with *Gilmer*, the court in *Carter v. Gibbs* [909 F.2d 1452 (Fed. Cir. 1990)] also ruled that a party does not forgo the substantive rights afforded by a statute by agreeing to arbitrate a claim brought under the FLSA.

National Treas. Employers Union and F.D.I.C., 53 F.L.R.A. 1469 (Feb. 27, 1998). Accordingly, since the law provides for a salaried employee's damages in "failed exemption" cases to be limited to "half-time," as demonstrated below, the arbitrator also should limit any remedy to half-time. In addition, since a court would not allow an employee to obtain a double recovery for the same hours worked, the arbitrator should prohibit such a recovery as well.

PART 1: THE APPROPRIATE REMEDY IN A FAILED-EXEMPTION CASE SUCH AS THIS IS "HALF-TIME"

I. HALF-TIME IN GENERAL

A. What is "half-time"?

When employees' hours of work tend to vary, or fluctuate, week to week, the fluctuating workweek method of overtime calculation affords employers an alternative to the standard overtime formula of one and one-half times the employee's hourly rate of pay for each overtime hour worked. The fluctuating workweek method assumes the employer has agreed that

employees will be paid a fixed salary for all hours worked in the week, no matter how few or how many. Overtime liability is then calculated by dividing that fixed salary by the number of hours actually worked in the week to reach a "regular" rate of pay, and by paying one-half that regular rate for each hour worked that week over 40 hours (hence the phrase "half-time").

This method of calculation is rooted in a Supreme Court decision dating back to 1942, *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572 (1942). The Supreme Court there defined the phrase "regular rate of pay," which is not defined in the Fair Labor Standards Act ("FLSA"), and in so doing noted that a "regular rate" need not be a *fixed* hourly rate. A "regular rate" could be achieved legally under the FLSA by dividing a fixed salary by the total number of hours worked, because "the rate per hour does not vary for the entire week, though week by week the regular rate varies with the number of hours worked." *Id*. at 580. *See also* 5 C.F.R. §551.511(a) (discussed in Part B below).

FLSA regulations specifically endorse this method of overtime calculation for employees--like HUD's--who are salaried and whose hours of work vary from week to week. The regulations of the U.S. Department of Labor ("DOL") explain:

> Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

29 C.F.R. §778.114(a). DOL further explains that this method of overtime compensation satisfies the FLSA's requirement that overtime be paid at 1½ times the regular hourly rate because--

> The "regular rate" under the Act is a rate per hour. The Act does not require employers to compensate employees on an hourly rate

> basis; their earnings may be determined on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek . . . . The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid.

29 C.F.R. §778.109 (emphasis added).

B. Is "half-time" applicable to federal employees?

Federal employers may pay employees on a half-time basis just as other employers may. As just noted, the conceptual underpinning of the half-time method is the recognition that: "The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid." 29 C.F.R. §778.109. Significantly, the regulations of the Office of Personnel Management ("OPM") contain nearly identical language:

> An employee's "hourly regular rate" is computed by dividing the total remuneration paid to an employee in the workweek by the total number of hours of work in the workweek for which such compensation was paid.

5 C.F.R. §551.511(a). Indeed, the court in *Brooks v. Weinberger*, 730 F.Supp. 1132, 1135 n.5 (D.D.C. 1989), recognized that section 551.511 is equivalent in meaning and purpose to the just-quoted 29 C.F.R. §778.109, which together with section 778.114 forms the regulatory underpinning for half-time.[3]

The quoted OPM regulation, like its DOL counterpart, means that every hour counts in determining the regular rate. This, in turn, means that the regular rate of a salaried federal

[3] The cited case involved security guards employed by the General Services Administration.

employee already compensates him or her for the straight time portion of overtime. And, since the "1" in the "1½" has already been paid, it follows that all that is left to pay is the "½." Thus, the Federal Circuit has recognized that payment for overtime hours at one-half the regular rate in addition to the salary will satisfy the overtime pay requirement. *See Zumerling v. Devine*, 769 F.2d 745 (Fed. Cir. 1985) (discussed in Parts II and III.B below).

Further evidence that OPM's regulations contemplate half-time is found in 5 C.F.R. §551.301. That regulation says:

> (a)(1) Except as provided in paragraph (a)(2) of this section [relating to criminal investigator receiving availability pay] and Sec. 551.311, an agency shall pay each of its employees wages at rates not less than the minimum wage specified in section 6(a)(1) of the Act for all hours of work as defined in subpart D of this part. . . .
>
> (b) An employee has been paid in compliance with the minimum wage provisions of this subpart if the employee's hourly regular rate of pay, as defined in Sec. 551.511(a) of this part, for the workweek is equal to or in excess of the rate specified in section 6(a)(1) of the Act.

What purpose is served by paragraph (b) of this regulation? OPM already has the power to, and does, set wages for federal government employees. Why would OPM need to tell an agency not to allow an employee's wage to slip below the FLSA minimum wage? Furthermore, why would OPM expect that an employee's wages would fluctuate such that a slippage would occur? All of these questions vanish if the regulation is read as applying to an employee receiving half-time, a method of pay which effectively reduces the employee's hourly regular rate with each additional hour worked. Specifically, this regulation is understandable as a warning that the agency should never allow the fluctuating regular hourly rate of an employee whose workweek fluctuates to drop below the minimum wage. However, if an employee can have only a fixed hourly rate, then it is obvious that the employee's rate will never diminish to less than the minimum wage, thus rendering paragraph (b) meaningless.

C. What are the requirements for using the "half-time" method?

In order for an employer to use the fluctuating workweek / half-time method of payment, the following requirements must be met:

- There must be a clear understanding between employer and employee "that the fixed salary is compensation" for *all* the hours worked each workweek, whatever their number, apart from overtime compensation;
- There must be a clear understanding that the employee's base salary will not fluctuate even though the job requires the employee to work varying or fluctuating hours; and
- The employee's salary must be large enough to ensure that the regular pay rate never falls below the minimum wage.

See 29 C.F.R. § 778.114; Wage-Hour Opinion Letter dated November 30, 1983. As demonstrated in the next section of this brief, those requirements are met here.

D. Do HUD employees have an understanding that they are salaried?

Courts have recognized that the "clear understanding" requirement is met when employees were generally aware that their salary was intended as compensation for whatever hours they worked. One Federal appellate court has stated:

> Neither the regulation nor the FLSA in any way indicates that an employee must also understand the manner in which his or her overtime pay is calculated. Nor do the regulation and the FLSA in any way indicate that an employer must secure from its employees written acknowledgements indicating that the employees' pay plan has been explained to them.

Bailey v. County of Georgetown, 94 F.3d 152, 156 (4th Cir. 1996). Another court said:

> Section 778.114 does not require that the employee know the hours expected to be worked, that the fixed salary is not be paid for weeks where the employee performs no work, <u>or any other details of how the [Fluctuating Workweek Method] is administered</u>.

Samson v. Apollo Resources, Inc., 242 F.3d 629, 638 (5th Cir. 2001) (emphasis added). *See also* cases cited in Part III.A below.

Here, the employees' understanding that they were salaried is reflected clearly in the HUD/AFGE Collective Bargaining Agreement ("CBA"). For example, references to the employees' "salary" may be found in CBA paragraphs:

- 11.02(1)(b) (incentive awards based on salary);
- 18.03(1) (overtime cap based on salary);
- 18.03(2) (same);
- 33.02(3) (deduction of Union dues from salary);
- 46.05 (collection of salary overpayments);
- 46.07(2)(e) (provision of salary information to Union)
- 46.08(2) (notice of non-receipt of salary check).

In addition, the fact that employees are salaried and that their effective hourly rate may vary from week to week is alluded to in the CBA statement that:

> If an FLSA nonexempt employee does not request or take compensatory time within the established time periods, the unused compensatory time will be paid at the overtime rate in effect for the work period in which it was earned.

CBA ¶18.04 (emphasis added). If an employee worked at a fixed hourly rate, the underlined language above would be nonsensical. Rather, this language reflects the Union's recognition that the overtime rate of a salaried employee will vary from week to week based on the ratio of salary to hours worked.

Moreover, all General Schedule ("GS") employees should be presumed to have an understanding that they are salaried. The compensation of GS employees always is stated as a salary. For example, one can look up the salary for any GS level and step in any locality on the GS Calculator at http://www.opm.gov/oca/06tables/gscalcul.asp. OPM does not offer a similar calculator for identifying the employee's hourly rate. Also, the affected employees previously were classified as exempt. Therefore, they necessarily understood that their salaries covered all

hours worked—since exempt employees do not receive FLSA overtime. The very basis of the grievance that led to this arbitration was that employees who allegedly should have received overtime pay did not receive it. The fact that those employees are now claimed by the Union to have non-exempt duties does not change the fact that they were paid--and understood they would be paid--a fixed salary for all hours worked.[4]

II. HALF-TIME IS THE APPROPRIATE METHOD OF COMPENSATION IN FAILED EXEMPTION CASES

It is a given that HUD employees have fixed tours of duty. Thus, they do not have fluctuating schedules. However, the very fact that overtime claims are being made indicates that they do have--or claim to have--fluctuating workweeks. That is all that is required to use the half-time method. *See Flood v. New Hanover County*, 125 F.3d 249, 253 (4th Cir. 1997) (finding that employees' hours fluctuated for purposes of section 778.114; even though they worked pursuant to a fixed schedule, the number of hours varied from week to week); *Griffin v. Wake County*, 142 F.3d 712, 715 (4th Cir.1998) (finding that work hours must fluctuate but rule does not require an unpredictable schedule). And because they claim to have worked a fluctuating workweek, the fluctuating workweek/half-time method is the recognized method for determining backpay due under the FLSA to a salaried employee who was wrongly classified as exempt and thus worked uncompensated or under-compensated overtime, as is demonstrated in the following pages.

In the private sector, for instance, DOL conducts tens of thousands of investigations and compliance actions every year of employers who have allegedly misclassified workers as

[4] The arbitrator should not be confused by any argument that the employees did not understand that they were to receive half-time because they, in fact, did not receive half-time. There is no requirement that employees understand that they will receive half-time. Rather, the only requirement is that they understand that they are receiving a salary that covers all hours worked.

exempt.[5] In every case involving a salaried employee who is found to have non-exempt duties, DOL calculates back wages using the fluctuating workweek/ half-time method. This has been the law and the practice almost since time immemorial. Likewise, because most exempt employees are paid a salary for all hours worked, "half-time" is recognized by courts as the standard measure of "make-whole relief" in so-called "failed exemption" cases, i.e., where an employee was wrongly treated as exempt. *See, e.g., Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1138-39 (5th Cir. 1988) (reversing trial court which incorrectly computed unpaid overtime compensation due non-exempt employees by dividing weekly salary by 40 hours and multiplying that rate by 1½ and times all hours over 40 in each week worked where agreement on salary for varying hours existed; holding that correct method is to divide salary by hours worked, then multiply by ½ times hours over 40 in the workweek); *Sutton v. Legal Services Corp.*, 11 W.H. Cas2d 401 (D.C. Sup. 2006) (discussed in Part III.C below). In *Brennan v. Valley Towing Co., Inc.*, 515 F.2d 100, 110 (9th Cir. 1975), the court said, after finding that the employees at issue were salaried but were not exempt:

> On remand, the district judge should proceed as follows:
>
> First, he must calculate the "regular rate" of pay for each employee in each week, based on the average hourly salary for the 47 guaranteed hours. . . .
>
> Secondly, he should award back pay for the last seven hours worked in each regular work week, in the amount of one-half of the rate determined in step one.

What this quotation describes is exactly what HUD is proposing here—using the half-time method to compensate employees in a "failed exemption" case.[6]

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[5] In 2005, DOL conducted 34,858 compliance actions, of which 11,134 focused on overtime pay violations. *See* http://www.dol.gov/esa/whd/statistics/200531.htm.

[6] The court in *Valley Towing* listed two more steps arising from the fact that the employees at issue there also were entitled to commissions. Those two other steps are not relevant here.

The half-time method of compensation has been applied to calculate FLSA backwages due salaried federal employees also. Specifically, in the Federal Circuit stated in *Zumerling, supra*:

> Similarly, OPM's determination that the regular rate is to be calculated based upon the total hours worked for the remuneration is a proper one. While the statute does not speak to the hours from which the rate is to be calculated, the Secretary's regulations provide an adequate framework for comparison.
>
> . . . By § 778.109, the rate is to be calculated "by dividing [the] total remuneration (except statutory exclusions) in any workweek [or work period] by the total number of hours actually worked by [the employee] in that workweek [work period] for which that compensation was paid." This regulation thus provides for the same calculation as OPM's guidelines.

769 F.2d at 751-52 (bracketed text in original). The court continued:

> [OPM] explains that the additional compensation is one-half the rate rather than one and one-half the rate because "in computing an employee's total remuneration for the work period, the employee has already been compensated at 100 percent for all his hours in his tour of duty." By receiving an additional one-half pay, the employee receives in total one and one-half times the regular rate at which he is employed.

