IN THE MATTER OF ARBITRATION BETWEEN:

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

Union's Renewed Motion for Partial Summary Judgment
Relating to Liability for Certain GS-11, 12, 13 and 14 Positions and
Union's Motion for Summary Judgment on Certain Damages for all GS-10's and Below
and for Certain GS-11, 12, 13 and 14 Positions

The Union, by and through its attorneys, Michael J. Snider, Esq., Ari Taragin, Esq., Jeffery Taylor, Esq., Jason Weisbrot, Esq. and Jacob Schnur, Esq. and Council President, Carolyn Federoff, Esq., request that the Arbitrator grant its **Motion for Partial Summary Judgment relating to Liability for Certain GS-11, 12, 13 and 14 Positions** as a matter of law. The Union further moves for **Summary Judgment** on the issue of certain categories of damages for all GS-10 and below employees and for Certain GS-11, 12, 13 and 14 Positions.

Applicable Law

Summary Judgment motions are both allowed and used in arbitrations.

See, e.g., ***AFGE, Local 1760 and Department of Health and Human Services, Social Security Administration, Office of Hearings and Appeals, Region II,*** 36

FLRA 212 (June 28, 1990); ***Elkouri & Elkouri: How Arbitration Works,*** 6th Ed., ABA, BNA (2003).

More importantly, Arbitrators have uniformly utilized the Federal Court's summary judgment standard when reviewing such motions during arbitration proceedings. See generally ***SSA vs. AFGE, Local 1336***, Document No. ARBIHS09312, KC-99-R-0006, LAIRS 22362 (01 Jul 1999)(arbitrator determined that a motion for summary judgment may be granted where there is no dispute regarding the material facts, or if only a question of law is involved); ***SSA vs. AFGE, Council 220***, Document No. ARBIHS08711 (27 Nov 1996)(arbitrator granted motion for summary judgment where the only issue was an interpretation of the Work Schedules Act). Additionally, the Federal Labor Relations Authority has upheld an arbitrator's discretion to entertain motions for summary judgment. ***See AFGE, Natl. Council SSA Fld. Operations Council vs. SSA***, 54 FLRA NO. 88, 0-AR-2912 (1998).

The availability of summary judgment helps a factfinder " 'to secure the just, speedy, and inexpensive determination of every action.' " ***Celotex Corp. v. Catrett****,* 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 1). Summary judgment is appropriate where there is no dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56 of the Rules of the United States Court of Federal Claims (RCFC); ***Anderson v. Liberty Lobby, Inc****.,* 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is material if it would affect the outcome of the suit. ***Anderson****,* 477 U.S. at 248, 106 S.Ct. 2505. The moving party bears the burden of showing that there is an absence of any genuine issue of material

fact. ***Dairyland Power Coop. v. United States***, 16 F.3d 1197, 1202 (Fed.Cir.1994) (citing ***Celotex***, 477 U.S. at 325, 106 S.Ct. 2548).All doubt over factual issues must be resolved in favor of the party opposing summary judgment. ***Mingus Constructors, Inc. v. United States***, 812 F.2d 1387, 1390 (Fed.Cir.1987).

The non-moving party, however, has the burden of producing sufficient **evidence** that there is a genuine issue of material fact in dispute which would allow a reasonable finder of fact to rule in its favor. ***Anderson,*** 477 U.S. at 256, 106 S.Ct. 2505. Such evidence need not be admissible at trial; nevertheless, mere denials, conclusory statements or evidence that is merely colorable or not significantly probative is not sufficient to preclude summary judgment. ***Celotex,*** 477 U.S. at 324, 106 S.Ct. 2548; ***Anderson,*** 477 U.S. at 249-50, 106 S.Ct. 2505; ***Mingus,*** 812 F.2d at 1390-91; *see also* ***Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.,*** 731 F.2d 831, 835-36 (Fed.Cir.1984) (in making a determination as to whether genuine issues of material fact exist, the court is not to accept a party's bare assertion that a fact is in dispute).

"The party opposing the motion must point to an **evidentiary conflict** created on the record by at least a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant." ***Barmag,*** 731 F.2d at 836**.** Summary judgment must be granted against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case and for which that party bears the burden of proof at trial. ***Celotex,*** 477 U.S. at 322, 106 S.Ct. 2548.

