

IN THE MATTER OF ARBITRATION BETWEEN:

THE AMERICAN FEDERATION)	
OF GOVERNMENT EMPLOYEES,)	
COUNCIL 222, AFL-CIO,)	
)	ISSUE: FLSA Overtime
UNION,)	
)	
v.)	
)	ARBITRATOR ROGERS
US DEPARTMENT OF HOUSING)	
AND URBAN DEVELOPMENT,)	
)	
AGENCY.)	
_____)	

**UNION’S MOTION TO COMPEL RESPONSES TO § 7114
OR IN THE ALTERNATIVE FOR AN ADVERSE INFERENCE**

The Union on behalf of Grievants moves for an **Order** compelling the Agency to produce and comply with a timely and lawfully propounded Request for Information in the instant case, or in the alternative for an adverse inference, and in support states:

1. On or about September 7, 2006, the Union on behalf of Grievants submitted a Request for Information to the Agency via hand delivery.
2. The Union received the Agency’s response (**Attachment A** hereto) on or about September 18, 2006.
3. The Agency’s response was insufficient and stated its intent to refuse to provide the relevant information in this matter. The Agency did not conduct a proper investigation to even determine if the document requested could be obtained without placing a burden on the Agency. The Union has repeatedly asked the Agency to indicate how many FTE hours it estimates would be required to produce the requested documents. To date, the Agency has not provided a response. The Union has further requested that the Agency produce the

documents in a piece-meal approach as they become available, but the Agency has merely refused to produce most of the requested documents.

4. The instant Grievance raises matters of serious contract violations pursuant to the FLSA, Back Pay Act, FEPA and the Collective Bargaining Agreement between the parties.

5. Specifically, this motion is in response to the Agency's answers to the Union's requests No. 10, 11, 13, 14, 15, 16, 17 and 18 of its Request for information.

The Union also objects to the Agency's responses to requests No. 9 and 12, to the extent that the information that will be provided is insufficient.

6. Request No. 9 states that the Union be provided with:

All documents indicating travel on Saturday or Sunday by GS-360 grades 11-15 during hours corresponding to their normal tour of duty, since June 18, 2000.

7. The Agency responded to the request stating:

Response: HUD objects to this request to the extent it relates to non-bargaining unit members as such information is not necessary for discussion, understanding, and negotiation of subjects within the scope of collective bargaining. HUD further objects that this information is not reasonably available due to the efforts required to make the documents available, including costs and displacement of the agency's workforce. In addition, this information is believed to be in the possession of individual bargaining unit members and thus already available to the Union. Subject to and without waiving those objections, the Agency states that it has, at great cost and expense, assembled certain time and attendance records which contain some of the requested information and which will be provided to the Union.

8. The Agency response is insufficient on several grounds. First, the request is specifically limited to GS-360 grades 11-15, who are all members of the bargaining unit and does not seek any information pertaining to non-bargaining unit employees. Second, HUD's argument with regard to excessive cost and displacement of agency workforce is an improper basis for an objection that the

request is overly burdensome. The documents being requested are integral to the instant litigation as all bargaining unit members are entitled to compensation for weekend travel time during normal tour of duty hours.

9. Pursuant to 29 CFR § 785.39 and other guidelines, travel time during the normal tour of duty hours on weekends is compensable. Furthermore, bargaining unit members are also entitled to compensation for work performed during travel pursuant to 29 CFR § 785.41.
10. The Union further states that to the extent that some Union Grievants maintained all their travel records, the Union should not be precluded from having the records for those bargaining unit members that did not keep any or kept only some of the records being requested by the Union. The Agency is the only party that has an obligation to keep and maintain these records and should be ordered to provide all records in its possession relevant to this request, in addition to certain time and attendance records that the Agency intends to produce. Section 11(c) of the FLSA requires employers to “make, keep and preserve records” of employees and “their wages, hours, and other conditions and practices of employment” in accordance with the regulations. 29 U.S.C.A. § 211(c); 29 C.F.R. § 516.1.
11. Request No. 10 states that the Union be provided with:

All documents indicating travel on Sunday by GS 10 and below during hours corresponding to their normal tour of duty, since June 18, 2000.
12. The Agency responded to the request stating:

Response: HUD objects to this because this information is not reasonably available due to the efforts required to make the documents available, including

costs and displacement of the agency's workforce. In addition, this information is believed to be in the possession of individual bargaining unit members and thus already available to the Union.

