IN THE MATTER OF ARBITRATION BETWEEN

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

Request for Information Pursuant to 5 USC 7114(b)

The Union requests the following information to be provided within thirty (30) calendar days. The information should be provided in unredacted form, if possible, and sanitized if necessary. The information should be provided in the form in which it is kept, ie, electronically if kept electronically, paper if kept in paper format. The descriptions below are meant to be construed liberally but if there is any ambiguity, please contact Union Counsel as soon as possible and prior to responding.

1. Report titled "The State of Fair Housing: FY 2005 Annual Report on Fair Housing," and for FY 2000 through FY 2004. (See attached sample cover.)

2. Regional Directors Monthly Performance Reports for May 2000, 2001, 2002, 2003, 2004, 2005, and 2006. (We understand this is a monthly report. If May is not available, please substitute another month within the fiscal year.) (See attached sample cover.)

3. If Request No. 1 is not provided, please provide a Full Time Employee (FTE) list for each year since 2000 through present for FHEO on or about January 1st of each year.

4. List of the number of FTEs for each cylinder since 2000 until current, on or about January 1 of each year.

5. All travel data requested in connection with the Travel Grievance filed in June 2000 that is not specifically covered elsewhere in this RFI.

6. Daily vehicle utilization reports for each car used by any GS-360 grades 11-15, since June 18, 2000 (see attached Form HUD 21016).

7. All Daily Vehicle utilization reports for each car used by any GS-10 and below, since June 18, 2000 (see attached Form HUD 21016).

8. All Daily Vehicle utilization reports for each car used by all other bargaining unit employees, since June 18, 2000 (see attached Form HUD 21016).

9. 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.

10. All documents indicating travel on Saturday or Sunday by GS 10 and below during hours corresponding to their normal tour of duty, since June 18, 2000.

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

12. 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.

13. 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.

14. 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.

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

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

17. HTMS records indicating time of Departure and time of arrival for all other bargaining unit employees on travel since June 18, 2000.

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

Particularized need: The Union believes that the Agency has violated the Grievants' rights to be properly compensated with Overtime Pay for work performed by the Grievants. The Union needs the requested information to prove the underlying facts and contentions in its Grievance.

The information is needed to indicate the amount of employees within the FHEO and 360 series, their corresponding work load and case load. The Union was believes that the work load/case load are indicative of working overtime hours in order to have case turnaround pursuant to HUD regulations.

Travel documents are needed to prove that Grievants did Agency work before their tour of duty, beyond their tour of duty, worked through lunch, on traveling days. These travel documents are also needed to demonstrate that Grievants have done Agency work and traveled on behalf of the Agency on weekends without compensation.

The vehicle logs are required to show the usage of government vehicles outside of normal tour of duty hours without compensation or without proper compensation.

HUD forms 25017 will show the exact tour of duty selected by bargaining unit employees.

NOTICE:

The information requested should be provided as it becomes available and not kept back until it is all ready. In the interest of transparency, it is requested that the Agency provide information to the Union in 15 days, as agreed, as to which documents it intends to provide on time, which it intends to provide but not on time, and which documents it intends to not produce (and why).

Sincerely,

Michael J. Snider, Esq.

Carolyn Federoff, President
AFGE Council of HUD Locals 222

IN THE MATTER OF ARBITRATION BETWEEN

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

Agency's Response to
Union's Request for Information Pursuant to 5 USC 7114(b)

The Department of Housing and Urban Development ("HUD" or the "Agency"), through counsel, hereby responds to the Request for Information ("RFI") submitted September 7, 2006.

General Objection

HUD objects to this Request for Information to the extent that the requested information is not necessary for discussion, understanding, and negotiation of subjects within the scope of collective bargaining. HUD further objects to this Request for Information to the extent that the requested information is not reasonably available taking into consideration the efforts required to make the documents available, including costs and displacement of the agency's workforce.

Specific Responses

1. Report titled "The State of Fair Housing: FY 2005 Annual Report on Fair Housing," and for FY 2000 through FY 2004. (See attached sample cover.)

Response: This information will be provided.

2. Regional Directors Monthly Performance Reports for May 2000, 2001, 2002, 2003, 2004, 2005, and 2006. (We understand this is a monthly report. If May is not available, please substitute another month within the fiscal year.) (See attached sample cover.)

Response: This information will be provided.

3. If Request No. 1 is not provided, please provide a Full Time Employee (FTE) list for each year since 2000 through present for FHEO on or about January 1st of each year.