Evidence in Support of Motion for Partial Summary Judgment Regarding Liability for Certain GS-11, 12, 13 and 14 Positions

In this case, the Agency has carried out a "HUD FLSA Evaluation" in which it has had classification experts evaluate each HUD employee PD and make a decision as to whether HUD now considers the position, and all incumbent employees in the position, to be FLSA exempt or FLSA non-exempt.

HUD has provided the Union with dozens of PDs which indicate that, in HUD's view, the positions and incumbents in those positions are now FLSA non-exempt. By and large[1], the Agency has ceded all GS-11 positions in the Agency and a fair number of GS-12 and GS-13 positions. The Agency's self-classification of these positions, and of the incumbents in those positions, is an ***admission*** by the Agency that it has found the positions and incumbents to be FLSA non-exempt. Ergo, there are no factual disputes over this matter and the Union is entitled to judgment on liability for these positions/employees as a matter of law.

The ceded positions are as follows (copies of each PD and HUD FLSA Evaluation are attached on CD ROM to the hard copies of this **Motion**):

PD Ref #	Position Title	Series	Grade	PD Number	Exemption
1	Social science analyst	101	11		non-exempt
10	Economist	110	11	AS2739.01	non-exempt
11	Economist	110	11	AS2658.01	non-exempt
12	Field economist	110	11		non-exempt
13	Research economist	110	11		non-exempt
35	Administrative staff specialist	301	11		non-exempt
539	Administrative support assistant	301	11	AS2457	non-exempt

[1] The only, and a notable, exception is the GS-904 (Law Clerk) position, which the parties are about to litigate.

36	Correspondence analyst	301	11	AS2204.02	non-exempt
757	Correspondence analyst	301	11		non-exempt
537	Correspondence management specialist	301	11		non-exempt
585	CPD representative	301	11	BO5823	non-exempt
586	CPD representative	301	11	HD0041	non-exempt
588	CPD representative	301	11	FD0002	non-exempt
587	CPD specialist	301	11		non-exempt
582	Data systems coordinator	301	11		non-exempt
37	Education and outreach specialist	301	11		non-exempt
409	Freedom of information specialist	301	11		non-exempt
38	Freedom of information specialist	301	11		non-exempt
39	Freedom of information specialist	301	11		non-exempt
40	Freedom of information specialist	301	11		non-exempt
41	Freedom of information specialist	301	11		non-exempt
755	Management information specialist	301	11	BO0015	non-exempt
42	Office administrator	301	11		non-exempt
589	Office administrator	301	11	HD0044	non-exempt
759	Office administrator	301	11	WO5521	non-exempt
43	Presidential management intern (PMI)	301	11		non-exempt
44	Program coordinator	301	11		non-exempt
538	Program evaluation specialist	301	11	WO5525	non-exempt
606	Program evaluation specialist	301	11	WO5524	non-exempt
561	Program support specialist	301	11	AS2747	non-exempt
758	Program support specialist	301	11	000434	non-exempt
756	Quality assurance specialist	301	11		non-exempt
45	Staff assistant	301	11		non-exempt
492	Correspondence assistant	303	11		non-exempt
491	Training services technician	303	11	AS0679.01	non-exempt
685	Staff assistant	303	11		non-exempt
101	Management analyst	343	11		non-exempt
459	Management analyst	343	11	WO4825	non-exempt
460	Management analyst	343	11	WO5531	non-exempt
461	Management analyst	343	11	MN2993.01	non-exempt
462	Management analyst	343	11	WO4826	non-exempt
463	Management analyst	343	11	HN0002	non-exempt
464	Management analyst	343	11	WO3950	non-exempt
766	Management analyst	343	11	WO5429	non-exempt
102	Operations analyst (listed as "program analyst" on copy 2)	343	11	WO5103	non-exempt
103	Program analyst	343	11	GR0286.01	non-exempt
104	Program analyst	343	11	MM8251	non-exempt
458	Program analyst	343	11	WO4831	non-exempt
786	Program analyst	343	11	BUS0015	non-exempt
787	Program analyst	343	11	AS2913.01	non-exempt
788	Program analyst	343	11		non-exempt
171	Equal opportunity specialist	360	11		non-exempt
172	Equal opportunity specialist (civil rights analyst)	360	11	000269	non-exempt