Id. at 752. Here, too, because HUD's affected employees received a salary that was intended to cover all hours worked, they already have been compensated at 100 percent for all hours in a tour of duty. By receiving an additional one-half pay, the employees would receive in total one and one-half times the regular rate at which they are employed.[7]

The following is an illustration of how the half-time calculation would be applied to a failed exemption case involving a federal employee: Take for example, an employee who was treated as exempt and was paid a GS-10, Step 1 base salary of $42,040. This translates to a weekly salary of approximately $810 per week. If that employee is later found to be non-exempt

[7] It makes no difference that the employees in *Zumerling* were firefighters who were subject to the partial exemption in section 7(k) of the FLSA. The court's explanation of the mathematics involved in calculating the overtime pay of a salaried employee is equally applicable to any salaried employee.

and entitled to overtime pay, the calculation must take into account the fact that his salary constituted his compensation, except for overtime premiums, for whatever hours are worked in the workweek. The straight-time portion of any overtime pay was already paid. Thus, if during the course of four weeks this employee had worked 40, 44, 50, and 48 hours, his regular hourly rate of pay and overtime compensation in each week would be as follows:

Hours Worked	***Regular Rate***	***OT Hours***	***Overtime Pay***	***Total Pay***
40	$810 ÷ 40 = $20.25	0	n/a	$810.00
44	$810 ÷ 44 = $18.41	4	4 x ½ x $18.41 = $36.82	$846.82
48	$810 ÷ 48 = $16.88	8	8 x ½ x $16.88 = $67.52	877.52
50	$810 ÷ 50 = $16.20	10	10 x ½ x $16.20 = $81.00	$891.00

Of course, using half-time will not eliminate the need for a damages hearing because the half-time calculation must be done on a case-by-case basis. However, to the extent that any employee already has received as much or more overtime compensation than he or she would be entitled to under the half-time method just described, the arbitrator should rule that that particular employee is not entitled to additional compensation.

III. HALF-TIME HAS BEEN UNIVERSALLY RECOGNIZED AS AN APPROPRIATE METHOD OF PAYMENT FOR SALARIED, NON-EXEMPT WORKERS

A. Every federal appellate circuit that has considered the issue has recognized half-time, as have trial courts in other circuits

Since half-time is expressly provided for by DOL regulations, it comes as no surprise that the courts have endorsed it as well. These cases also shed light on the proper application of the half-time method, for example, what it means to have a "clear understanding" about the method of pay.

In *Valerio v. Putnam Associates, Inc.* 173 F.d 35, *amended and reh'g denied,* 5 W.H. Cas.2d 1024 (1st Cir. 1999), the **First Circuit** found a clear mutual understanding where a fixed

salary covered all hours worked and the plaintiff was told she would receive no overtime if worked over 40 hours a week. Although she was found to be entitled to overtime despite the employer's statement, it was only at half-time. *See also Martin v. Tango's Restaurant, Inc.*, 969 F.2d 1319, 1324 (1st Cir. 1992) (Supreme Court in *Missel* indicates method of calculating regular rate; additional half-time, not time-and-a-half, owed on hours over 40 per workweek).

In *Bailey v. County of Georgetown*, 94 F.3d 152 (4th Cir. 1996), the **Fourth Circuit** held that the "clear understanding" requirement was met when employees were generally aware that their salary was intended as compensation for whatever hours they worked. *Accord*, *Roy v. County of Lexington*, 948 F.Supp. 529 (D.S.C. 1996); *Matthews v. Wells*, 4 W.H. Cas.2d 103 (4th Cir. 1997); *Knight v. Morris*, 693 F. Supp. 439, 445 (W.D. Va. 1988) (employees who understood they were fixed-salary employees received as damages additional overtime at ½ rather than regular rate); *Quirk v. Baltimore County, Maryland*, 895 F. Supp. 773 (D. Md. 1995).

In *Singer v. City of Waco*, 324 F.3d 813 (5th Cir. 2003), the **Fifth Circuit** said that the existence of an agreement can be determined from how plaintiff firefighters were actually paid, concluding that salary was intended to compensate for all regular and overtime hours because they received the same salary for each work period even in pay periods where they worked overtime hours. *See also Samson v. Apollo Resources, Inc.*, 242 F.3d 629 (5th Cir. 2001) (clear mutual understanding exists where the fixed salary included compensation for all hours worked during the workweek by the employee); *Cox v. Brookshire Grocery Co.*, 919 F.2d 354, 356-57 (5th Cir. 1990) (affirming district court's use of ½ regular rate method); *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1138-39 (5th Cir. 1988) (reversing trial court which incorrectly computed unpaid overtime compensation due non-exempt employees by dividing weekly salary by 40 hours and multiplying that rate by 1½ and times all hours over 40 in each week worked where agreement on salary for varying hours existed; holding that correct method is to divide salary by hours worked, then multiply by ½ times hours over 40 in the workweek).

In *Fegley v. Higgins,* 19 F.3d 1126, 1130 (6th Cir. 1994), the **Sixth Circuit** acknowledged the trial court's appropriate use of the half-time method.

In *Zoltek v. Safelite Glass Corp.*, 884 F. Supp. 283, 287-88 (N.D. Ill. 1995), a trial court in the **Seventh Circuit** held that additional overtime compensation for nonexempt, salaried employee working fluctuating hours should be calculated at ½ regular rate times number of overtime hours, not 1½ , because employee already compensated at regular rate for all hours worked.

In *Brennan v. Valley Towing Co., Inc.*, 515 F.2d 100 (9th Cir. 1975), the **Ninth Circuit** found that the half-time method should be used in a failed exemption case. *See* page 9 above. *See also Baker v. Calif. Shipbuilding Corp.*, 73 F. Supp. 322 (S.D. Cal. 1947) (recognizing same approach).

In *Donovan v. Maxell Prods.*, 26 W.H. Cas. 485, 488 (M.D. Fla. 1983), a trial court in the **Eleventh Circuit** accepted a compliance officer's calculations of additional overtime due for salaried employee working varying hours at ½ regular rate times overtime hours worked.

In a case involving the very Union involved in this case, *American Federation of Government Employees (AFGE) Local 3721 v. District of Columbia*, 732 F. Supp. 1, 2-3 (D.D.C. 1989), the trial court in the **D.C. Circuit** held that that the correct method to calculate regular rate is total compensation divided by hours worked in workweek; total statutory compensation due may then be calculated as total hours times regular rate plus overtime hours times ½ regular rate.

B. The Federal Circuit has recognized half-time for federal employees

As noted above, the Federal Circuit applied the half-time method to federal employees in *Zumerling v. Devine*, 769 F.2d 745 (Fed. Cir. 1985), *aff'g* 591 F. Supp. 537 (W.D. Pa. 1984). There the court explained that

> the additional compensation is one-half the rate rather than one and one-half the rate because "in computing an employee's total remuneration for the work period, the employee has already been compensated at 100 percent for all his hours in his tour of duty." By receiving an additional one-half pay, the employee receives in total one and one-half times the regular rate at which he is employed.

769 F.2d at 752. This holding was reaffirmed in *LaForte v. Horner*, 833 F.2d 977 (Fed. Cir. 1987).[8]

C. The District of Columbia has recognized half-time

The Half-time method also has been recognized as legal under District of Columbia law. In *Sutton v. Legal Services Corp.*, 11 W.H. Cas.2d 401, 2006 WL 469968 (D.C. Super. 2006), a U.S. Government corporation announced that for several years it had misclassified many of its employees as exempt, meaning that they were salaried and not eligible for overtime compensation. Thereafter, the employer reclassified all of these employees as non-exempt and initiated a process to compensate them for hours they had worked overtime during the period they were misclassified. On these facts, the *Sutton* court said:

> With respect to calculation of back pay for overtime earned, the court concludes as a matter of law that the "fluctuating work week method" is the correct formula. Virtually every court that has considered the question has so held, including the Supreme Court in *Overnight Motor Transportation Co. v. Missel* [cited above].

11 W.H. Cas.2d at 404.

D. The overwhelming majority of other jurisdictions also recognize half-time

While not all states have addressed the validity of the half-time method under state wage orders or statutes, the overwhelming majority of jurisdictions that have addressed the issue have permitted the fluctuating workweek calculation. Among the most recent state court decisions to

[8] The Agency recognizes that both *Zumerling* and *LaForte* dealt specifically with the reasonableness of a specific OPM guideline relating to fire-fighters. Nevertheless, the teachings of *Zumerling* and *LaForte* are universal. They are: (1) The half-time method is the mathematically correct way to determine the overtime pay due salaried non-exempt employees; and (2) the half-time method complies with applicable federal pay laws.

have directly addressed half-time calculations is from the State of Washington, where the state Supreme Court held that an employer's calculation of overtime pay for employees who worked a fluctuating workweek did not violate the Washington Minimum Wage Act. *Inniss v. Tandy Corp.*, 7 P.3d 807 (Wash. 2000). The court's reasoning in the *Inniss* case is representative of others in which the fluctuating workweek method of pay is found to be valid under state law: the court noted that the Washington Minimum Wage Act was enacted to conform state minimum wage laws to the FLSA, and therefore found DOL's interpretations of the Act and its regulations, which endorse the half-time method, to be persuasive authority for the same practice under Washington law.

The same result was reached by the Supreme Judicial Court of Massachusetts, which decided that the state's overtime pay statute and regulations permitted use of the modified fluctuating work compensation week method at issue in that case. *Goodrow v. Lane Bryant, Inc.*, 732 N.E.2d 289 (Mass. 2000). That court explained:

> [The applicable state regulation] defines "[r]egular [h]ourly [w]age rate" as "the amount that the employee is regularly paid for each hour of work. When an employee is paid on a piece work basis, salary, or any basis other than an hourly rate, the regular hourly rate shall be determined by dividing the total hours worked during the week into the employee's total earnings." This regulation recognizes that a salaried employee's regular hourly rate may fluctuate on a weekly basis depending on the number of hours worked, and is inversely proportional to the number of hours worked. The nonexempt salaried employee is still entitled under [the regulations] to receive one and one-half times that rate for overtime hours worked, but that requirement is satisfied by paying the employee an additional fifty percent of the regular hourly rate for the overtime hours worked. This is so because the employee's salary is considered to include "straight time" for all hours worked, including the overtime hours. Had this not been the case the regulation would have provided that the regular hourly rate be determined by dividing weekly salary by forty hours.

Id. at 296-97 (citations omitted). The same reasoning applies to HUD employees.

This analysis also was applied in federal court decisions interpreting the laws of Michigan, Illinois and Pennsylvania: the courts in these respective cases determined that the state wage law of those respective states was meant to be coextensive with the FLSA, and that the fluctuating workweek method of overtime calculation was therefore permissible under the laws of those states. *See Fakouri v. Pizza Hut of America, Inc.*, 824 F.2d 470, 474 (6th Cir. 1987) (interpreting Michigan law); *Condo v. Sysco Corp.*, 1 F.3d 599 (7th Cir. 1993) (Illinois law permits fluctuating workweek method of overtime pay); *Friedrich v. U.S. Computer Systems, Inc.*, 1990 WL 124967 (E.D. Pa. 1990) (under Pennsylvania statute substantially identical to 29 C.F.R. § 778.114, defendant properly calculated overtime using half-time method). An Illinois appellate court also has agreed that the Illinois wage law parallels the federal law and that an employer's half-time calculations were acceptable. *Haynes v. Tru-Green Corp.*, 507 N.E.2d 945, 951 (Ill. Ct. App. 1987).

Although some states have not explicitly adopted fluctuating workweek overtime calculations by statute or regulation, nor have their courts addressed the issue, the state departments of labor (or equivalent) have taken the position that all pay methods authorized by the FLSA are appropriate under state law. This appears to be the case in New York, New Jersey, Rhode Island and Connecticut, and, as far as we can ascertain, in almost every other jurisdictions.[9]

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[9] The only exceptions Agency's counsel has found are Alaska and California. Alaska has a daily overtime requirement. Thus, the Alaska Supreme Court has held that the pertinent Alaska statutes do not automatically incorporate federal case law or administrative law, and noted that Alaska regulations rejected "flextime plans" such as those established under 29 C.F.R. § 778.114. *Dresser Industries, Inc. v. Alaska Dept. of Labor*, 633 P.2d 998 (Ak. 1981).

In California also, a state statute imposes a daily as well as a weekly overtime requirement, and the fluctuating workweek overtime calculation was disapproved for daily overtime pay by one California appellate court. *Skyline Homes Inc. v. Department of Indus. Relations*, 165 Cal. App. 3d 239, 211 Cal. Rptr. 792 (1985).

In contrast, the FLSA has no requirement for daily overtime, so the reasoning in Alaska and California is inapposite here. Any daily premium pay requirement for federal employees would have to derive from some other statutory or contractual basis and thus would not be a basis for claiming under the FLSA.

E. The Federal Labor Relations Authority has never addressed the issue of half-time but would follow recognized law if faced with the issue

The Agency's search has revealed no instance in which the FLRA discussed the half-time method. However, just as an arbitrator is obligated to follow the applicable legal precedents (*see* Part I above), so is the FLRA. Accordingly, there is no doubt that the FLRA would recognize the half-time method for damages in failed exemption cases, which is almost universally applied across the United States, as limiting the employees' entitlement in this case.