13. The Agency response is insufficient on several grounds. HUD's argument with regard to excessive cost and displacement of agency workforce is an improper basis for an objection that the request is overly burdensome. The documents being requested are integral to the instant litigation as all GS-10 and below bargaining unit members are entitled to compensation for weekend travel time during normal tour of duty hours. In fact, this request is even narrower than the previous request as it only asks for travel on Sunday.
14. Pursuant to 29 CFR § 785.39 and other guidelines, travel time during the normal tour of duty hours on weekends is compensable. Furthermore, bargaining unit members are also entitled to compensation for work performed during travel pursuant to 29 CFR § 785.41.
15. The Union further states that to the extent that some Union Grievants maintained all their travel records, the Union should not be precluded from having the records for those bargaining unit members that did not keep any or kept only some of the records being requested by the Union. The Agency is the only party that has an obligation to keep and maintain these records and should be ordered to provide all records in its possession relevant to this request. Section 11(c) of the FLSA requires employers to "make, keep and preserve records" of employees and "their wages, hours, and other conditions and practices of

employment” in accordance with the regulations. 29 U.S.C.A. § 211(c); 29 C.F.R. § 516.1.

16. Request No. 11 states that the Union be provided with:

All documents indicating travel on Sunday by all other bargaining unit employees during hours corresponding to their normal tour of duty, since June 18, 2000.

17. The Agency responded to the request stating:

Response: HUD objects to this because this information is not reasonably available due to the efforts required to make the documents available, including costs and displacement of the agency’s workforce. In addition, this information is believed to be in the possession of individual bargaining unit members and thus already available to the Union.

18. The Agency response is insufficient on several grounds. HUD’s argument with regard to excessive cost and displacement of agency workforce is an improper basis for an objection that the request is overly burdensome. The documents being requested are integral to the litigation of all other bargaining unit employees that are entitled to compensation for weekend travel time during normal tour of duty hours. The request is narrow in scope as it only pertains to travel on Sunday.

19. Pursuant to 29 CFR § 785.39 and other guidelines, travel time during the normal tour of duty hours on weekends is compensable. Furthermore, bargaining unit members are also entitled to compensation for work performed during travel pursuant to 29 CFR § 785.41.

20. The Union further states that to the extent that some Union Grievants maintained all their travel records, the Union should not be precluded from having the records for those bargaining unit members that did not keep any or kept only

some of the records being requested by the Union. The Agency is the only party that has an obligation to keep and maintain these records and should be ordered to provide all records in its possession relevant to this request. Section 11(c) of the FLSA requires employers to “make, keep and preserve records” of employees and “their wages, hours, and other conditions and practices of employment” in accordance with the regulations. 29 U.S.C.A. § 211(c); 29 C.F.R. § 516.1.

21. Request No. 12 states that the Union be provided with:

All documents indicating travel by any GS-360 grades 11-15 on a weekday, prior to the beginning of their normal tour of duty, since June 18, 2000.

22. The Agency responded to the request stating:

Response: HUD objects to this request to the extent it relates to non-bargaining unit members as such information is not necessary for discussion, understanding, and negotiation of subjects within the scope of collective bargaining. HUD further objects that this information is not reasonably available due to the efforts required to make the documents available, including costs and displacement of the agency’s workforce. In addition, this information is believed to be in the possession of individual bargaining unit members and thus already available to the Union. Subject to and without waiving those objections, the Agency states that it has, at great cost and expense, assembled certain time and attendance records which contain some of the requested information and which will be provided to the Union.