484	Telecommunications specialist	391	11	MN2846	non-exempt
698	Financial operations analyst	501	11		non-exempt
729	Accountant	510	11		non-exempt
521	Budget analyst	560	11	AS2571	non-exempt
224	Construction analyst	828	11	D15312	non-exempt
699	Paralegal specialist	950	11		non-exempt
703	Paralegal specialist	950	11		non-exempt
704	Paralegal specialist	950	11		non-exempt
705	Paralegal specialist	950	11		non-exempt
706	Paralegal specialist	950	11	AS2858	non-exempt
707	Paralegal specialist	950	11	MN1006.01	non-exempt
505	Audio visual broadcasting engineering specialist	1071	11	WO5529	non-exempt
832	Affordable housing specialist	1101	11		non-exempt
835	Building operation specialist	1101	11	AS2768	non-exempt
309	Consumer protection compliance specialist (RESPA)	1101	11		non-exempt
820	Contract oversight specialist	1101	11	WO3646	non-exempt
310	Enforcement analyst	1101	11	D16421	non-exempt
311	Enforcement analyst	1101	11	MN2074	non-exempt
312	Grants evaluation specialist	1101	11	JO7119	non-exempt
313	Grants management specialist	1101	11		non-exempt
819	Housing program specialist	1101	11		non-exempt
314	Marketing and outreach specialist	1101	11	RE1946	non-exempt
796	Mortgage-backed securities specialist	1101	11		non-exempt
315	Operations analyst	1101	11		non-exempt
316	Public housing revitalization specialist	1101	11	D16321	non-exempt
819	Public housing revitalization specialist (facilities management)	1101	11		non-exempt
317	Public housing revitalization specialist (FM)	1101	11		non-exempt
318	Public housing revitalization specialist (generalist)	1101	11	OO00006	non-exempt
818	Public housing revitalization specialist (generalist)	1101	11		non-exempt
821	Real estate asset analyst	1101	11	AS2860.01	non-exempt
797	Transactions management technician	1101	11	WO5087	non-exempt
391	Financial analyst	1160	11	D16348	non-exempt
466	Photographer	1160	11		non-exempt
688	Realty Specialist	1170	11		non-exempt
686	Housing management specialist - trainee	1173	11		non-exempt
514	Training services technician	1702	11	AS2455	non-exempt
510	Inventory management specialist	2010	11	WO4955	non-exempt
173	Equal opportunity specialist	360	12		non-exempt
225	Construction analyst	828	12		non-exempt
320	Asset manager	1101	12		non-exempt
326	Enforcement analyst	1101	12	D16205	non-exempt
328	Grants evaluation specialist	1101	12		non-exempt
416	Public housing revitalization specialist	1101	12	000008	non-exempt

	(FM)				
335	Public housing revitalization specialist (generalist)	1101	12		non-exempt
393	Financial analyst	1160	12		non-exempt
175	Equal opportunity specialist	360	13		non-exempt
351	Enforcement analyst	1101	13	D16044	non-exempt
417	Grants evaluation specialist	1101	13		non-exempt
357	Lead grants evaluation specialist	1101	13		non-exempt
358	Lead grants management specialist	1101	13		non-exempt
365	Public housing revitalization specialist (FM)	1101	13		non-exempt
366	Public housing revitalization specialist (generalist)	1101	13		non-exempt
369	Senior asset manager	1101	13	000197	non-exempt
396	Financial analyst	1160	13	D16297	non-exempt
398	Senior financial analyst	1160	13		non-exempt
419	Program analyst	343	14	RE1451.01	non-exempt

Evidence in Support of Motion for Summary Judgment Regarding Certain Damages for All GS-10 and Below Positions and for Certain GS-11, 12, 13 and 14 Positions

On September 28, 2005, the Parties entered into a Partial Settlement Agreement (**GS-10 and Below PSA**). The coverage of the Agreement was limited as follows:

> This Agreement addresses only the FLSA classification of employees at the GS-10 and below level. It does not address damages for those or any other employees; it does not address the FLSA classification issues concerning any bargaining unit employees, other than those specifically and explicitly referenced.

In the **GS-10 and Below PSA**, the Agency agreed, for those employees in positions the Agency wished to exempt from the FLSA at the GS-10 and below levels, to take the following steps by October 21, 2005:

1. Identify each employee, including name, job title, job series, grade, step, geographic location, and contact information.

2. For each identified employee, provide the position description and all available predecessor position descriptions since June 18, 2000, the specific exemption relied upon to exempt the employee, all information relied upon to exempt the employee and a detailed explanation as to how the employee is properly exempt, in the Agency's view, including any FLSA review and/or

> worksheet(s), the name of the individual(s) who made the determination to exempt each FLSA exempt employee and the date the decision was made.