PART 2: THE AGENCY IS ENTITLED TO OFFSET PAYMENTS FOR CREDIT HOURS, COMPENSATORY TIME-OFF, FLEXIBLE WORK SCHEDULES, AND OTHER ALLOWANCES SO EMPLOYEES DO NOT RECEIVE A WINDFALL

This part of HUD's motion relates to certain types of allowances that HUD allows its employees pursuant to law, regulation and/or the collective bargaining agreement. These allowances include credit hours, compensatory time-off, and flexible work schedules, among others. Through this motion, the Agency asks that employees that already received one or more of these allowances to cover specific hours worked be precluded from receiving a windfall in the form of an additional damages award for the same hours.

HUD notes that it has discussed these allowances with the Union and that the Union may not dispute that some HUD employees are precluded from claiming overtime for certain hours worked and/or that certain payments to workers may be offset against potential overtime liability. However, the parties have not reached any clear agreement. To the extent that the Union, in response to this motion, is willing to stipulate to any such matters, the Arbitrator will not need to rule on that aspect of the motion.

I. CREDIT HOURS

Title 5, Chapter 61 of the U.S. Code authorizes various "Flexible Schedules," including "Credit Hours." *See* 5 U.S.C. §6126. *See also* OPM's "Handbook on Alternative Work Schedules" published at http://www.opm.gov/oca/aws/. Pursuant to these authorities, HUD

allows its employees to accrue Credit Hours. Specifically, the CBA describes "Credit Hours" as "work performed by an employee in excess of an eight-hour tour of duty on any workday in order to vary the length of a subsequent workday." CBA ¶17.02(5). In other words, for the employees' convenience, HUD and the Union agreed that an employee who needs to leave early, arrive late, or take time off on one day can "pay" for it by working extra hours (i.e., in excess of his or her tour of duty) on a prior day or even in a prior workweek. In essence, this provision allows employees to schedule their own work in excess of 40 hours per week.

Needless to say, giving employees that option could place the Government in the position of paying runaway overtime costs that would be completely within the employee's control. Accordingly, 5 U.S.C. §6123(b) states:

> Notwithstanding the provisions of law referred to in subsection (a)(1) of this section [relating to overtime pay], an employee shall not be entitled to be compensated for credit hours worked except to the extent authorized under section 6126 of this title or to the extent such employee is allowed to have such hours taken into account with respect to the employee's basic work requirement.

Consistent with this provision, the Union agreed that:

> Work performed for credit hours is differentiated from overtime work, which is ordered and directed by Management. Work performed for credit hours is not compensated as, nor is it subject to the rules and regulations governing, overtime work.

CBA ¶17.02(5) (emphasis added). The Union further agreed:

> When an employee is performing additional work on a given workday in order to earn credit hours, overtime work on that day shall be defined as work that has been ordered or approved by Management in excess of the employee's basic eight-hour work requirement plus the additional work time approved in order to permit the employee to earn credit hours (i.e., if an employee is approved to work one (1) additional hour beyond his/her scheduled eight-hour tour of duty in order in order to earn one (1) credit hour, overtime work is work ordered or approved by Management in excess of nine (9) work hours on that workday). Time worked to earn credit hours shall not be subsequently converted to or compensated as overtime work.

Id. ¶17.04(2)(e) (emphasis added). This provision is implemented in HUD's Alternate Work Schedule Programs, Policies and Procedures Guide ¶4.15.[10]

Accordingly, to the extent that the evidence shows that a particular hour in excess of an employee's tour of duty was worked for the purpose of earning a "Credit Hour," no overtime pay is due for that hour and that hour is not counted toward calculating overtime hours worked.

II. COMPRESSED WORK SCHEDULES

A "Compressed Work Schedule" is a "method of establishing individual work schedules that allows employees to work eighty (80) hours in a biweekly pay period in fewer than ten (10) days." CBA ¶17.02(3). In particular, an employee may elect to work a "5-4/9" schedule which entails working five days in one workweek of a pay period and four days in the other workweek of the same pay period, with eight of those days being nine hours long and one of them being eight hours long.[11] *Id*. *See also* CBA . ¶17.04(3).

An employee on a Compressed Work Schedule works more than 40 hours in one workweek and fewer than 40 hours in the second workweek, for a total of 80 hours in the tw0-week period. Thus, like the Credit Hours program, the Compressed Work Schedule program, could place HUD in the position of paying excessive overtime costs. The Union therefore agreed that:

> Overtime work under a compressed work schedule shall be defined as work which has been ordered or approved by Management in excess of nine (9) hours, on those days when the employee is scheduled to work a nine-hour tour of duty, and in excess of eight (8) hours, on those days when the employee is scheduled to work an eight-hour tour of duty.

CBA ¶17.04(3)(g).

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[10] This publication is officially recognized in CBA Supplement 46, ¶5 as the implementation of HUD's Credit Hours program.

[11] (8 days x 9 hours) + (1 day x 8 hours) = 72 hours + 8 hours = 80 hours.

Accordingly, to the extent that the evidence shows that a particular hour in excess of an employee's tour of duty was worked due to a "Compressed Work Schedule," no overtime pay is due for that hour and that hour is not counted toward calculating overtime hours worked.

III. COMPENSATORY TIME OFF

A. Compensatory time off is to be paid only at straight time

Pursuant to Article 18 of the CBA, nonexempt HUD employees may elect to earn overtime pay or "Compensatory Time" for a particular overtime hour. CBA ¶18.03(1). Paragraph 18.03(3) states that overtime will be paid at time-and-a-half. By making this statement about overtime pay in a section that also deals with compensatory time off, the CBA provides that compensatory time, unlike overtime, will not be paid at time-and-a half, but only at straight time.

Since this arbitration arises from a grievance filed by the Union, any damages award is limited by the terms of the CBA from which the Union's jurisdiction is derived.[12] Accordingly, the Union is not entitled to proceed with a grievance on behalf of any employees who elected and received compensatory time off on a straight time basis.

B. HUD is entitled to a credit against overtime pay for compensatory time off allowed

Even if the Arbitrator does not agree that employees who elected and received compensatory time off on a straight time basis are not entitled to any additional pay, HUD is entitled at a minimum to a credit or offset against overtime liability for any compensatory time off given.

IV. ROUNDED TIME

[12] While individual grievants might be entitled to enforce FLSA rights that are in excess of what the CBA provides, the Union is bound by its contract and can have no jurisdiction greater than that contract.

Section 18.05(2) of the CBA provides a formula for rounding "irregular or occasional" overtime work to the nearest quarter-hour. In some circumstances, this formula benefits the employee by allowing the employee to be paid for 7½ minutes that he or she did not work. In other circumstances, this formula results in an employee working a small amount of irregular or occasional overtime without additional pay. As with any situation in which rounding is used, the laws of statistics dictate that such rounding eventually results in equilibrium and the employee gets paid for the hours and minutes he worked. Accordingly, it was legally proper for the Union to agree that no overtime claim could be made for less than 7½ minutes of work, and any such claims therefore should not be heard. This means not only that no employee may make a separate claim for less than 7½ minutes of overtime work, but also that such claims may not be aggregated.[13]

V. COMPENSATORY TIME FOR RELIGIOUS OBSERVANCE

As provided in Public Law 95-390, HUD employees may "work compensatory overtime for the purpose of taking time off without charge to leave or loss of pay when personal religious beliefs require that the employee abstain from work during certain periods." CBA ¶24.17. The CBA expressly provides that such overtime will be compensated "hour for hour," i.e., at straight-time. *Id.* *See also* 5 C.F.R. §550.1002(d). Accordingly, no claims should be heard for overtime compensation as a result of an employee's working religious compensatory time.

CONCLUSION

As noted above, the specific damages, if any, to which an individual employee may be entitled must be determined on a case-by-case basis. However, it is proper for the arbitrator to narrow the issues by granting a motion in limine to limit backpay in accordance with applicable law and the CBA.

[13] The FLSA does not require payment for *de minimis* amounts of work, which may be up to 10 minutes. 29 C.F.R. §785.47.

Regarding the calculation of back overtime pay that may be found due, the proper method of calculation is the half-time formula. The overwhelming majority of courts, including the United States Supreme Court and the Court of Appeals for the Federal Circuit have recognized the legality of the half-time method, and it is fully consistent with OPM's regulations. Accordingly, the Agency's motion to cap the overtime pay of salaried employees at half-time should be granted. To the extent that the Agency has already paid in excess of the half-time premium for any overtime worked, the arbitrator should find that no additional backpay is that worker.

HUD acknowledges the obvious--Agency employees who were classified as nonexempt were paid traditional time-and-a-half overtime. This is because HUD is more generous than the FLSA and OPM's regulations require and HUD has not availed itself of the half-time method for those workers it has classified as nonexempt. It might even be true that but for the alleged misclassification, HUD's employees would have received overtime pay at the generous time-and-a-half rate. But the arbitrator's role is not to be generous, but rather to enforce the law and the CBA, and those authorities do not require more than half-time as the remedy for a failed exemption. This is an FLSA grievance, and it must be resolved pursuant to the FLSA.

With regard to allowances, employees who already received one or more of the allowances discussed above to cover specific hours worked should be precluded from receiving a windfall in the form of an additional damages award for the same hours. Accordingly, this aspect of HUD's motion also should be granted.

Dated: May 23, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion In Limine Regarding Damages was sent to counsel for the Union on May 23, 2006 by email to mike@sniderlaw.com and carolyn_federoff@hud.gov.

/s/
Daniel B. Abrahams

DC:609069v1

IN THE MATTER OF ARBITRATION BETWEEN:

NATIONAL COUNCIL OF HUD LOCALS 222, AFGE, AFL-CIO,	)	Arbitrator Sean Rogers
Union,	)	Issue: FLSA Overtime Damages
v.	)	
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,	)	**ORAL ARGUMENT REQUESTED**
Agency.	)	

UNION'S MEMORANDUM IN OPPOSITION TO AGENCY'S "MOTION IN LIMINE" RE: DAMAGES

INTRODUCTION

The Union, AFGE Council of Locals 222, by and through its counsel, Snider & Associates, LLC, respectfully submits this memorandum in opposition to the Agency's motion in limine regarding damages. The Agency's motion is not a proper "motion in limine" – it does not seek to strike or prevent any evidence at hearing. It is actually a Motion for Summary Judgment, which would be inappropriate at this time. The Agency is attempting to litigate the damages issue without a hearing. If taken as a motion for summary judgment with regard to proper method of overtime compensation then the motion should be denied as premature. The Union reserves the right to add expert witness testimony if it is taken as a Summary Judgment motion. In fact, the Union's **Motion for Summary Judgment on Damages** addresses many of these issues.

The Agency is attempting to cut its liability for "suffered or permitted" overtime by 2/3, cheating employees further out of overtime pay they have been deprived for decades. The Agency makes the following preposterous statement in its Conclusion:

> HUD acknowledges the obvious--Agency employees who were classified as nonexempt were paid traditional time-and-a-half overtime. This is because HUD is more generous than the FLSA and OPM's regulations require and HUD has not availed itself of the half-time method for those workers it has classified as nonexempt. It might even be true that but for the alleged misclassification, HUD's employees would have received overtime pay at the generous timeand-a-half rate.

The Agency does not make this argument in good faith. No Federal GS employee has ever been paid on a fluctuating workweek rule method – and the Agency cites no precedent for this wrong assumption. Applying the rule in this case would be outright theft from these employees, as well as contrary to law. Interestingly, OPM's own new 2006 proposed regulations implementing the FLSA do not reference anywhere the Rule the agency urges to be applied here. See http://www.opm.gov/fedregis/2006/71-052606-30317-a.htm. Compensation was not "paid" for suffered or permitted work, and therefore cannot be included in one's salary.

I. The appropriate remedy for the misclassified employees in this matter is compensation at the overtime rate of 1.5 times the regular rate of pay because the Agency did not meet the fluctuating work week rule.

The employees in this matter were all misclassified as exempt by the Agency for the relevant time period of the arbitration. The Agency contends that in misclassified exemption cases the proper remedy is to use the fluctuating work week rule. The Agency finds support in its argument through a number of misapplied cases and one Supreme Court decision that does not address the issue but rather merely defines

regular rate as it applied to the fluctuating work week rule. The Union does not dispute that the FLSA does support use of the fluctuating work week rule in certain narrow situations, but that is only where employees receive fixed salaries and work varying hours week to week such that the fixed hourly rate will change depending on the number of hours worked each week, and, as noted, only under certain narrow circumstances. But this is simply not the case for the employees in this arbitration.

A. The fluctuating work week rule does not apply to the employees in this arbitration.

The Agency fails to properly define the fluctuating work week rule in its motion. Under the FLSA, before an employer can pay employees under the "fluctuating work week" plan, the employer must meet the following five (5) requirements:

(1) employee's hours must fluctuate from week to week;

(2) employee must receive fixed weekly salary that remains the same regardless of number of hours employee works during week;

(3) the fixed amount must be sufficient to provide compensation at regular rate not less than legal minimum wage;

(4) employer and employee must have clear, mutual understanding that employer will pay employee the fixed weekly salary regardless of hours worked; and

(5) employee must receive 50% overtime premium in addition to fixed weekly salary for all hours that employee works in excess of 40 during that week.

See Fair Labor Standards Act of 1938, § 7(a)(1), 29 U.S.C.A. § 207(a)(1); 29 C.F.R. § 778.114. As demonstrated below, the Agency did not meet all prongs of the five part

test,[1] and therefore fails the test and is prohibited from utilizing the Rule to reduce its liability in this case.