Response: n/a.

4. List of the number of FTEs for each cylinder since 2000 until current, on or about January 1 of each year.

Response: This information is maintained on a fiscal year basis only and will be provided to the extent reasonably available.

5. All travel data requested in connection with the Travel Grievance filed in June 2000 that is not specifically covered elsewhere in this RFI.

Response: This information was provided previously to the extent it is reasonably available.

6. Daily vehicle utilization reports for each car used by any GS-360 grades 11-15, since June 18, 2000 (see attached Form HUD 21016).

Response: HUD is researching whether this information is reasonably available and will provided an updated response if and when one is available.

7. All Daily Vehicle utilization reports for each car used by any GS-10 and below, since June 18, 2000 (see attached Form HUD 21016).

Response: HUD is researching whether this information is reasonably available and will provided an updated response if and when one is available.

8. All Daily Vehicle utilization reports for each car used by all other bargaining unit employees, since June 18, 2000 (see attached Form HUD 21016).

Response: HUD is researching whether this information is reasonably available and will provided an updated response if and when one is available.

9. 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.

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.

10. All documents indicating travel on Sunday by GS 10 and below during hours corresponding to their normal tour of duty, since June 18, 2000.

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.

11. 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.

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.

12. 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.

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.

13. 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.

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.

14. 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.

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.

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

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.

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

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.

17. HTMS records indicating time of Departure and time of arrival for all other bargaining unit employees on travel since June 18, 2000.

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.

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

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.

Epstein Becker & Green, P.C.

By: /s/
Peter M. Panken

Counsel for the Agency

IN THE MATTER OF ARBITRATION BETWEEN:

THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 222, AFL-CIO,	)	
UNION,	)	ISSUE: FLSA Overtime
v.	)	
US DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,	)	ARBITRATOR ROGERS
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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Jason I. Weisbrot, Esq.
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104 Church Lane, Suite 100
Baltimore, Maryland 21208
410-653-9060 Phone
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Carolyn Federoff
President, AFGE Council of HUD Locals 222

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:

Arbitrator Sean Rogers
1100 Gatewood Drive
Alexandria, VA 22307

Daniel B. Abrahams
Peter M. Panken
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October 5, 2006
Date

/s/
Michael J. Snider, Esq.

IN THE MATTER OF ARBITRATION
BEFORE ARBITRATOR SEAN J. ROGERS

THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 222, AFL-CIO Union, - and - U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Agency.	:	ISSUE: FLSA OVERTIME

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT'S OPPOSITION TO THE UNION'S MOTION TO COMPEL RESPONSES

The United States Department of Housing and Urban Development ("Agency" or "HUD"), through counsel, respectfully responds to the Union's Motion to Compel dated October 5, 2006 (Motion #12) and requests that the Arbitrator rule that:

1. The Union is not entitled to any information in addition to what the Agency already has provided in response to the Union's September 7, 2006 request for information because the remaining information is neither "necessary" nor "reasonably available" within the meaning of 5 U.S.C. §7114(b) and other controlling legal authority.

2. Because the Union is not legally entitled to the information at issue, common sense and fairness dictate that HUD's inability and/or refusal to provide such information does not warrant an adverse inference.

By email dated November 17, 2006, the Union withdrew its second Motion to Compel (Motion #13).

I. PRELIMINARY STATEMENT

This opposition relates to a Union request for information dated September 7, 2006, which was submitted to HUD purportedly pursuant to 5 U.S.C. §7114(b). HUD

has already responded promptly to the request, providing information where appropriate and objecting where appropriate. Because the Union's right to information under 5 U.S.C. §7114(b) is not absolute, and because HUD's objections are based upon recognized grounds set forth in the statute, HUD respectfully requests that the Arbitrator deny the Union's motion to compel.

II. RESTRICTIONS ON THE UNION'S STATUTORY RIGHT TO REQUEST INFORMATION

Pursuant to the Federal Service Labor Management Relations Statute ("FSLMRS"), a union is entitled to receive from a Government agency only information which is both (1) normally maintained by the agency in the regular course of business ***and*** (2) reasonably available and necessary for discussion, understanding, and negotiation of subjects within the scope of collective bargaining. *See* 5 U.S.C. §7114(b)(4). In interpreting the terms of the Statute, the Federal Labor Relations Authority ("FLRA") has read into the law specific standards for determining whether the requested information is "necessary" and "reasonably available."