The Parties further agreed that, if the Agency did not identify an employee as described in paragraph 1 and provide the information described in paragraph 2 for an employee/position, that employee/position would be reclassified to FLSA non-exempt status effective the beginning of the first full pay period after October 21, 2005.

The Parties mutually agreed to the following definition of "affected bargaining unit employees:"

> "any listed employee in the Agency's Payroll Reports covering the period of June 18, 2000 through October 1, 2005 at the GS-10 level and below."

Regarding damages, the parties agreed" that the issue of damages (including retroactive date of reclassification) and attorney fees has not yet been resolved, and will be addressed by the parties separately."[2]

Damages for 10's and Below, and For Ceded GS-11, 12, 13 and 14 Positions/Employees

The Union seeks make whole relief, required by law, for all GS-10 and below employees who the Agency agreed to reclassify, and for all incumbents (between June 2000 and present) in the above-listed positions at the GS-11, 12, 13 and 14 levels, which the Agency has ceded as FLSA non-exempt.

[2] The Agency agreed to bear the cost of the Arbitrator for the mediation session held on September 28, 2005, but it is not clear if the Agency has yet paid the Arbitrator.

The Agency, by ceding GS-10's and below, has admitted that it wrongfully misclassified those employees and now the employees are entitled to retroactive remedies.

Similarly, the Agency, by ceding the above-listed positions at the GS-11, 12, 13 and 14 levels, has admitted that it wrongfully misclassified those employees and now those employees are entitled to retroactive remedies.

The Union will not move for Summary Judgment at this time over the issue of willfulness, but does move for liability for the following categories of damages:

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

29 U.S.C. § 216(b) states, in relevant part:

> Any employer who violates the provisions of section 206 and section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

The types of compensation described below are those classic remedies provided by the FLRA and courts for wrongfully classified employees, and are warranted as a matter of law. There is no factual dispute that could alter the entitlement of the relevant employees to these damages.

Differences Between Overtime Pay for Exempt and Non-Exempt Employees

Overtime for general schedule (GS) federal government employees is recoverable under either Title 5 of the United States code (Title 5 overtime) [for FLSA Exempt employees] or under the Fair Labor Standards Act (FLSA overtime)[for FLSA Non-exempt employees].

Each provision has certain advantages and provides an overtime hourly rate of one and one-half (150%) of the employee's basic hourly rate, with exceptions as explained herein. Federal employees are generally entitled to receive overtime pay at the rate of one and a half times their regular hourly rate under the Federal Employees Pay Act (FEPA or Title 5). 5 U.S.C. §§5501-5541 et seq.

However, overtime under Title 5 has three principle disadvantages.

First, overtime pay under Title 5 is capped at the employee's hourly rate. Prior to January 2004, Title 5 overtime pay was capped at the GS-10, step 1 overtime rate.[3] 5 U.S.C. §5542(a)(2). The result of the "cap" is that persons at or over GS-10, step 1 are paid at an overtime hourly rate which is the same as their basic hourly pay rate. In other words, overtime is paid the same as straight time. Prior to January 2004, employees at the GS-12 and above levels would earn less money per hour for overtime work than they would for straight time work.

[3] A copy of the current General Schedule pay scale is usually published as a note to 5 U.S.C. §5332 in the United States Code and can be found at www.opm.gov.

Second, 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 election, to compensatory time.

The third major disadvantage is that Title 5 overtime must be approved in advance, while FLSA Overtime must be paid even if it was "suffered or permitted."

Misclassified Employees Are Entitled to Damages for Underpaid ("capped") Overtime

When an Agency is found to have misclassified an employee as FLSA exempt, the classic remedy is to make the employee whole. In other words, "but for" the Agency's misclassification, any overtime the employee worked "would have" been worked at the true time-and-a-half rate, as opposed to the "capped" rate. Make whole relief, as a matter of law, is to pay each employee the difference between the capped rate and their true overtime rate for each hour of overtime they worked while wrongfully exempt.

Misclassified Employees Are Entitled to Damages for Compensatory time

Similarly, an Agency found to have misclassified an employee as FLSA exempt must, to make the employee whole, pay the employee, for each hour of compensatory time earned during the relevant time period, their overtime rate offset by the amount of their straight time / hourly rate (ie, the amount of compensation they received as comp time). ***U.S. Department of the Navy, Naval Sea Systems Command and IFPTE,*** 57 FLRA 543 (September 28, 2001)(**"NSSC"**).