1. Employees hours do not "regularly" fluctuate from week to week.

The HUD employees in this arbitration do not work fluctuating work weeks as required by the rule. The Agency boldly concludes that the employees at HUD work hours that vary from week to week. This is simply not true, there is no factual basis to this claim and the Agency has attached no affidavits to its Motion supporting this claim. The fluctuating work week rule does not cover irregular or infrequent fluctuations in the work week, as those experienced by the employees at HUD, but rather regular (one would even say planned) fluctuations.

The CBA between the parties specifically provides that the basic work week is 40 hours and that is how many hours employees are expected to work each week. This rule is not intended to apply to slide and glide employees that can arrive and leave anytime within a certain window during the day. Nor does it even apply to the irregular or occasional overtime work that causes the tour of duty to run over 40 hours per week. This rule applies to employees, for example, that regularly work 30 hours one week and then 50 hours the next.

In fact, the fluctuating workweek rule could not apply to the employees at issue since they would be docked pay if they worked less than 40 hours per week.

The cases cited by the Agency all deal with EMS, firefighters and/or law enforcement officers that work regular schedules based on shifts of on and off duty work. The hours in those cases actually fluctuate (in a planned manner) from week to

[1] The Union does not contest that the Agency met the third prong of the test.

week based on when the first on duty shift begins relative to the work week. Unlike those employees, the employees in HUD all work Monday – Friday and are expected to and do work 40 hours per week. Any overtime work performed is not a fluctuation in the work week; it is suffered or permitted overtime. The Agency has not cited one case directly on point from any Arbitrator or the FLRA. These FLSA OT cases have been litigated in the Federal Sector for decades and not once has any Arbitrator or the Authority applied this Rule to Federal employees – for a reason: it does not apply.

The Agency cited a number of cases which do not apply to this case. For example, *Overnight Motor* involved an employee that worked irregular hours for a fixed salary. *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572 (1942). His duties and responsibilities involved wide fluctuations in time required to perform his job. *Id.* at 1218. The facts in that case demonstrated that his average work week was 65 hours and varied between 75 and 80 at times. *Id.*

Zumerling v. Devine applied to employees that worked fluctuating work weeks. The court there specifically excluded employees in the General Schedule (GS) classification -- such as the Grievants -- when it stated that the Plaintiffs were covered, "in contrast to the typical general schedule employee who is scheduled for a 40 hour work week," such as those employees involved in this matter and that work at HUD. *Zumerling v. Devine*, 769 F.2d 745, 746 (Fed. Cir. 1985). The case specifically addresses the fact that firefighters and law enforcement officers work different schedules than most general schedule government employees. The government employees at HUD do not work "fluctuating" work weeks under the caselaw and

regulations. They work a regular 40 hour schedule plus uncompensated (suffered or permitted) overtime.

Samson v. Apollo Resources also applied to employees that were paid under a fluctuating work week primarily because they may be called upon to work a varied number of hours each week. *Samson v. Apollo Resources, Inc.*, 242 F.3d 629, 638 (5th Cir. 2001). The case holds that employees do not need to know the exact manner that the overtime payment is calculated or made. *Id.* But the case presumes that employees understand that they will be paid overtime. *Id. See also Bailey v. County of Georgetown*, 94 F.3d 152, 156 (4th Cir. 1996). That cannot be the case with the employees at HUD, because they ostensibly understood that they were not entitled to any overtime compensation for "suffered or permitted" work, while exempt.

It is clear that the employees in this matter understood they were compensated for working fixed 40 hour schedules and any fluctuations in the schedule were irregular and not compensated. Now that they are non-exempt, however, in order to make them whole the Arbitrator should (as have all Federal Sector arbitrators who addressed this issue in the past) award a make whole remedy, not a lesser remedy.

2. Employees were not paid the fixed weekly salary regardless of number of hours worked.

The second prong requires employers to pay employees the fixed weekly salary regardless of leave, even if for personal reasons. *See* Wage-Hour Opinion Letter No. 2161 (May 28, 1999); Wage-Hour Opinion Letter No. 479 (May 18, 1966). While the code does allow certain leave policies and deductions for discipline, it does not allow the employer to deduct wages based on quality and quantity of work. The employees at

HUD were required to use leave status to substitute for missed work hours each week. While the Union does not object to the use of sick leave, annual leave, credit hours and/or compensatory time, if an employee did not have any approved leave remaining then he/she must use leave without pay (LWOP) and would be paid less than the fixed weekly salary, not regardless of, but precisely because the employee did not work 40 hours. *See* Wage-Hour Opinion Letter No. 2065 (December 24, 1997). This leave policy in itself prevents the Agency from claiming the fluctuating work week rule because there were times that employees were not paid the fixed weekly salary regardless of number of hours worked. *See also* Wage and Hour Opinion Letter No. FLSA2006-15 (May 12, 2006).

3. The employer and employee did not have a "clear, mutual understanding" that the employer will pay the employee the fixed weekly salary regardless of hours worked.

The employer classified the employees as exempt and did not even think the agency was under a duty to pay overtime wages for hours in excess of 40. Yet, the agency now contends that the whole time there was a "mutual agreement" that the employees were under the fluctuating work week rule. The CBA provides just the opposite. The basic workweek was 40 hours. Employees were ostensibly only expected to work 40 hours, unless workload otherwise required on an irregular basis.

The CBA excerpt alluded to by the Agency does not apply to exempt employees. Agency's Motion at 7, *see also* CBA para. 18.04. It clearly applies only to FLSA non-exempt employees and does not show a clear, mutual understanding as to any of the exempt employees involved in this matter. Furthermore, the Agency misapplies the clear, mutual understanding prong entirely. It is not whether the employee knows

he/she is salaried, but rather whether they know the fixed salary is for all hours worked in any given work week. The employees in this case had a clear understanding that the fixed salary only covered 40 hours each work week – they were paid nothing for the excess hours.

The statutory language found in 778.109 and 551.511 does not mean that the regular rate of a salaried employee compensates him/her for the straight time portion of the overtime. The language clearly provides the regular rate is computed based on the total number of hours for which the compensation was paid. The Agency intended the fixed salary to compensate employees for 40 hour work weeks; the Agency did not believe it even owed these exempt employees any compensation for hours worked in excess of 40 which were "suffered or permitted."

The employees at HUD understood that they are salaried employees and paid a fixed rate for 40 hours of work per week. Contrary to the Agency's belief, the locality pay tables for compensation of general schedule employees is stated in both terms of annual salary and basic hourly rates based on 40 hour work weeks and OPM does provide similar calculations for hourly rates. Furthermore, the OPM table itself provides overtime rates, which are calculated to be exactly 1.5 times the base rate, except where capped by statute.

4. The employees at HUD were not paid the required 50% overtime premium for hours that employees worked in excess of 40, which would be necessary for the Agency to qualify for the fluctuating workweek rule.

It is interesting to note that this is the one prong of the test that the Agency failed to mention. The Agency did not compensate any of the employees in this arbitration with 50% overtime premium for hours worked in excess of 40.

While the agency notes that it did not matter that the firefighters in *Zumerling* fell under Sec. 7(k) regarding when overtime hours accrued, it did matter that these employees were firefighters and not subject to the general schedule of forty hours per workweek as was the case for HUD employees. Every court that the Agency cites as applying the half-pay method of payment concluded that the employees fell under the five-prong fluctuating workweek rule. Yet, the Agency in this matter glossed over only three of the five requirements and failed to even address the issue that employees were not contemporaneously paid the 50% overtime premium owed under the fluctuating workweek rule. **Providing that payment now retroactively is not sufficient**. *See Cowan v. Treetop Enterprises*, 163 F.Supp.2d 930 (M.D. Tenn. 2001).

B. The proper method of payment for overtime work is not the half-time approach adopted by the Agency, because the fluctuating work week rule does not apply.

1. Unlike the Employees in the Case Law Cited by the Agency, the Employees in this Arbitration Do Not Work a Fluctuating Work Week Due to Off-Duty Days

The Agency overly relies on cases, like *Flood* and *Blackmon*, that are inapplicable and distinguishable. In *Flood*, the court addressed a case that involved EMS workers that worked regularly recurring cycles of on-duty and off-duty hours. While working a fixed schedule, the employee's hours actually fluctuated on a planned basis in that case because the total hours worked each week depended on the number of scheduled on-duty work days that fall within a given week. *See also Griffin v. Wake County*, 142 F.3d 712 (1998) (finding employee subject to fluctuating work week because workweeks did fluctuate and employer provided employee with memorandum outlining payment method and samples). Furthermore, the employees in that case were provided a memorandum of understanding with regard to the fluctuating method of payment.

Unlike the employees in *Flood,* the exempt employees at HUD did not have a clear, mutual understanding with regard to fluctuating workweeks. In fact, the workweeks did not fluctuate simply because some employees worked longer hours. The fixed schedules at HUD were not based on on-duty and off-duty days and did not cause any employees to work more than 5 days each week.

2. The Fluctuations in the HUD Employees' Schedules Are Not Consistent Enough to Justify Use of the Fluctuating Work Week Pay Method

The Wage and Hour Division of DOL has provided that an employer can use the fluctuating pay method to compensate employees that work alternating and fluctuating workweeks pursuant to a fixed schedule. In that case, the employee alternated working 43 and then 51 hours every other workweek. Wage and Hour Letter (May 16, 1966). That is not the case in this matter. The fluctuations in the general schedule of HUD employees are irregular and not pursuant to a fixed schedule. Further, HUD has not had its fluctuating workweek "Plan" approved, has not circulated it to employees and has not had employees agree to it.

Further, the Agency's reliance on the first circuit case of *Valerio v. Putnam Associates*., 175 F.3d 35 (1st Cir. 1999), is misplaced. The employee in that case was hired to work from "8:30 until whenever," knew the employer was not paying overtime for hours in excess of 40 and regularly worked more than 40 hours per week.

Courts do not endorse the fluctuating workweek rule simply to reduce damages or potential liability of the employer. The courts that apply the rule actually find that the employer met the 5 prong test. The Union does not contest the existence of the fluctuating workweek rule. The Union merely disputes the application of the fluctuating workweek rule to the employees in this matter because they did not work regular, planned fluctuating work weeks and there was no clear, mutual understanding with regard to the salary compensating them for all hours worked.

The Agency does nothing more than make a bold and general statement supported by cherry-picked case law that does not apply to the case at bar. The Union

does not contest that the fluctuating work week rule is accepted and practiced in cases where applicable. Yet, none of the Agency's case law supports the contention that "half-time is universally recognized as the proper method of payment for salaried non-exempt employees."

In *Bailey*, the court only held that the district court's instruction with regard to whether employees must have a clear, mutual understanding of the way overtime is calculated was lawful. *Bailey v. County of Georgetown*, 94 F.3d 152 (4th Cir. 1996). The court did not address the facts of the case de novo. Furthermore, the facts are not applicable to the employees in this matter:

> Each deputy sheriff is paid a specified annual salary; no additional compensation is paid unless the deputy works more than 171 hours during a given twenty-eight-day cycle. For each hour in excess of 171 hours worked by a deputy during such a cycle, the deputy receives overtime pay. The overtime rate to be paid to the deputy is determined by dividing his or her base salary for that twenty-eight-day period by the total number of hours worked, yielding an adjusted hourly rate of pay. An overtime premium of one-half of that adjusted hourly amount is then paid for each hour worked in excess of 171 hours.
> *Id.* at 153-154.

The employees in *Bailey* were law enforcement officers (sheriffs deputies) and worked fluctuating work weeks because the payment plan was based on cycles of twenty-eight days. *See also Knight v. Morris*, 693 F. Supp. 439, 445-446 (W.D.V.A. 1988) (law enforcement officers fell under fluctuating work week rule because they "testified that they understood that their salary represented their total straight-time salary, regardless of the hours they were required to work in a given period").

Furthermore, the employees were contemporaneously paid overtime compensation for the excess hours at the 50% premium rate. On the other hand, the

employees at HUD worked general schedule 8 hour tours of duty, five days a week and the Agency did not ***contemporaneously*** pay the 50% overtime premium for excess hours.

3. The Fluctuating/ Half Pay Method of Payment is Not Proper For *Misclassified* Employees

Contrary to the Agency's bold assertion, not every case that considered improper classification of a non-exempt employee applied the fluctuating/half-pay method of payment. To the contrary, a DC Federal Court[2] has held exactly the opposite. *See, e.g., Rainey v. American Forest and Paper Association*, 26 F.Supp.2d. 82 (D.D.C. 1998); *See also Cowan*, *supra*. In *Rainey*, the court concluded that there cannot be a clear, mutual understanding if the employer believed the employee was exempt and not entitled to overtime compensation. This term cannot apply, therefore, retroactively – logically or practically. The fluctuating work week rule is only applicable to currently non-exempt employees that are entitled to overtime compensation.

The *Rainey* court reasoned that if the parties had agreed that the employees' compensation was subject to the fluctuating workweek rule then the employees would be classified as non-exempt. The court therefore dismissed the defendant's motion for summary judgment on damages. *Cowan* elaborated on *Rainey*'s ruling that classifying an employee as exempt precludes the clear mutual understanding necessary for the fluctuating work week payment method to apply. According to the *Cowan* decision, if an employee is misclassified as exempt, there cannot be a clear mutual understanding between the employer and the employee that overtime premiums would be paid, nor can there be contemporaneous payments of 50% overtime.