A. The Information Must be Necessary

In order to demonstrate that requested information is "necessary" under §7114(b)(4) of the Statute, a union "must establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information, and the connection between those uses and the union's representational responsibilities under the Statute. The requirement that a union establish such need will not be satisfied merely by showing that requested information is or would be relevant or useful to a union. Instead, a union must establish that requested information is required in order for the

union adequately to represent its members." *Internal Revenue Service, Washington, D.C.*, 50 FLRA 661, 669-70 (1995). In addition, "the union's responsibility for articulating its interests in the requested information requires more than a conclusory assertion and must permit an agency to make a reasoned judgment as to whether the disclosure of the information is required under the Statute." *Id.* at 670.

B. The Information Must be Reasonably Available

According to the FLRA, "the statutory requirement that data be reasonably available would exclude data which, although available, is available only through extreme or excessive means." *Department of Health and Human Services, Social Security Administration*, 36 FLRA 943, 950 (1990). A U.S. Circuit Court of Appeals has explained, "in evaluating the reasonable availability of documents, the FLRA should focus primarily on the efforts required to make the documents available, including costs and displacement of the agency's workforce" and "should at all times keep in mind Congress's stated goal of maintaining effective and efficient governmental operations." *Department of Justice, U.S. Border Patrol v. FLRA*, 991 F.2d 285, 292 (5th Cir. 1993); *see also* 5 U.S.C. §7101(b) ("The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.").

The FLRA and the courts have routinely rejected union requests for information where the costs of responding were excessive and hence the requested information was deemed not reasonably available. *See, e.g., United States Customs Service South Central Region New Orleans District*, 53 F.L.R.A. 789 (1997) (union's request for copies of materials covering a four-year period was not "reasonably available" where agency submitted evidence estimating it would cost over $19,000 and take more than 1,500 man-hours to produce the information); *Department of Air Force, HQ, Air Force*

Logistics Command & AFGE, 21 FLRA No. 71 (1986) (union's request for information relating to all agency disciplinary actions involving misuse of time-clocks was too broad, where the information sought would have required at least 3 months to produce and involved minimum screening expense of $30,000); *Department of Justice, U.S. Border Patrol v. FLRA, supra* (information requested by union was not reasonably available because "the Border Patrol would have to remove several employees from their regularly assigned duties for several weeks to search for, collect, collate, and redact thousands of pages of documents in various locations around the world.").

III. HUD IS NOT LEGALLY REQUIRED TO PROVIDE ADDITIONAL RESPONSIVE INFORMATION TO THE UNION'S SEPTEMBER 7, 2006 REQUEST BECAUSE SUCH INFORMATION IS NOT NECESSARY OR REASONABLY AVAILABLE

The Union's request for information dated September 7, 2006 contains 18 separate requests seeking various reports, records and HUD forms. The Union's motion to compel additional responses specifically addresses its requests for:

- 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;
- All documents indicating travel on Sunday by GS 10 and below during hours corresponding to their normal tour of duty, since June 18, 2000;
- 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;
- 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;
- 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;

- 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;
- HTMS records indicating time of Departure and time of arrival for GS-360 employees on travel since June 18, 2000;
- HTMS records indicating time of Departure and time of arrival for GS-10 and below employees on travel since June 18, 2000;
- HTMS records indicating time of Departure and time of arrival for all other bargaining unit employees on travel since June 18, 2000; and
- All HUD forms 25017 for each bargaining unit employee since May 1, 1998.

As shown below, this information is neither "necessary" nor "reasonably available."

Regarding the Union's alleged need for this information, it should first be noted that the Union appears to already possess many of the requested documents. Indeed, copies of travel records were introduced in connection with the live testimony in the 360s hearing and also were attached to the 26 affidavits that the Union submitted in the 360s hearing.

Also, the last request above is for a type of documents that has already been provided or made available to the Union; however, this specific request is for a time that is outside the scope of the present grievance and arbitration. The Union has no need for such information since the statute of limitations on work in 1998 and 1999 ran many years ago. The Union also does not need some of the other requested travel records which have already been provided by HUD to the Union.

Finally, and most importantly, the requested information is not necessary because it relates to potential damages that might be due bargaining unit members if and when, but only if and when, the employees are found to be nonexempt. To date, there has not been a single finding by the arbitrator that any employee at any level is

nonexempt, nor has HUD agreed to reclassify any employee above the GS-10 level, with the possible exception of paralegals. Accordingly, any claimed need for this information is premature and the information is not presently "necessary."