23. The Agency response is insufficient on several grounds. First, the request is specifically limited to GS-360 grades 11-15, who are all members of the bargaining unit and does not seek any information pertaining to non-bargaining unit employees. Second, HUD’s argument with regard to excessive cost and displacement of agency workforce is an improper basis for an objection that the request is overly burdensome. The documents being requested are integral to the instant litigation as all bargaining unit members; including GS 360 grades 11-

15, are entitled to compensation for travel time exceeding normal travel time to and from work.

24. Pursuant to 29 CFR § 785.34, § 785.35 and § 785.36, as well as other guidelines, travel time before and after the normal tour of duty on weekdays is compensable during certain circumstances. Furthermore, bargaining unit members are also entitled to compensation for work performed during travel pursuant to 29 CFR § 785.41.
25. The Union further states that to the extent that some Union Grievants maintained all their travel records, the Union should not be precluded from having the records for those bargaining unit members that did not keep any or kept only some of the records being requested by the Union. The Agency is the only party that has an obligation to keep and maintain these records and should be ordered to provide all records in its possession relevant to this request, in addition to the certain time and attendance records that the Agency intends to produce. Section 11(c) of the FLSA requires employers to “make, keep and preserve records” of employees and “their wages, hours, and other conditions and practices of employment” in accordance with the regulations. 29 U.S.C.A. § 211(c); 29 C.F.R. § 516.1.
26. Request No. 13 states that the Union be provided with:

All documents indicating travel by any GS-10 and below on a weekday, prior to the beginning of their normal tour of duty, since June 18, 2000.
27. The Agency responded to the request stating:

Response: HUD objects to this because this information is not reasonably available due to the efforts required to make the documents available, including costs and displacement of the agency's workforce. In addition, this information is believed to be in the possession of individual bargaining unit members and thus already available to the Union.

28. The Agency response is insufficient on several grounds. HUD's argument with regard to excessive cost and displacement of agency workforce is an improper basis for an objection that the request is overly burdensome. The documents being requested are integral to the instant litigation as all GS-10 and below bargaining unit members are entitled to compensation for travel time that exceeds normal travel time to and from work on weekdays.
29. Pursuant to 29 CFR § 785.34, § 785.35 and § 785.36, as well as other guidelines, travel time before and after the normal tour of duty on weekdays is compensable during certain circumstances. Furthermore, bargaining unit members are also entitled to compensation for work performed during travel pursuant to 29 CFR § 785.41.
30. The Union further states that to the extent that some Union Grievants maintained all their travel records, the Union should not be precluded from having the records for those bargaining unit members that did not keep any or kept only some of the records being requested by the Union. The Agency is the only party that has an obligation to keep and maintain these records and should be ordered to provide all records in its possession relevant to this request. Section 11(c) of the FLSA requires employers to "make, keep and preserve records" of employees and "their wages, hours, and other conditions and practices of

employment” in accordance with the regulations. 29 U.S.C.A. § 211(c); 29 C.F.R. § 516.1.

31. Request No. 14 states that the Union be provided with:

All documents indicating travel by all other bargaining unit employees on a weekday, prior to the beginning of their normal tour of duty, since June 18, 2000.

32. The Agency responded to the request stating:

Response: HUD objects to this because this information is not reasonably available due to the efforts required to make the documents available, including costs and displacement of the agency’s workforce. In addition, this information is believed to be in the possession of individual bargaining unit members and thus already available to the Union.

33. The Agency response is insufficient on several grounds. HUD’s argument with regard to excessive cost and displacement of agency workforce is an improper basis for an objection that the request is overly burdensome. The documents being requested are integral to the instant litigation as all bargaining unit members are entitled to compensation for travel time that exceeds normal travel time to and from work on weekdays. The Union needs these documents to calculate damages for purposes of hearings and global settlement discussions.