[2] The Union notes that all hearings in this case are all taking place in the District of Columbia.

> To be sure, in *Blackmon v. Brookshire Grocery Co.,* 835 F.2d 1135 (5th Cir.1988), the Fifth Circuit applied Section 778.114(a) retroactively, but this Court agrees with *Rainey* that the Defendants' prior assertion of exempt status for these employees and the lack of contemporaneous payment of the 50% overtime to unit managers bar the Defendants' reliance upon Section 778.114(a).
>
> The structural framework of the Act and the DOL regulations undercuts defendant's claim that it had a "clear mutual understanding" with plaintiff. Defendant has maintained consistently that ... plaintiff was employed in an administrative capacity that rendered her exempt from section 207(a) of the Act. If plaintiff were in fact exempt, she clearly would not have been entitled to any overtime compensation, no matter how computed, as the provisions for overtime compensation apply only to employees not exempt from section 207(a). Yet defendant insists that all along it had a clear mutual understanding with plaintiff, one defined by the regulations as encompassing an understanding that overtime premiums would be paid. See 29 C.F.R. section 778.114(a) ("a clear mutual understanding ... that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek..") Defendant cannot credibly argue both sides of the same coin.
>
> If defendant believed that plaintiff was exempt from section 207(a), such that she was entitled to no overtime compensation, then it was not possible for it to have had a clear mutual understanding with plaintiff that she was subject to calculation method applicable only to non-exempt employees who are entitled to overtime compensation.

Cowan, 163 F.Supp.2d at 941-942, *citing*, *Rainey*, 26 F.Supp.2d. at 101-102. *See also Dingwall v. Friedman Fisher Associates,* 3 F.Supp.2d 215 (N.D.N.Y.1998) (employer failed to meet fluctuating work week rule because no evidence that misclassified employee understood salary was intended to compensate him for every hour worked; employee manuals distributed at various times during plaintiff's employment all state that “staff personnel are normally expected to work a 40 hour week….”). *See also Troutt v. Stavola Brothers, Inc.,* 905 F.Supp. 295, 300 (M.D.N.C.1995), *aff'd,*107 F.3d 1104 (4th Cir.1997) (Section 778.114 inapplicable because “Defendant has failed to establish that there was any ‘clear mutual understanding’ regarding fluctuating hours.”).

Therefore, based on clear local precedent, misclassifying employees as exempt precludes an employer from asserting that there was a mutual understanding or that they contemporaneously paid the additional 50% premium required for qualification for the Rule. Accordingly, the fluctuating half pay method of payment cannot be used in the case of the employees in this arbitration who were considered by the Agency to be exempt.

The Agency would be urging the Arbitrator to find a clear, mutual understanding based on an implied-in-fact agreement. *See Mayhew v. Wells*, 125 F.3d 216 (4th Cir. 1997). But there are no additional facts to support the position that the employees understood the salary was intended to compensate for any of the hours above 40.

The Agency's calculations based on half-time overtime premium were correct, if the fluctuating work week rule applied. *See* Agency's Motion at 10-11. However, with regard to the employees at HUD, the normal overtime rate is applicable. In the case of the hypothetical GS-10, Step 1 employee with base salary of $42,040 that works 40, 44, 48 and 50 hours, his/her regular hourly rate of pay and overtime compensation in each week would be as follows:

Hours Worked	***Regular Rate***	***OT Hours***	***Overtime Pay***	***Total Pay***
40	$810 ÷ 40 = $20.25	0	n/a	$810.00
44	$810 ÷ 40 = $20.25	4	4 x 1.5 x $20.25 = $121.50	$931.50
48	$810 ÷ 40 = $20.25	8	8 x 1.5 x $20.25 = $243.00	$1053.00
50	$810 ÷ 40 = $20.25	10	10 x 1.5 x $20.25 = $303.75	$1113.75

The basic rate of $810 equals the regular rate for all weeks because the employee is only being compensated for 40 hours of work. If that employee is later found to be non-exempt and entitled to overtime pay, the calculation for overtime must use the 1.5 premium rate because the straight time portion of the overtime compensation has not been paid.

II. **The Agency is not entitled to deny legitimate overtime payments to HUD employees that were misclassified based on the erroneous claim that this time falls under other allowances.**

The Union is not asking for double compensation, but rather only asks that the HUD employees receive a "make whole remedy," which would include all overtime payments denied to them due to the Agency's misclassification. Because the Agency misclassified employees, they were denied the **choice** between compensatory overtime and overtime. Therefore these employees have a right to the overtime that they would have been paid.

Under Title 5, employees are not entitled to a choice between compensatory time and overtime, while FLSA covered employees are entitled to overtime pay and, **at their express election**, to compensatory time. AFGE 3614 and EEOC, **60 FLRA 601** (2005).

Therefore, 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:**

> The regulation governing compensatory time off for employees covered by the FLSA (5 C.F.R. ' 551.531(a)) is significantly different in that employees may elect compensatory time. In promulgating 5 C.F.R. ' 551.531(a), the Office of Personnel Management (OPM) explained that "[t]he rules governing compensatory time off requested by an employee are not the same under both parts 550 and 551." 56 Fed. Reg. 26,340 (May 3, 1991). Distinguishing the rule under 5 U.S.C. ' 5543(a)(2), OPM stated that "there is no legal authority for an agency to require that a nonexempt employee take compensatory time off in lieu of overtime pay under the FLSA." Instead, under 5 C.F.R. ' 551.531(a), compensatory time off for employees covered by the FLSA is "[a]t the request of an employee."
>
> There is no evidence in this case that the Agency provided employees with a choice of whether to elect compensatory time off, in lieu of overtime pay, as required under 5 C.F.R. § 551.531(a). We reject the Agency's claim that "the Union in this case admitted that compensatory time off was properly requested" as unsubstantiated. Exceptions at 5. First, the portions of the transcript of the arbitration hearing on which the Agency relies do not address the specific point of whether any of the grievants in this case requested compensatory time off. Second, at the time the Agency provided compensatory time to the grievants, the Agency was treating the grievants as though they were covered by title 5, not title 29. As stated above, for employees covered by title 5 (specifically, under 5 U.S.C. § 5543(a)(2)), the decision to require GS-12 employees to take compensatory time off rests solely with an agency. In this case, the record reflects that the Agency did not give the grievants the choice between overtime pay and compensatory time off to which they were entitled had they been considered covered under title 29, but essentially required the grievants to take compensatory time off.
>
> Even assuming that some of the grievants requested compensatory time off, however, nothing in the record before us shows that such requests were based on the employees, understanding that under title 29 they had a choice between overtime pay and compensatory time off. The absence of such a showing in the record is not surprising, inasmuch as the Agency was operating solely under title 5 in compensating the employees for the overtime worked, and title 5 does not afford the employees such a choice.
>
> Since the grievants were not given the choice of electing compensatory time off or overtime pay, as required under the FLSA, and because the FLSA provides a

> statutory basis for granting employees overtime pay at the rate of time and one-half, the award, which provides the grievants with the difference between straight time and time and one-half, is not contrary to law. Note 14
>
> > 14. We are aware that, under 5 C.F.R. § 551.501(a)(7), an employee who takes compensatory time off is not eligible to receive overtime pay. However, this exclusion from the overtime pay provisions of the FLSA applies when the employee's compensatory time off is granted under the compensatory time off provision of the FLSA, namely, 5 C.F.R. § 551.531. If the Agency had correctly classified the grievants as covered under the FLSA for the periods of the overtime worked, and if the employees had properly been given a choice and had requested and taken compensatory time off, there would be no basis, under law, to grant any additional compensation. Here, however, the grievants were not given the choice to which they were legally entitled under title 29, since their compensatory time off was erroneously granted under the overtime provisions of title 5. Consequently, 5 C.F.R. § 551.501(a)(7) does not operate to bar the additional differential to the grievants ordered by the Arbitrator.
>
> 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….the appropriate remedy consists of the payment of overtime pay, calculated under title 29, reduced by the value of the compensatory time off.

Therefore, under the FLSA and based on clear and unambiguous FLRA precedent, an employee must receive overtime for any hours worked beyond their tour of duty, unless they are given the choice and expressly **choose** to have that time counted as compensatory time. Because the misclassified employees were denied the choice of whether their uncompensated overtime would be considered overtime or as compensatory time/credit hours, and they were treated as FLSA Exempt employees during the time period that they earned the compensatory time, they are entitled to the half time that they would have accrued had they been given the overtime option.

Therefore, an employee who worked one hour beyond their tour of duty and was compensated with a credit hour (and denied the choice to have this counted as overtime), should receive an additional payment of half their salary for that hour since they would have received the time and a half rate had they been given the choice of counting it as overtime that they were entitled to.

Therefore, all HUD employees that were misclassified are entitled to compensatory time damages, as explained above.

Rounded Hours

The Union agrees that some claims are so de minimis that they cannot result in a reasonable claim but the Agency has cited no law requiring that aggregation of such time cannot be allowed. Further, since the Agency failed to keep accurate time records, the Union should not be punished for the Agency's sins, and therefore any time claimed by employees should be fully credited as a just and reasonable inference.

Religious Compensatory Time and Credit Hours

The Union agrees that RCT is a full hour-for-hour offset for premium pay overtime, as are proven credit hours. We see no need for briefing these matters, wasting the Government's time and money or the Arbitrator's time or efforts, since we do not disagree. The Agency should leave out such things from its Brief.

CONCLUSION

For the foregoing reasons, the Arbitrator should grant judgment in favor of the Union.

Respectfully Submitted,

_____

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I certify that a copy of the foregoing was served as follows:

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BEFORE
SEAN J. ROGERS
ARBITRATOR:

In the Matter of Arbitration Between:
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 222, AFL-CIO,

***Union*,**

and

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

***Agency*.**

AGENCY'S MEMORANDUM IN RESPONSE TO THE UNION'S OPPOSITION TO THE AGENCY'S MOTION IN LIMINE

The United States Department of Housing and Urban Development ("HUD", "Department" or "Agency"), through its counsel, Epstein Becker & Green, P.C., respectfully submits this memorandum in response to the Union's opposition to the Agency's motion in limine regarding damages to avoid potential double recovery of wages and overtime by Union employees.

On a preliminary note, it is unfortunate that the Union has chosen to continue its practice of putting almost as much effort into disparaging the messenger as it puts into debating the message. Contrary to the claims on page 2 of the Union's brief, the Agency's arguments are neither "preposterous" nor lacking "good faith." Indeed, if the Union had restrained its rhetoric, it might have caught its own self-contradictory assertion in the very first paragraph of its brief in which it first asserts that a motion for summary judgment regarding damages is "inappropriate at this time," and then states that the Union's own motion for summary judgment on damages has addressed many of the same issues raised in HUD's motion.

It also is unfortunate that the Union chooses to expend resources quibbling over the name of HUD's motion. *See* Union's Opposition at 1. The issues raised in HUD's motion are the proper subject of a "motion in limine," i.e., "a request for guidance [from] the court regarding an evidentiary question." *Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995). A motion in limine has been defined as "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Gage v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 365 F.Supp.2d 919, 926 (N.D. Ill. 2005) (citing *Luce v. United States*, 469 U.S. 38, 40 n. 105 (1984)). Here, the purpose of HUD's motion is to exclude anticipated prejudicial evidence by narrowing the issues that must be addressed in the upcoming damages hearing. For example, by seeking a ruling that the only proper basis for recovery is half-time and that employees may not recover to the extent that they already received compensatory time-off valued at more than their overtime entitlement (i.e., "half-time"), the Agency seeks to preempt the Union from introducing prejudicial evidence of significantly larger amounts that employees erroneously believe they are due. In addition, HUD's motion will promote judicial economy by reducing the quantity of evidence that the Arbitrator will have to receive and consider.

In any case, whether HUD's motion is called a motion in limine or a motion for summary judgment, it should be granted. The reasons are as follows:

The Union freely admits that the "half-time" or "fluctuating workweek" method of pay is a legal one. Union's Opposition at 3 & 11. Thus, the Office of Personnel Management ("OPM") ***could*** adopt the half-time method as an *a priori* method of payment for salaried federal employees. By the same token, HUD admits that OPM has not in fact adopted the half-time or fluctuating workweek method of pay as an *a priori* method of payment, i.e., a method of pay to

be used in the first instance for nonexempt employees. None of that is in dispute. The only dispute here is whether half-time is the preferred method of ***retroactive*** compensation in so-called "failed exemption" cases, i.e., where a salaried employee was wrongly denied overtime pay because he was treated as exempt but lacked the necessary exempt "duties."

The Union appears to admit that ***most*** "failed-exemption" cases have used the half-time method to calculate back pay. *See* Union's Opposition at 13 ("not every case . . . applied the fluctuating/half-pay method of payment") (underlining in the original).[1] Even HUD does not claim that 100% of courts use the half-time method in failed exemption cases.[2] However, in contrast to the small number of contrary cases adduced by the Union, the fact remains as stated by the court in *Sutton v. Legal Services Corp.*, 11 W.H. Cas.2d 401, 404 (D.C. Sup. 2006): "Virtually every court that has considered the question" has upheld the remedial use of half-time in failed exemption cases, including the Supreme Court. To demonstrate this fact, we provide below a sampling of cases in which compensation using the half-time method was found to be the appropriate remedy for a failed exemption:

- *Overnight Motor Transportation Co. v. Missel* , 316 U.S. 572 (1942) (failed Motor Carrier Act exemption);
- *Valerio v. Putnam Assoc. Inc.*, 173 F.3d 35 (1st Cir. 1999) (failed administrative exemption);
- *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135 (5th Cir. 1988) (failed executive and administrative exemptions);
- *Yadav v. Coleman Oldsmobile*, 538 F.2d 1206 (5th Cir. 1976) (failed executive and administrative exemptions);

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[1] The Union improperly calls the "half-time" method the "half-pay" method (*id.*), perhaps with the intention of prejudicing the Arbitrator. In fact, the half-time method makes the employee whole because he or she was already paid a salary for all hours worked including the overtime hours.