Nor is the information "reasonably available." It is impossible to know precisely how many pages of information the Union is requesting until the collection process is complete. However, an estimate can be made based on the travel records attached to the 26 affidavits submitted by the Union for the 360s hearing. Those 26 affidavits claim about three to five trips per year per employee, with travel documentation totaling up to twenty pages. Extrapolating to the more than 9,300 employees who have been in the bargaining unit at one time or another since the year 2000--a number of employees taken from the Union's so-called "super-duper-combo-list"--and assuming only 10 pages of travel documentation per employee, the request may generate 93,000 or more photocopies. Based on the costs incurred for prior requests, as set forth below, this would cost the agency at least $100,000. If, as may be possible, the average is 25 or 30 pages per employee, the page count may be nearly a quarter of a million. These quarter million pages would have to be found and copied at a cost to the taxpayer of as much as $300,000. These figures are reasonable estimates based on the HUD Office of Chief Financial Officer's estimate that, in connection with Union requests for information relating to the present grievance and arbitration proceedings, HUD has utilized more than two thousand three hundred sixty (2,360) hours of twenty seven (27) employees to make more than seventy thousand eight hundred (70,800) photocopies at

a salary cost of more than seventy three thousand nine hundred ninety one dollars ($73,991).[1] The types of documents copied include:

- HUD 25012 Time and Attendance Record Worksheets;
- SF 71 Leave Slips;
- HUD 260 Leave Records;
- HUD 25020 Employee Record and Certification of Extra hours of Work Forms;
- HUD 25018 Notification of Intent to Work Credit Hours Forms;
- HUD 25017 Work Schedule Request Form;
- HUD 1040 Overtime Authorization Forms;
- STARWEB Printouts;
- PC-Tare Printouts;
- Medical Documentation;
- Donated Leave Forms;
- Advanced Sick Leave Documentation;
- Leave Audits;
- eMail Documenting Leave Requested or Taken; and
- Voluntary Leave Forms.

These have been provided or made available to the Union. It should be noted that the above time and costs for copying are in addition to the eighteen (18) days that two HUD employees spent retrieving the records to be copied. The above costs to HUD and the taxpayer also do not take into account the "regular" work that was not performed while the above retrieval and copying was being performed, thus interfering with Congress's

[1] These figures are believed to be incomplete. Time and attendance records for GS-360s alone likely number more than 100,000 pages.

stated goal of maintaining effective and efficient governmental operations. In short, to require HUD to expend another $100,000-$300,000 responding to the Union's requests is unreasonable.

Accordingly, the Union's motion to compel should be denied.

IV. THE UNION IS NOT ENTITLED TO AN ADVERSE INFERENCE RULING

The Union is not entitled to an adverse inference ruling because, for the reasons set forth above, the Union is not legally entitled to the information requested in its motion to compel responses. Common sense and fairness dictate that a party cannot be penalized for not doing that which it has no obligation to do.

V. CONCLUSION

For the forgoing reasons, the Agency respectfully requests that the Arbitrator deny the Union's Motion to Compel Responses and issue a written ruling stating that:

(1) the Union is not entitled to any additional information in response to the requests set forth in its September 7, 2006 request for information because such information is neither "necessary" nor "reasonably available"; and

(2) the Union is not entitled to an adverse inference ruling because it is not legally entitled to any of the information which it seeks to compel.

Dated: November 20, 2006

Respectfully submitted,

EPSTEIN BECKER & GREEN P.C.

/s/ Shlomo D. Katz
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Counsel to the Agency

Certificate of Service

I hereby certify that a copy of this United States Department of Housing and Urban Development's Opposition to the Union's Motion to Compel Responses was sent to Michael J. Snider, Esquire on November 20, 2006 by email to mike@sniderlaw.com and carolyn_federoff@hud.gov.

/s/ Shlomo D. Katz
Shlomo D. Katz

IN THE MATTER OF ARBITRATION
BEFORE ARBITRATOR SEAN J. ROGERS

THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 222, AFL-CIO Union, - and - U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Agency.	ISSUE: FLSA OVERTIME

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT'S SURREPLY TO THE UNION'S MOTION TO COMPEL RESPONSES

The United States Department of Housing and Urban Development ("Agency" or "HUD"), through counsel, surreplies to the Union's Reply to the Agency's Opposition to the Union's Motion to Compel dated October 5, 2006 (Motion #12).