34. Pursuant to 29 CFR § 785.34, § 785.35 and § 785.36, as well as other guidelines, travel time before and after the normal tour of duty on weekdays is compensable during certain circumstances. Furthermore, bargaining unit members are also entitled to compensation for work performed during travel pursuant to 29 CFR § 785.41.

35. The Union further states that to the extent that some Union Grievants maintained all their travel records, the Union should not be precluded from having the

records for those bargaining unit members that did not keep any or kept only some of the records being requested by the Union. The Agency is the only party that has an obligation to keep and maintain these records and should be ordered to provide all records in its possession relevant to this request. Section 11(c) of the FLSA requires employers to “make, keep and preserve records” of employees and “their wages, hours, and other conditions and practices of employment” in accordance with the regulations. 29 U.S.C.A. § 211(c); 29 C.F.R. § 516.1.

36. Request No. 15 states that the Union be provided with:

HTMS records indicating time of Departure and time of arrival for GS-360 employees on travel since June 18, 2000.

37. The Agency responded to the request stating:

Response: This information is not reasonably available due to the efforts required to make the documents available, including costs and displacement of the agency’s workforce.

38. The Agency response is insufficient on several grounds. HUD’s argument with regard to excessive cost and displacement of agency workforce is an improper basis for an objection that the request is overly burdensome. The documents being requested are integral to the instant litigation as all bargaining unit members, including GS-360 grades 11-15 are entitled to compensation for travel time. The Union needs these documents to calculate damages for purposes of hearings and global settlement discussions.

39. Pursuant to 29 CFR §§ 785.34-785.39, as well as other guidelines, travel time before and after the normal tour of duty is compensable during certain

circumstances. Furthermore, bargaining unit members are also entitled to compensation for work performed during travel pursuant to 29 CFR § 785.41.

40. The Union further states that to the extent that some Union Grievants maintained all their travel records, the Union should not be precluded from having the records for those bargaining unit members that did not keep any or kept only some of the records being requested by the Union. The Agency is the only party that has an obligation to keep and maintain these records and should be ordered to provide all records in its possession relevant to this request. Section 11(c) of the FLSA requires employers to “make, keep and preserve records” of employees and “their wages, hours, and other conditions and practices of employment” in accordance with the regulations. 29 U.S.C.A. § 211(c); 29 C.F.R. § 516.1.

41. Request No. 16 states that the Union be provided with:

HTMS records indicating time of Departure and time of arrival for GS-10 and below employees on travel since June 18, 2000.

42. The Agency responded to the request stating:

Response: This information is not reasonably available due to the efforts required to make the documents available, including costs and displacement of the agency’s workforce.

43. The Agency response is insufficient on several grounds. HUD’s argument with regard to excessive cost and displacement of agency workforce is an improper basis for an objection that the request is overly burdensome. The documents being requested are integral to the instant litigation as all GS-10 and below bargaining unit members are entitled to compensation for travel time. The Union

needs these documents to calculate damages for purposes of hearings and global settlement discussions.

44. Pursuant to 29 CFR §§ 785.34-785.39, as well as other guidelines, travel time before and after the normal tour of duty is compensable during certain circumstances. Furthermore, bargaining unit members are also entitled to compensation for work performed during travel pursuant to 29 CFR § 785.41.
45. The Union further states that to the extent that some Union Grievants maintained all their travel records, the Union should not be precluded from having the records for those bargaining unit members that did not keep any or kept only some of the records being requested by the Union. The Agency is the only party that has an obligation to keep and maintain these records and should be ordered to provide all records in its possession relevant to this request. Section 11(c) of the FLSA requires employers to “make, keep and preserve records” of employees and “their wages, hours, and other conditions and practices of employment” in accordance with the regulations. 29 U.S.C.A. § 211(c); 29 C.F.R. § 516.1.
46. Request No. 17 states that the Union be provided with:

HTMS records indicating time of Departure and time of arrival for all other bargaining unit employees on travel since June 18, 2000.
47. The Agency responded to the request stating:

Response: This information is not reasonably available due to the efforts required to make the documents available, including costs and displacement of the agency’s workforce.