[2] HUD did use the phrase "almost universally" (Motion at 17), which was a correct statement, as shown here.

- *Fegley v. Higgins*, 19 F.3d 1126, 1130 (6th Cir. 1994) (failed independent contractor test);
- *Yellow Transit Freight Lines, Inc. v. Balven*, 320 F.2d 495 (8th Cir. 1963) (failed Motor Carrier Act exemption);
- *Zumerling v. Devine*, 769 F.2d 745 (Fed. Cir. 1985) (failed 7(k) partial exemption);
- *Mitchell v. Abercrombie & Fitch*, 428 F.Supp.2d 725 (S.D. Ohio 2006) (failed executive exemption);
- *Perez v. RadioShack Corporation*, 11 W.H. Cas.2d 163 (N.D. Ill. 2005) (failed executive exemption);
- *Tumulty v. Fedex Ground Package System, Inc.*, 2005 WL 1979104 (W.D. Wash. 2005) (failed unspecified exemption as well as independent contractor test);
- *Saizan v. Delta Concrete Products Co.,* 209 F.Supp.2d 639 (M.D. La. 2002) (failed unspecified exemption);
- Donovan v. Castle Springs, LLC, 2002 WL 31906183 (D. N.H. 2002) (failed executive exemption);
- *Quirk v. Baltimore County, Maryland*, 895 F. Supp. 773 (D. Md. 1995) (failed professional exemption);
- *Donovan v. Maxell Prods.*, 26 W.H. Cas. 485, 488 (M.D. Fla. 1983) (failed executive exemption);
- *Rau v. Darling's Drug Store, Inc.,* 388 F. Supp. 877 (W.D. Pa. 1975) (failed executive and administrative exemptions);
- *Sutton v. Legal Services Corp.*, 11 W.H. Cas.2d 401 (D.C. Sup. 2006) (failed exemption); and
- *Goodrow v. Lane Bryant, Inc.*, 732 N.E.2d 289 (Mass. 2000) (failed executive exemption).

As the Arbitrator can see, these cases come from a wide range of jurisdictions--federal and state, trial and appellate. And this list is not complete; indeed, the Supreme Court acknowledged in its *Overnight* decision that it was merely adopting a remedy that already had been adopted by the courts of appeal for the Fifth, Sixth and Eight Circuits. 316 U.S. at 580.

Given the 64-year existence of Supreme Court precedent on the subject, not to mention the plethora of other cases reaching the same conclusion in the context of all of the white collar exemptions, it is unclear how isolated trial courts could even have the *chutzpah* to differ. In any case, the arguments advanced by the Union which rely on the opinions of those isolated trial courts should be rejected.

On page 4 of its brief, the Union asserts that the half-time method is available only when the fluctuating workweek is planned. Not surprisingly, the Union cites no case for that proposition, since there is no such rule. In any case, such a rule would be irrelevant to this case because this case is not about whether the half-time method may be adopted *a priori*. Again, the only issue is whether half-time is the preferred method of ***retroactive*** compensation in so-called "failed exemption" cases. As just noted, the Union appears to admit that ***most*** "failed-exemption" cases have used the half-time method to calculate back pay. Indeed, the U.S. Supreme Court's 1942 decision in *Overnight, supra*, adopted half-time as the proper means of calculating remedial overtime pay for salaried employees long before there was a Department of Labor ("DOL") rule allowing half-time as an *a priori* method of payment. *Teblum v. Eckerd Corp. of Florida, Inc.*, 11 W.H. Cas.2d 382, 392 & n.15 (M.D. Fla. 2006). Thus, by trying to apply every nuance of 29 C.F.R. §778.114 to this case, the Union is in fact putting the cart before the horse. Put another way, ***HUD has a common law right to pay half-time as a remedial measure, and there is no regulation or applicable binding precedent that says otherwise.***[3]

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[3] It thus is irrelevant also that there is no direct parallel to section 778.114 in the OPM regulations. Use of half-time as a remedial measure is based on the Supreme Court's 1942 interpretation of the FLSA language itself, not on any regulation. *See Valerio, supra* 173 F.3d at 40 (half-time was appropriate remedy under Massachusetts law even though Massachusetts has no half-time regulation because it is implied by the law itself). Nonetheless, it is worth noting that the same calculation of "regular rate" that led the Supreme Court to the result it reached in *Overnight* is found also in OPM's regulation, 5 C.F.R. §551.511(a), which states:

(continued)

Also on page 4 of its brief, the Union asserts that HUD's employees are not salaried "since they would be docked pay if they worked less than 40 hours per week." First, this is an overstatement, since it is far more likely that the employee would be docked ***leave*** (sick, annual or credit hours) rather than ***pay***. Such ***leave*** docking is completely consistent with salaried status. *See, e.g.*, Wage-Hour Opinion Letter dated December 24, 1997 *and see* cases cited below. Moreover, vis-à-vis the rare occasions when ***pay*** docking may theoretically occur, the Union is forgetting the "public accountability" exception to the salary basis test which permits a "public agency" (defined in 29 U.S.C. §203(x) to include "the Government of the United States") to dock employees' salaries for absences for personal reasons. Specifically, 29 C.F.R. §541.710 (formerly 29 C.F.R. §541.5(d)) states:

> An employee of a public agency who otherwise meets the salary basis requirements of [the regulations] shall not be disqualified from exemption under [the white collar exemptions] on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because:
>
> (1) Permission for its use has not been sought or has been sought and denied;
>
> (2) Accrued leave has been exhausted; or
>
> (3) The employee chooses to use leave without pay.

DOL explained when this rule was initially promulgated in 1992:

(continued)

> An employee's "hourly regular rate" is computed by dividing the total remuneration paid to an employee in the workweek by the total number of hours of work in the workweek for which such compensation was paid.

> Public accountability embodies the concept that elected officials and public agencies are held to a higher level of responsibility under the public trust that demands effective and efficient use of public funds in order to serve the public interest. It includes the notion that the use of public funds should always be in the public interest and not for individual or private gain, including the view that public employees should not be paid for time they do not work that is not otherwise guaranteed to them under the pertinent civil service employment agreement (such as personal or sick leave), and the public interest does not tolerate wasteful and abusive excesses such as padded payrolls or "phantom" employees.

57 Fed. Reg. 37,676 (Aug. 19, 1992). More recently, in 2004, DOL reaffirmed this position, stating:

> The Department continues to believe this is a necessary exception to the salary basis requirement for public employees[.]

69 Fed. Reg. 22,191 (April 23, 2004). Thus, the hypothetical and vague deductions complained of by the Union do not affect the salaried status of the particular employees in question whose pay was never docked.[4]

Indeed, later in its brief, the Union corrects its mistake and admits that the employees are salaried. Union's Opposition at 8. ("The employees at HUD understood they are salaried employees…"). And "[t]he Union does not contest that the Agency met the third prong of the test" for the fluctuating work week which requires a "fixed amount" of salary sufficient to satisfy the minimum wage.) *Id.* at 4 n.1.

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[4] HUD acknowledges that, ***for the private sector***, the Department of Labor ("DOL") considers the salary test for the half-time test to be even stricter than the salary basis test for exemption. However, OPM regulations contain no salary basis test at all, specifically because it considers such a test to be incompatible with public accountability. *See* 62 Fed. Reg. 67,238 (December 23, 1997) (citing DOL's public agency exception to the salary basis test). Thus, any such comparison is impossible and irrelevant. Indeed, under the public accountability exception to the no-docking rule, public employers that dock workers' pay do ***not*** convert them to nonexempt status. *See, e.g., Demos v. Indianapolis*, 302 F.3d 698 (7th Cir. 2002). On the same basis, such docking should not prevent public employers from availing themselves of half-time for failed exemption cases. In the worst case, actual docking might make the individual employee who was docked ineligible for half-time damages, but that cannot preclude application of the standard common law remedy to the entire class of federal workers.

The Union makes a related, and also incorrect, argument on page 6 of its brief, where it asserts that the fact that HUD required employees to use personal time or vacation in lieu of absence from work somehow impairs payment on a salary basis. This simply is wrong. The half-time method in no way bars occasional deductions from salary for willful absences or tardiness. *See Samson v. Apollo Resources, Inc.*, 242 F.3d 629, 638 (5th Cir. 2001) *and Cash v. Conn Appliances*, 4 WH Cases 2d 941, 948 (E.D. Tex. 1998) (both citing U.S. Wage and Hour Division Field Operations Handbook §32b04b (allowing "occasional disciplinary deductions for willful absence or tardiness or for the initial and terminal week of employment")); *see also* Wage-Hour Opinion Letter dated November 30, 1983. Indeed, in *Griffin v. Wake*, 142 F.3d 712, 718 (4th Cir. 1998), the court succinctly disposed of a similar claim stating:

> Wake County has voluntarily provided its EMTs with the extra benefit of paid vacation and sick leave. The EMTs now claim that the County violates federal law when it requires its employees to draw down their accrued leave or vacation balances when they exercise this benefit. Unlike deductions from base pay, such deductions from leave simply do not constitute a violation of section 778.114. To countenance the EMTs' claim to the contrary would beg the question how, if at all, any system of earned vacation time is to operate if an employer may not deduct from it when an employees take a vacation.

See also Aiken v. County of Hampton, 977 F. Supp. 390 (D. S.C. 1997) (reductions in leave and holiday pay permitted).

On page 5 of its brief, the Union asserts that the half-time method applies only when there are "wide" fluctuations in the employee's workweek. The Union's belief is mistaken and there is no case that stands for the proposition that the Union asserts. (The Union cites one case where those happened to be the facts. By the Union's logic the half-time method would apply only to males, since the employee in that case happened to be male.) There is not even a requirement that the hours fluctuate both above and below 40 hours per week. *Teblum, supra*, 11

W.H. Cas.2d at 390 & n.12 (fluctuating hours requirement satisfied even though employees were required to work a fixed minimum number of hours per week). *Teblum* cites *Condo v. Sysco Corp.,* 1 F.3d 599, 603 (7th Cir. 1993), which notes that each requirement of 778.114 was satisfied because plaintiff worked fluctuating hours, although he never worked fewer than forty hours per week). *See also Evans v. Lowe's Home Centers, Inc.* 2006 WL 1371073 (M.D. Pa. 2006).

The Union is confusing the so-called Belo Plan (§ 7(f) of the FLSA. 29 U.S.C. §207(f)) fluctuation rules with the half-time rules (§ 7(a) of the FLSA, 29 U.S.C. §207(a)). *See* Wage-Hour Opinion Letter dated October 27, 1967. *See also Vadav v. Coleman Oldsmobile, Inc.*, 538 F.2d 1206 (5th Cir. 1976) (per curiam); *Triple "AAA" Co. v. Wirtz,* 378 F. 2d 884 (10th Cir. 1967); *Griffin v. Wake County, supra*, 142 F.3d at 715 ("section 778.114 does not require an unpredictable schedule") (citing *Flood v. New Hanover County*, 125 F.3d 249, 253 (4th Cir. 1997)). Indeed, half-time is permitted for a fixed schedule of alternating workweeks. *Aiken v. County of Hampton*, 172 F.3d 43 (4th Cir. 1998) *affirming* 977 F. Supp. 390 (D. S.C. 1997). As long as the workweek ever fluctuates above 40 hours in a workweek, the half-time method is applicable. And, inherent in the Union's bringing a "suffered or permitted to work" overtime claim is an admission that employees worked an irregular number of hours that sometimes fluctuated above the 40 hour mark.

On page 7 of its brief, the Union misquotes or misunderstands HUD's argument. HUD never claimed that "there was a 'mutual agreement' that the employees were under the fluctuating work week rule." The law does not even require such an agreement. All that HUD said is that employees understood that they would be paid a fixed salary for all hours worked.

As the court stated in *Griffin v. Wake County, supra*, 142 F.3d at 716, regarding the plaintiffs' claim that "they were not asked to consent to the plan, but rather were told about it"—

> "[T]his argument confuses understanding with agreement, and the regulation speaks only in terms of the former. We are unable to find, and the [plaintiffs] have not identified, any case in which a court has required that employees consent to the fluctuating workweek plan to satisfy section 77.114 – employees need only understand it.

