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

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

Counsel to the Agency

TABLE OF CONTENTS

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]

---

[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]

---

[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]

---

[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).

---

[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,

EPSTEIN BECKER & GREEN P.C.

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of this 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