48. The Agency response is insufficient on several grounds. HUD's argument with regard to excessive cost and displacement of agency workforce is an improper basis for an objection that the request is overly burdensome. The documents being requested are integral to the instant litigation as all bargaining unit members are entitled to compensation for travel time. The Union needs these documents to calculate damages for purposes of hearings and global settlement discussions.
49. Pursuant to 29 CFR §§ 785.34-785.39, as well as other guidelines, travel time before and after the normal tour of duty is compensable during certain circumstances. Furthermore, bargaining unit members are also entitled to compensation for work performed during travel pursuant to 29 CFR § 785.41.
50. The Union further states that to the extent that some Union Grievants maintained all their travel records, the Union should not be precluded from having the records for those bargaining unit members that did not keep any or kept only some of the records being requested by the Union. The Agency is the only party that has an obligation to keep and maintain these records and should be ordered to provide all records in its possession relevant to this request. Section 11(c) of the FLSA requires employers to "make, keep and preserve records" of employees and "their wages, hours, and other conditions and practices of employment" in accordance with the regulations. 29 U.S.C.A. § 211(c); 29 C.F.R. § 516.1.
51. Request No. 18 states that the Union be provided with:

All HUD forms 25017 for each bargaining unit employee since May 1, 1998.

52. The Agency responded to the request stating:

Response: This information is not reasonably available due to the efforts required to make the documents available, including costs and displacement of the agency's workforce. In addition, any information relating to work allegedly performed prior to the applicable FLSA statute of limitations is not necessary for discussion, understanding, and negotiation of subjects within the scope of collective bargaining.

53. The Agency response is insufficient on several grounds. HUD's argument with regard to excessive cost and displacement of agency workforce is an improper basis for an objection that the request is overly burdensome. The documents being requested are integral to the instant litigation as all bargaining unit members are entitled to compensation for travel time during weekdays outside the normal tour of duty hours. The Union needs these documents to determine which tour of duty each bargaining unit employee elected when they first started working at the Agency.

54. The Union further states that the documents are not being used for purposes of examining work performed prior to the applicable FLSA time period. The documents indicate which tour of duty each bargaining unit employee elected when first starting to work for the Agency. The documents were instituted in May, 1998. Furthermore, some employees made their elections prior to June, 2000, the relevant time period for the grievance, therefore, the Union needs the documents dating back to 1998 to determine the normal tour of duty hours for employees in June, 2000.

55. For the above stated reasons the Agency should be compelled to provide all

relevant and essential information requested by the Union.

56. This failure on the part of the Agency to provide these materials has created a prejudicial disadvantage for the Union and the Grievants in preparation for the scheduled hearings on damages in these matters.
57. The Agency did not engage in any interactive process with the Union or other entities that possess the relevant documents to determine whether the information could be produced without excessive cost to the Agency. The Agency further never conducted the factor analysis associated with cost-shifting. See Zubulake v. UBS Warsburg, et. al., 217 F.R.D. 309 (S.D. N.Y. 2003); See also Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978).
58. The Agency is precluded from relying on any argument that the documents requested were deleted and therefore not discoverable. See Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 652 (D.Minn.2002) ("[I]t is a well accepted proposition that deleted computer files, whether they be e-mails or otherwise, are discoverable."); See also Simon Property Group L.P. v. mySimon, Inc., 194 F.R.D. 639, 640 (S.D.Ind. 2000).
59. The Union established in these information requests a particularized need for the information, in accordance with the applicable Federal Labor Relations Authority (FLRA) guidelines, including 1. Why it needed the requested information, 2. How it would use the requested information and 3. How the articulated use of the information related to the Statute.
60. The United States Supreme Court has approved the use of the adverse inference rule - that if the information had been provided, it would have been unfavorable to

the Agency and favorable to the opposing party. Id.; See Insurance Corp. of Ireland v. Compayne Des Bauxites, 456 U.S. 694, 705 (1982), Hammond Packing Co. v. Arkansas, 212 U.S. 322, 350-1 (1909).