Id. Here, ***the Union admits that "[t]he employees at HUD understood that they were salaried employees. . . ." Union's Opposition at 8*** (emphasis added).[5] Indeed, since the employees were treated as exempt, they necessarily understood that they were receiving a salary for all hours worked. (The Union admits this too. *Id.* ("[T]he Agency did not believe it even owed these exempt employees any compensation worked in excess of 40 . . .").) The employees may not have understood every nuance of HUD's payroll system. However, as the Fourth Circuit has observed, the FLSA does not place the burden on the employer "to hold an employee's hand and specifically tell him or her precisely how the payroll system works." *Griffin v. Wake County, supra*, 142 F.3d at 716 (citing *Monahan v. County of Chesterfield*, 95 F.3d 1263, 1275 (4th Cir. 1996)); *see also Goodrow, supra* 73 N.E. 2d at 298 (Mass. 2000) (citing *Valerio, supra* 173 F.3d at 39-40). Moreover, in *Zoltek v. Safelite Glass Corp.*, 884 F. Supp. 283 (N.D. Ill. 1995), the court held that the employee impliedly agreed to half-time when the employee worked overtime hours for a consistent salary for 2½ years. In *Dooley v Liberty Mut. Ins. Co.*, 307 F. Supp. 2d 234, 250-52 (D. Mass. 2004), the court rejected a "novel" claim--***exactly the claim that the***

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[5] The Union notes that the "locality pay tables for compensation of general schedule employees is stated in both terms of annual salary and basic hourly rates..." Union Opposition at 8. Of course, some GS employees are entitled FLSA overtime and others are entitled to just Title 5 overtime, so some hourly rate equivalent is required. The fact that a salary has been reduced to an hourly equivalent has no impact on whether it is a salary. *Cf.*, 29 C.F.R. §541.604 (b) ("[a]n exempt employee's earning may be computed on an hourly, a daily or shift basis...").

Union is making here--that a clear mutual understanding was impossible when defendants denied plaintiffs were entitled to overtime. Finally, in *Roy v. County of Lexington*, 948 F. Supp. 529 (D. S.C. 1996), the court found the salary arrangement was clear even if the employees were not informed and did not understand how overtime was calculated. Thus, it is completely irrelevant that, as the Union asserts on page 11 of its brief, "HUD has not had its fluctuating workweek 'Plan' approved, has not circulated it to employees and has not had employees agree to it." In addition, this assertion is irrelevant because HUD has no such "Plan," just an intention to pay a salary for all hours worked. Again, the only issue in HUD's motion is whether half-time is the preferred method of ***retroactive*** compensation in so-called "failed exemption" cases.

Beginning on page 13 of its brief, the Union argues that because the hearings in this case are taking place in Washington, D.C., the Arbitrator should follow the opinion of the D.C. federal trial court in *Rainey v. American Forest and Paper Ass'n, Inc.*, 26 F.Supp.2d 82 (D.D.C. 1998). *Rainey* held that the plain language of 29 C.F.R. §778.114 requires that an employee paid under the fluctuating workweek method be paid overtime, while an employee wrongly classified as exempt has not been paid overtime; thus, according to Judge Oberdorfer, half-time cannot be used as a remedial measure of damages.

First, it should not even need to be said that it is only fortuitous that the hearings in this arbitration are taking place in the District of Columbia. They could just as well have been anywhere in the United States where HUD employees are found. Thus, there is no particular reason to give more weight to *Rainey* than to any other judicial decision.

Second, there actually are good reasons to give ***less*** weight to *Rainey* than to other judicial decisions. Not only did the *Rainey* court simply miss the point, the *Rainey* decision has been soundly rejected in both the District of Columbia courts and courts of other jurisdictions.

The *Rainey* court missed the point because no one is suggesting that 29 C.F.R. §778.114 was ***promulgated*** to provide a remedial measure in failed-exemption cases. As noted above, attempting to apply every nuance of section 778.114 to a remedial situation puts the cart before the horse since the Supreme Court's decision adopting half-time as the correct remedial measure in failed-exemption cases was issued long before there was a section 778.114.[6] The reason that the U.S. Supreme Court and the overwhelming majority of appellate and trial courts, as well as the U.S. Department of Labor, have adopted the half-time method for use in failed-exemption cases is because it is required by the language of the FLSA. It also is required by the language of OPM's regulation, 5 C.F.R. §551.511(a) (quoted in footnote 3 above). It also happens to be the fairest way to make a misclassified salaried employee whole, especially considering the fact that the employer and employee both believed that the employee's salary already compensated him in full.

It is not surprising therefore that *Rainey* has been almost universally rejected. For example, just a few months ago, in *Sutton v. Legal Services Corp., supra*, ***a failed-exemption case*** involving a federal government corporation,[7] the court said:

> With respect to calculation of back pay for overtime earned, ***the court concludes as a matter of law that the "fluctuating work week method" is the correct formula. Virtually every court that has considered the question has so held, including the Supreme Court*** in *Overnight Motor Transportation Co.* [*supra*] (interpreting the Fair Labor Standards Act). To the extent that Judge Oberdorfer's decision in *Rainey v. American Forest and Paper Assoc.*, 26 F.Supp.2d 82 (D.D.C. 1998) is not distinguishable, the court declines to follow it.

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[6] *See* footnote 3.

[7] *See* 42 U.S.C. §2996 *et seq.*

11 W.H.Cas.2d at 404 (emphasis added). Similarly, in *Tumulty, supra*, the court summarized Rainey and said: "This Court does not find this reasoning persuasive and declines to follow it." *Id.* at *5. The court explained:

> The First and Fifth Circuits have both held that ***employers who inappropriately misclassified an employee as exempt from the FLSA may rely on §778.114 to determine overtime due*** because the employees understood that they would be paid a fixed weekly salary regardless of the hours worked. *Valerio v. Putnam Assoc. Inc.*, 173 F.3d 35, 39-40 (1st Cir.1999); *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1138 (5th Cir.1988). "The parties must only have reached a 'clear mutual understanding' that while the employee's hours may vary, his or her base salary will not." *Valerio*, 173 F.3d at 40. ***Neither court required that the employee know that he would receive overtime compensation or have actually received it contemporaneously.*** In fact, in *Valerio*, the employee understood that her employer did not intend to pay her overtime. These cases imply that the employee need not have understood that he would receive overtime compensation and need not have been paid such compensation contemporaneously.

Id. at *4 (emphasis added). Accordingly, the *Tumulty* court granted summary judgment to the employer (Fedex) and held that the half-time method should be used to compensate employees to whom Fedex had improperly denied overtime because it did not consider them Fedex employees. *See also Perez, supra,* ***another failed exemption case***, which expressly rejected Rainey as contrary to the majority rule and instead following the rule set forth by the many of the cases listed on pages 3-4 above.

The other decision on which much of the Union's case rests is *Dingwall v. Friedman Fisher Associates, P.C.*, 3 F.Supp.2d 215 (N.D.N.Y. 1998). *See* Union's Opposition at 14. However, that decision does not support the Union's argument. Firstly, the *Dingwall* judge did not reject the half-time method. Rather, he merely found that it did not apply on the facts before him. Second, if the *Dingwall* judge had rejected the half-time method, he simply would have been placing himself in the tiny minority of cases, which the Arbitrator should not follow.

Finally, even on the facts before him, the *Dingwall* judge reached the wrong decision. In particular, the judge interpreted the statement in the employee manual that a workweek would "normally" be 40 weeks to mean that the workweek would never fluctuate. However, the dictionary definition of "normally" says exactly the opposite. *See, e.g., Webster's Third New Int'l Dictionary* 1540 (1981) ("normally" defined as "commonly, usually"). By definition, "normally" contemplates exceptions. Thus, the fact that HUD employees normally, commonly or usually work 40 hours in a workweek does not preclude the possibility of overtime or of a fluctuating workweek, as the mere fact of the Union's grievance proves. Accordingly, nothing in the *Dingwall* case can support an argument that because HUD's employees had a normal 40-hour workweek, they were not paid a salary that was intended to cover all hours worked.

Accordingly, HUD's motion should be granted and any back pay found to be due to any employees who are found to have been improperly treated as exempt should be limited to half-time. In addition, to the extent that such employees already received compensatory time-off or other compensation in excess of half-time, they should take nothing.

Dated: July 12, 2006

Respectfully submitted,

EPSTEIN BECKER & GREEN P.C.

/s/

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Agency's Memorandum in Response to the Union's Opposition to the Agency's Motion In Limine was sent to counsel for the Union on July 12, 2006 by email to mike@sniderlaw.com and carolyn_federoff@hud.gov.

/s/
Daniel B. Abrahams

DC:671758v4

IN THE MATTER OF ARBITRATION BETWEEN:

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

UNION'S SUR-REPLY TO AGENCY'S REPLY TO UNION'S OPPOSITION TO AGENCY'S MOTION IN LIMINE RE: DAMAGES

The Union, by and through its undersigned counsel, hereby submits its sur-reply to Agency's Reply Brief in the instant matter and states in support thereof:

INTRODUCTION

The motion in limine filed by the Agency is premature, as no evidence has been taken or is even available on any "understanding" between HUD and the bargaining unit employees. The issue of whether there was a clear and mutual understanding between the employer and employees regarding what the salary was intended to compensate, at the very least, requires testimony from employees, documentary evidence, i.e. the CBA, and employment contracts, that can be presented at a hearing. Furthermore, the evidence about uncompensated overtime hours will still need to be presented at a hearing on damages, whether the ultimate remedy is 1.5 or .5 times the regular rate. *See* Agency Reply at 2. The same evidence will need to be presented regarding number of hours worked and not properly compensated. Contrary to the Agency's argument, there is no "prejudicial evidence" to strike regarding the number of

uncompensated hours each employee worked, especially if each hour is still being counted, albeit only being remedied at the .5 rate. There is no jury to be prejudiced, either.

I. There is no regulation or proposed version of OPM guidelines that adopts the fluctuating work week rule for retroactive backpay in misclassified exemption cases.

The Agency claims that OPM could 'easily adopt' the fluctuating work week rule (FWW rule) to federal sector general schedule employees, like those in this matter. *See* Agency Reply at 2-3. The guidance is already provided by the DOL regulations. Yet, the current OPM regulations, as well as the most recent proposed version, specifically do not adopt the fluctuating work week rule as the a priori method of payment and does not mention it in any way, shape or form.

While the Agency contends that the FWW method of payment is the preferred method in "failed exemption" cases, there is no supporting authority for this contention. In fact, Monica Gallagher, who was Associate Solicitor for the US Department of Labor, disputes this claim. See Affidavit of Monica Gallagher ("Affidavit"). In fact, the policy of DOL is to seek full back wages to make the grievant whole. That means to pay the grievant as he would have been paid if he was properly classified, ie, time-and-a-half for retroactive unpaid overtime. It is only in a very small minority of cases that the conditions for using the FWW method of compensation are present. *Id*. However, the conditions for the FWW rule have not been met in the case at bar.

II. The Grievants' workweeks did not "fluctuate" as to number of hours they are *required* to work.

One of the conditions for using the FWW rule is that the workweeks of the employees fluctuate with regard to number of hours required to work. *See* Affidavit. The

employees at HUD were all general schedule employees that were required to work 40 hours each workweek in order to receive the fixed salary. Any "suffer and permit" overtime performed by misclassified exempt employees must be compensated at the rate at which the employee would have been paid but for the "failed exemption." In this matter, the employees are owed the straight time and half time portion of the overtime rate for all hours over 40.

III. There was no clear mutual understanding as to what the salary was intended to compensate.

The key issue in this matter is whether the exempt employees and HUD had a "clear mutual understanding" that the salary being paid was meant and intended to compensate those employees for all hours worked each week. The Agency's Motion in Limine must be denied as there is no serious dispute that there was no clear mutual understanding. If there was any understanding, it was that employees were being paid the fixed salary for 40 hours of work, and receiving no compensation for uncompensated hours in excess. The very fact that a fixed salary was paid does not mean it was intended to compensate the employee for all hours worked, especially in the federal government. *See* Affidavit. Employees could receive a plethora of additional compensation for hours over 40, such as credit hours, comp time, Title V overtime, religious comp time, etc. Further their pay would be docked, as a matter of law, for working less than 40 hours without sufficient leave. This is an automatic disqualification from the WFFR.

HUD claims it has a "common law right" to pay under the half-time method and that no regulation or applicable binding precedent holds otherwise. *See* Agency Reply at 5. However, besides that fact that there is no "common law" exception to the FLSA

and the FLRA has never created such a defense to paying full backpay, there is only a common law right to pay under the half-time method if there was a clear mutual understanding between the parties. In other words, you have to meet the requirements of the rule to avail yourself of the payment method. *See* Affidavit. Also, the employees at issue here would be entitled to time-and-a-half under the Back Pay Act even if not under the FLSA.

A. There was no clear mutual understanding that the fixed salary paid compensated the Greivants for the straight time portion of all hours worked.

The *Rainey* Court understood the requirements of the FWW rule when it concluded that the failure to make contemporaneous payment precluded the employer in that case from utilizing the half-time method. *See Rainey v. American Forest and Paper Association*, 26 F.Supp.2d. 82, 101-102 (D.D.C. 1998); *See also Cowan v. Treetop Enterprises*, 163 F.Supp.2d 930, 941-942 (M.D. Tenn. 2001); *Spires, et al., v. Ben Hill County, et al.*, 745 F.Supp. 690 (M.D. Georgia 1990). It was not that failure to pay contemporaneous overtime was a requirement in itself. Rather, it was material evidence that there was **not a clear mutual understanding** that the salary was only intended to pay the straight time portion of all hours worked and that the employees were entitled to the half-time payment for overtime hours. *See* Union's Opposition at 12-13; *See also* Affidavit.