The Authority explained in **NSSC** :

> 5 U.S.C. § 5543 differentiates among employees at various grade levels. For an employee whose rate of basic pay is below the maximum rate of basic pay for GS-10, the head of an agency may "on request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment under section 5542 or section 7 of the [FLSA]." 5 U.S.C. § 5543(a)(1). In contrast, for an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10, such as GS-12 employees, the head of an agency can require that the employee "shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work under section 5542 of this title." 5 U.S.C. § 5543(a)(2). The decision whether to award compensatory time in lieu of overtime pay for employees covered under § 5543(a)(2) is solely within the discretion of an agency. *See John Doe, et al. v. United States,* 47 Fed. Cl. 594, 594-95 (2000) ("The choice to award compensatory time rests entirely with the [a]gency for employees exceeding the maximum rate for GS-10." (footnote omitted)).
>
> The regulation governing compensatory time off for employee's covered by the FLSA (5 C.F.R. § 551.531(a)) is significantly different in that employees may elect compensatory time. In promulgating 5 C.P.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."
> …
> We further note that, in an analogous situation, the Comptroller General found that an employee who was entitled to overtime pay under the FLSA, but was erroneously granted compensatory time off under title 5 instead, was entitled to an additional amount of overtime compensation under the FLSA. *See Matter of Marion D. Murray,* 59 Comp. Gen. 246 (1980) (*Murray*). There, as here, the amount of overtime compensation was to be offset by the value of the compensatory time off. Although the facts in *Murray* and the facts in this case differ in certain respects, both cases involve employees who were or should have been classified as non-exempt from the overtime provisions of the FLSA and they both involve situations in which compensatory time off under title 5 was granted in error. In each case, the appropriate remedy consists of the payment of overtime pay, calculated under title 29, reduced by the value of the compensatory time off.

And in **Note 14** of **NSSC**, the Authority noted that:

> We are aware that, under 5 C.F.R. § 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.

Therefore, all HUD employees that were misclassified are entitled to comp time damages, as explained above, as a matter of law.

Misclassified Employees Are Entitled to Damages for Suffered or Permitted Overtime

There are two kinds of claims involved in this arbitration, “straight” and “suffer or permit” overtime. Straight overtime involves work performed by an employee in excess of 40 hours per week, which can be found in the Agency’s records, and, for which the employee did not receive appropriate compensation. In contrast, “suffer or permit” overtime is by its nature unrecorded and consists of work performed for the benefit of the Agency, and about which the agency knows or has reason to believe that the work is being performed. Examples of such claims in the instant arbitration include allegations of working through lunch or before or after regularly scheduled hours.

It is the employee’s burden – through the Union – to establish that he/she has “performed work” for which appropriate compensation was not provided and to “produce

sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680, 687-688 (1946). This can be accomplished through testimony or documents.

Recovery is not precluded simply because an employee is unable to prove hours worked with exactness or precision. *E.g., Mt. Clemens, supra*; *Reich v. Southern New England Telecommunications Corp*., 121 F. 3d 58,67 (2d Cir. 1997). Once the employee or union has satisfied this burden of proof, the burden shifts to the employer to provide evidence of the "precise amount of work performed" or evidence to "negative the reasonableness of the inference to be drawn from the employee's evidence." *Mt. Clemens* at 689. To the extent that the employer fails to meet its burden, the fact-finder can "award damages to the employee, even though the result be only approximate." *Mt. Clemens* at 689 (citation omitted).

Since the Agency has ceded all GS-10's and below and now (we urge the Arbitrator to find) has also ceded certain GS-11, 12, 13 and 14 positions/employees, it must, to 'make whole' the affected employees, compensate those employees with payment for all time suffered or permitted. While the Union understands that it bears the burden of proving the existence, extent and amount of the damages to a reasonable and justifiable inference, it now seeks a declaratory judgment that the Agency is liable for "suffered or permitted" overtime and that the damages hearing will proceed only on that evidence required to show the extent of the claims themselves.

Misclassified Employees Are Entitled to Liquidated Damages

Under 29 USC Section 216 of the FLSA, an employer is liable for both past due overtime and "an additional equal amount as liquidated damages." Liquidated damages are provided "for losses [employees] might suffer by reason of not receiving their lawful wage at the time it was due" (*Martin v. Cooper Elec. Supply Co.,* 940 F.2d 896, 907 (3d Cir. 1991) and "constitute [] compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages." (*Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697, 707 (1945)). Federal employees are entitled to liquidated damages (*See* 29 USC Section 204(f)) and Arbitrators have the authority to award such damages (*E.g., U.S. Department of Health and Human Services, Social Security Administration, Baltimore Maryland and American Federation of Government Employees,* 49 FLRA 483, 489-90 (March 10, 1994)).