61. The drawing of an adverse inference is an appropriate remedy for an Agency's failure to produce properly requested and relevant documents, such as that of the Agency here. See, e.g., Internal Revenue Service, Austin District Office, Austin, TX, 96 FLRR 1-1034; 51 FLRA No. 95; 51 FLRA 1166 (April 19, 1996) (documents requested were relevant and necessary and adverse inference granted when Agency refused to provide said documents, citing National Oceanic Atmospheric Administration, National Weather Service, Silver Spring, Maryland, 87 FLRR 1-1613; 30 FLRA 127 (1987)); National Park Service, National Capital Region, U.S. Park Service and PADC, 90 FLRR 1-1643; 38 FLRA No. 86; 38 FLRA 1027 (December 18, 1990) (sanctions for refusal to produce documents requested include striking testimony by refusing party on issue and/or drawing of an adverse inference); Department of Veterans Affairs, Finance Center, Austin, TX and NFFE, Local 1745, 93 FLRR 1-1204; 48 FLRA No. 21; 48 FLRA 247 (August 17, 1993) ("For example, if the union requested data ... the agency ... must either produce the data ... or suffer the inevitable consequences of adverse inferences drawn either as to content or the purpose, or both, of unseen documents."); Department of Justice, Immigration and Naturalization Service, Los Angeles District, Los Angeles, CA and AFGE, Local 505, 94 FLRR 1-4017 (June 16, 1994) (Absent the presentation of such witnesses, I infer that, if called, the testimony of Respondent's supervisors would

have been adverse to Respondent's case.) It is well settled that in such circumstances an adverse inference may be drawn regarding the factual matters at issue. See International Automated Machines, Inc., 285 NLRB 1122 (1987) citing, inter alia, Greg Construction Co., 277 NLRB 1411, 1419 (1985); Hadbar, Division of Pur O Sil, Inc., 211 NLRB 333, 337 (1974); and Marvin F. Hill Jr. and Anthony v. Sinicropi, Evidence In Arbitration, at 102 (The Bureau of National Affairs, 2d ed., 1987). Also see Bureau of Engraving and Printing, 87 FLRR 1-1421; 28 FLRA 796, 802 (1987); United States Department of Justice, Immigration and Naturalization Service and AFGE, Local 2718, 96 FLRR 1-1014; 51 FLRA No. 75; 51 FLRA 914 (February 29, 1996); Small Business Administration and AFGE, Local 3588, 99 FLRR 1-4002 (December 8, 1998) (adverse inference drawn from Agency failure to produce evidence on issue, citing United States Department of Justice, Immigration and Naturalization Service, 51 FLRA 914, 925 (1996)).

62. If this information had been provided, **it would have shown** that the information was extremely damaging to the Agency's position that that the bargaining unit employees are not entitled to any underpaid and/or unpaid compensation since June 2000.
63. Therefore, the Arbitrator should order the Agency to expeditiously produce all of the requested information, no later than Friday, September 29, 2006.
64. In the alternative, the Arbitrator should draw an inference, from the Agency's failure to provide the requested information, that the information would have been

extremely adverse to the Agency's position and supportive of the Union's position, and bar any evidence on the part of the Agency on these issues.

WHEREFORE, in light of the above information and facts, the Union respectfully requests that this honorable Arbitrator ORDER the Agency to produce the requested information and documents in an expedited manner.

WHEREFORE, the Union respectfully requests, in the alternative and for good cause shown, that the Arbitrator take an adverse inference from the Agency's unjustified refusal to provide the above information, and any other relief deemed proper and equitable, including reasonable attorney's fees for this action, costs and expenses.

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 and method indicated below.

SENT BY E-MAIL:

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October 5, 2006
Date

/s/
Michael J. Snider, Esq.