That is the case in this matter. In fact, the Agency paid exempt employees the straight time portion capped at GS 10, step 1 for overtime hours that were ordered and approved. If the Agency already paid those employees the straight time portion as salary for all hours worked, then it would only have paid those employees the half-time

portion owed under the fluctuating work week rule for overtime hours. The fact that the Agency paid the capped overtime rates for ordered and approved overtime proves that the Agency did not have a mutual understanding with employees that the salary was intended to pay all straight time portion for all hours worked each week.

The Agency's citation to the so-called almost universal rejection of *Rainey* is based on a few cases that merely hold that the FWW rule can be applied if the requirements are met.

The Court in *Sutton* specifically only declined to follow *Rainey* to the extent the facts were not distinguishable. *See* Agency Reply at 12. The Court in *Tumulty* only reiterated that the First and Fifth Circuits have held that: "employers who inappropriately misclassified an employee as exempt from the FLSA *may* apply Section 778.114 to determine overtime due **because** the employees understood that they would be paid a fixed weekly salary regardless of hours worked." (Emphasis added). *Tumulty v. Fedex Ground Package System, Inc.*, 2005 WL 1979104 (W.D. Wash. 2005). *See Valerio v. Putnam Assoc., Inc.*, 173 F.3d 35, 39-40 (1st Cir. 1999); *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135, 1138 (5th Cir. 1988). *See also* Agency Reply at 12-13.

The Union itself has agreed with the proposition that the FWW can apply if very specific conditions are met. But the facts of this matter are distinguishable from *Valerio* and *Blackmon* because the general schedule employees at HUD did not understand that they would be paid a fixed weekly salary regardless of hours worked. Put in other words, there was no clear mutual understanding as to what the salary was intended to compensate. The fact that the hours do vary does not prove that there was an understanding that the hours would vary. See Affidavit.

B. **The only clear mutual understanding between the Agency and Grievants was that the salary was intended to compensate for 40 hours of work each week – no more and no less.**

The Union does not mind if the Arbitrator rejects the FWW rule the way the *Dingwall* court did. *See* Agency Reply at 13-14. The Agency misstates the Union's and Court's argument when it contends that the mere fact that HUD employees normally work 40 hours does not preclude possibility of fluctuating workweeks. *Id.* The fact that HUD employees normally work 40 hours is material to prove that the mutual understanding was that the fixed salary compensated employees for 40 hours of work.

The argument made by the Plaintiffs in *Dooley* and rejected by the Court was that the bad faith by the employer precluded a clear mutual understanding because the plaintiffs were induced into believing they were exempt and not entitled to overtime. *See* Agency Reply at 10-11; *See also Dooley v. Liberty Mut. Ins. Co.*, 307 F.Supp.2d 234 (D.Mass. 2004). The Court did not reject the argument asserted by the Union that there was no clear mutual understanding as to the number of hours the salary was intended to compensate. Furthermore, the Court in *Roy* held that: "Lexington County explained to the employees and the employees *understood that they were paid a fixed salary apart from overtime*, even though the regular hours upon which that fixed salary was based actually varied among weeks." (Emphasis added) *See Roy v. County of Lexington*, 948 F.Supp. 529 (D. S.C. 1996). Unlike the employees in *Roy*, the Grievants in this matter did not have a clear mutual understanding that the fixed salary was apart from overtime.

Furthermore, the First Circuit has held that the receipt of "additional compensation" for any hours worked under 40 in any workweek precludes a finding of a

clear mutual understanding "that the employer will pay [a] fixed salary regardless of the number of hours worked." *O'Brien v. Town of Agawam*, 350 F.3d 279, 288-289 (1st Cir. 2003) (holding that no clear mutual understanding exists when employer pays employees "additional compensation" for hours worked "regardless [of] whether their total number of hours worked for the week exceeds forty"). As the First Circuit explained in *Agawam*:

> This case does not fit the §778.114 mold. It is true, as the district court emphasized, that each week the [employees] receive 1/52 of their annual base salary, irrespective of the number of shifts worked that week. But under the [employment agreements], that sum does not constitute all of the straight-time compensation that the [employees] may receive for the week. This is significant because by the plain text of §778.114, it is not enough that the [employees] receive a fixed *minimum* sum each week; rather, to comply with the regulation, the [employer] must pay each [employee] a "fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, *whether few or many*."

Agawam, 350 F.2d at 288 (emphasis in original). In *Agawam*, the employees received "additional compensation" for work performed on nighttime shifts, or for hours worked on otherwise off-duty time or when work hours exceeded eight in one day. *Id.* at 288-289.

A weekly **minimum** sum is not the same as a weekly **fixed** sum. *Agawam*, 350 F.3d at 288 ("by the plain text of §778.114, it is not enough that the officers receive a fixed *minimum* sum each week; rather, to comply with the regulation, the [employer] must pay each [employee a] 'fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, *whether few or many*'") (emphasis in original). Absent an understanding that the employee "will receive such **fixed** amount as straight-time pay for whatever hours he is called upon to work in a workweek, whether few or

many" (*see* 29 C.F.R. § 778.114) (emphasis added), Defendant cannot avail itself of the fluctuating workweek method to calculate the hourly rate of pay of the Grievants, because it cannot prove that the parties reached the "clear mutual understanding" required by 29 C.F.R. §778.114.

C. **Employees are expected to work 40 hours each workweek.**

The Agency makes a very long jump from the Union's admission that the employees are salaried to the conclusion that they understood they were receiving salary for all hours worked. *See* Agency Reply at 10-11. As noted, the CBA states that the basic work week is 40 hours. Additional provisions support the conclusion that the salary was intended to compensate for 40 hours of work per week:

Section 17.04 - Tours of Duty.

(1) **Flexitime**. Full-time employees, excluding those working compressed work schedules, shall be permitted to vary their daily work hours, subject to the following limitations:

(a) The standard workweek shall be Monday through Friday.

(b) Except for employees participating in the credit hour program, ***full-time employees shall account for forty (40) work hours during each workweek, consisting of five (5) eight-hour workdays,*** plus the office's established lunch period each day. The hours worked each day shall be consecutive, except for the lunch period.

Section 25.03 - Overtime Pay in Travel Status.

(1) ***For FLSA exempt employees*** to receive overtime while in a travel status, the assignment must meet both of the following conditions:

(a) ***Hours of work officially ordered and approved in excess of forty (40) hours in an administrative workweek*** or in excess of eight (8) hours in one (1) day; and

(b) The hours of work result from an event that could not be scheduled or controlled administratively.

(Emphasis added). See CBA.

Furthermore, the OPM salary tables are based on a 40 hours work week. This is material evidence that the salary was intended to compensate the employees for 40 hours of work each week. *See* Agency Reply at 10, FN 5. The employees are general schedule employees that considered their regular workweek to be 40 hours, were subject to a CBA that said that their normal workweek was 40 hours, and were told (as federal employees) that they would get credit hours, comp time, Title V overtime and/or religious comp – all as additional compensation (at normal hourly rate) above and beyond their 40 hours.

Once again, the very fact that a fixed salary was paid does not mean it was intended to compensate the employee for all hours worked, especially in the federal government. *See* Affidavit. But that is the key to determining what the employees believed the salary was intended to compensate. See 29 C.F.R. § 778.113(a). That is what the courts in those cases that applied the FWW rule concluded; they determined what the employee and employer agreed to as a regular or basic workweek and applied the fixed salary to the straight time portion for those hours.

Most recently, the United States District Court for Southern District of Texas found:

> Hopkins has met his burden of showing the **fluctuating workweek** method is **not applicable** here. There was no clear mutual understanding that the salary paid to Hopkins was intended to compensate him for all hours he was called upon to work in a workweek, whether few or many. Hopkins testified without contradiction that his supervisor told him, both when he was hired and when he was rehired, that he would be paid a salary based on a 40 hour workweek. Unlike in *Samson,* there is no evidence in this case that Mast Climbers had consciously adopted the fluctuating workweek method in advance, or that anyone from Mast Climbers ever explained the fluctuating workweek policy to Hopkins. The

> employee handbook did indicate that more than 40-hours might be required in a week, but it did not address whether the salary was intended to cover all hours worked, or how the employee would be compensated for overtime hours. There simply is no basis to conclude that Hopkins clearly understood that his salary was to compensate him for all hours worked in any given workweek.
>
> Because the fluctuating workweek standard does not apply, the court calculates Hopkins's damages on the assumption that his salary was based on a 40 hour workweek, and that he has not received any straight time compensation for overtime hours.

See Hopkins v. Texas Mast Climbers, L.L.C., et al., 2005 WL 3435033 (Dec. 14, 2005). The Arbitrator in this matter should do the same. The Union employees agreed to work 40 hours each week and expected to be paid for 40 hours of work. Any extra hours of work were uncompensated.

IV. The Agency cannot avail itself of the FWW rule because the fixed salary is not paid for all hours worked, regardless of number of hours worked.

The Agency further misunderstands the Union's position if it thinks the "leave" argument concerns the salaried status of employees or the fact that employees were required to use approved leave for personal days. See Agency Reply at 7-8. The Union's "leave" argument is that the Agency's leave policy violates the FWW rule because deductions from salaries were allowed, based on numbers of hours worked, if there was no approved leave left for the employee to take. *See* Union's Opposition at 5-6. The relevant Agency policy states:

> **Section 24.16 - Unauthorized Absences**. An employee who fails to report for duty and has not received supervisory approval for leave shall be carried in an absent without leave (AWOL) status for timekeeping purposes and may be subject to disciplinary action.

DOL regulations are very clear that the employer cannot have a policy that deducts from wages based on number of hours worked. The employee must receive his entire fixed

salary regardless of number of hours worked. The HUD employees were subject to a "leave" policy that allowed for deductions to the fixed salary precisely based on number of hours worked.

Furthermore, as DOL notes, the question is not whether deductions were actually made; it is the policy of whether deductions could be made that matters. **If** an employee **could** be paid less than the "agreed upon" salary for working less than 40 hours, the FWW Rule by its own terms does not and cannot apply. It is not whether any particular employee was docked pay for any particular workweek or pay period, but rather whether they could have been, if their leave had been exhausted. ***Since any of the Grievants could have been docked pay*** if they worked under 40 hours per week, without sufficient approved leave, ***the FWW Rule cannot ever apply*** to these general schedule federal employee.

The Agency's reliance on the "public accountability" exception is misplaced given the Union's actual argument. *See* Agency Reply at 6-7. That exception merely allows the Agency to still avail itself of the salary requirement of a particular exemption, i.e. administrative, professional, executive. It does nothing to support the argument that its leave policy does not violate the fluctuating work week rule based on allowance for deductions to the fixed salary. The Union does not argue that these employees are not salaried because the agency deducts from wages if there is no approved leave left. *See* Agency Reply at 7-8. The Union also does not argue that being required to use approved leave for personal days violates the FWW rule. *Id.* The Union's position is that the Agency's burden under the FWW rule to pay the full fixed salary for all hours worked, regardless if less or more than 40, cannot be met with the leave policy in place.

V. The Arbitrator has the authority to grant full time and a half damages under the Back Pay Act

The Union further contends that the Arbitrator can conclude that damages are proper under the Back Pay Act rather than the FLSA, precluding any finding of fluctuating work week rule. There is no alternative pay method under the Back Pay Act for the damages claimed in this matter.

As federal employees, plaintiffs are protected by two statutes requiring compensation for overtime work. Section 7(a)(1) of the FLSA, 29 U.S.C. § 207(a)(1), requires overtime pay "for a workweek longer than forty hours;" and section 5542(a) of the Federal Employees Pay Act (FEPA), 5 U.S.C. § 5542(a), requires overtime pay for work "in excess of 40 hours in an administrative workweek, or ··· in excess of 8 hours in a day." *See Agner v. U.S.,* 8 Cl. Ct. 635, 636*, affirmed, 7*95 F.2d 1017 (Fed. Cir. 1986). Federal employees were covered only by the FEPA until 1974 when the FLSA was extended to them by Pub.L. No. 93-259, 88 Stat. 55 (1974) (codified in various sections of 29 U.S.C.). Under this dual coverage, where there is an inconsistency between the statutes, employees are entitled to the greater benefit. *See* Library of Congress Reg. 2013-18, Section 3; *See also* Comp.Gen. 371 (1974).

VI. Undisputed Facts Favor the Union

The Union prevails due to the following undisputed facts:

1. Bargaining Unit employees ("Grievants") receive a base salary every week.
2. The Grievants receive additional compensation when they work in excess of 40 hours a week, in the form of credit hours, comp time, Title V overtime, religious comp and other forms of compensation.

3. The Grievants receive different amounts of weekly compensation when they work additional hours,

4. All of the additional compensation received by Grievants (credit hours, comp time, Title V overtime, religious comp and other forms of compensation) are, at a minimum, “hour-for-hour,” not “half-time” or “half-pay.”

5. Agency policy (indeed, US Government Policy) is that GS employees who have no leave and work less than 40 hours, or who work less than 40 hours without approved leave, are docked pay.

These undisputed facts clearly make the FWWR not applicable to the Grievants, as a matter of law.

CONCLUSION

For the foregoing reasons, the Arbitrator should grant judgment in favor of the Union.

Respectfully Submitted,

/s/

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Certificate of Service

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

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