While discretionary, there is a strong presumption in favor of doubling, a presumption which can be overcome only by the "employer's good faith . . . and reasonable grounds for believing that [the] act or omission was not a violation." 29 USC Section 260. 16 The employer bears this burden of proving "good faith" under Section 260, a burden which "is a difficult one to meet", with double damages "the norm, single damages the exception . . . ." *Walton v. United Consumers Club, Inc*., 786 F.2d 303, 310 (7th Cir. 1986).

Correspondingly, to establish "good faith", the employer must provide "plain and substantial evidence of at least an honest intention to ascertain what the Act requires

and to comply with it." *Brock v. Wilamowsky*, 833 F. 2d 11, 19 (2d Cir. 1987). As noted by another court, good faith "requires more than mere ignorance of the prevailing law or uncertainty about its development. It requires that an employer first take active steps to ascertain the dictates of the FLSA and then move to comply with them." (citations omitted). *Reich v. Southern New England Telecommunications Corp.,* 121 F. 3d 58, 71 (2d Cir. 1997). Thus, even evidence that an employer "did not purposefully violate the provisions of the FLSA is not sufficient to establish that . . . [the employer] acted in good faith." *Reich* at 71 (citations omitted).

The Union here also claims that it is entitled to the greater of interest or liquidated damages. In making that argument, it recognizes that there is no entitlement to both interest and liquidated damages, which would amount to an unlawful double recovery. *E.g., Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697, 707 (1945).

Here, the Agency has not and cannot, as a matter of law, establish good faith. Therefore all affected employees are entitled to the higher of either liquidated damages, or interest.

Further Argument Regarding Liability on Positions Ceded Through HUD's FLSA Review

The Agency has Ceded All Listed GS-11, 12, 13 and 14 Positions/Employees Listed as Non-Exempt.

FLSA exemptions are an affirmative defense that must be pleaded and proved by the defendant. ***Fife v. Harmon*** , 171 F.3d 1038 (5th Cir. 1999); ***Jones v. Giles***, 741 F.2d

245, 248-49 (9th Cir. 1983). Here, the Agency has agreed with the Union that the positions listed above, and all incumbents in those positions, are and have been FLSA exempt for the duration of the applicable time frame (June 2000 to present). That is clear and undisputable. Why do we need an ORDER from the Arbitrator?

Since the Agency has ceded those positions, however, ***no action*** has been taken to actually reclassify any employee as FLSA Non-exempt other than GS-10's and below[4]. Since the Agency has not acted, the Union is entitled to Judgment on liability for these positions, absent a signed settlement agreement.

While the Arbitrator has previously described the Agency's post-Grievance efforts at justifying its FLSA Exemptions as most likely "prepared in expectation of litigation and lack material and probative value," it is indisputable that the Agency's own FLSA Review and determination, when **HUD itself** concludes a position is FLSA ***non-exempt***, is a binding admission upon HUD.

Conclusion

Undisputably, the Agency has ceded all GS-10's and below, and has now admitted, in writing, that certain GS-11, 12, 13 and 14 positions (and the employees who encurmbered them from June 2000 to present) are, and have been, non-exempt. The Agency has not yet reclassified these GS-11/12/13/14 employees and therefore the Union moves for Summary Judgment on liability for those positions.

[4] The Union has submitted a 7114 RFI in an attempt to evaluate the Agency's compliance with the **GS-10 and below PSA.** If and when it receives information from the Agency, the Union will then evaluate the Agency's compliance and, depending on the results, return to the Arbitrator for compliance.

Certain damages are required as a matter of law for these positions, including undercompensated ("capped") overtime damages, compensatory time damages, suffered or permitted damages and liquidated damages. We ask for an Order awarding these as a matter of law, since the facts are undisputed.

Respectfully Submitted,

___/s/_____
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Attorney for the Union

___/s/_____
Carolyn Federoff
President, AFGE Council 222

Certificate of Service

I certify that a copy of the foregoing was served upon the Agency and Arbitrator via email and via first class mail with CD ROM attachment.

Date: February 27, 2006

___/s/_____
Michael J. Snider, Esq.