The Agency respectfully submits to the Arbitrator that the Union's Reply does nothing to undermine the Agency's Opposition, which provided ample grounds for the denial of the Union's Motion to Compel.

The very statute relied upon by the Union for its Motion to Compel places clear boundaries upon its right to receive information from HUD. The information must be both "necessary" and "reasonably available." The Union's reply fails to rebut the Agency's showing that the requested information is unnecessary and/or not reasonably available, that the Union is not entitled to the information and that the Union is not entitled to an adverse inference if such information is not provided.

The Agency's Opposition cites numerous decisions in which information was held not reasonably available where the burden of producing such information was far less than the expected burden in this matter. *See* Agency's Opposition at 2-3. The Union cites two decisions, presumably the most favorable decisions it could find, that information was reasonably available (1) which required three weeks effort to compile and (2) which required approximately 150 staff hours to compile. HUD's expected burden in terms of staff displacement and cost dwarfs the burden in both of the decisions cited by the Union.

The Agency's Opposition provided specific figures detailing the enormous burden of production associated with the Union's requests. The Union's Reply dismisses the Agency's specific figures regarding costs and staff hours as "puffery." However, the Union's demeaning characterization of the Agency's expenditures is unhelpful and does nothing to undermine the fact that HUD's expected burden to produce the requested information would far exceed the threshold for reasonable availability. The Union argues that the Arbitrator should not accept HUD's estimates because they were not provided by affidavit. There is no basis for that position. Nevertheless, although the Agency is not required to offer sworn statements, HUD hereby attaches two Declarations so that there is no issue concerning the unreasonableness of the Union's request.[1] As set forth in these two sworn Declarations, which represent only a fraction of the burden associated with the information already produced by the Agency and an even smaller fraction of the burden

[1] Declaration Of Jeannetta M. Evans In Opposition To Union's Motion For Discovery And Additional Equitable Relief is attached hereto as Exhibit A. Declaration Of Juanina B. Harris In Opposition To Union's Motion For Discovery And Additional Equitable Relief is attached hereto as Exhibit B.

that would be associated with the requests set forth in the Union's Motion to Compel, HUD has provided a minimum of approximately one-half million (500,000) pages of documents to the Union at a cost of a minimum of approximately one hundred thousand (100,000) dollars in salary. In addition, the salary costs do not even reflect the costs associated with the displacement of the Agency's staff. The Union's information request would unreasonably require additional Agency expenditures far in excess of even these enormous amounts.

The Union's remaining arguments are entirely beside the point. First, the fact that HUD is required to maintain the requested information and has such information in its possession does not mean that such information is reasonably available. To respond to the Union's request, the Agency would have to locate the information, sort the information, collate it, review it for privilege, and photocopy it, among other tasks. As set forth in the two sworn Declarations, HUD has already expended significant resources providing information in its possession to the Union. The additional cost associated with producing the remaining requested information renders such information unreasonably available.

Second, the fact that HUD could have avoided having to produce the requested information if it signed stipulations with the Union does not make the information any more reasonably available. HUD has no duty to enter into stipulations at the whim of the Union. The only question that has any bearing upon the Union's request for information is whether the information is reasonably available, which it is clearly not.

For the foregoing reasons, the Agency respectfully requests that the Arbitrator deny the Union's Motion to Compel Responses and grant the relief requested in the Agency's Opposition, filed on November 20, 2006.

Dated: December 13, 2006

Respectfully submitted,

EPSTEIN BECKER & GREEN P.C.

/s/ Shlomo D. Katz

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Counsel to the Agency

Certificate of Service

I hereby certify that a copy of this United States Department of Housing and Urban Development's Opposition to the Union's Motion to Compel Responses was sent to Michael J. Snider, Esquire on December 13, 2006 by email to mike@sniderlaw.com and carolyn_federoff@hud.gov.

/s/ Shlomo D. Katz
Shlomo D. Katz

EXHIBIT A

IN THE MATTER OF ARBITRATION
BEFORE ARBITRATOR SEAN J. ROGERS

THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 222, AFL-CIO Union, – and – U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Agency.	ISSUE: FLSA OVERTIME DECLARATION OF JEANNETTA M. EVANS IN OPPOSITION TO UNION'S MOTION FOR DISCOVERY AND ADDITIONAL EQUITABLE RELIEF

JEANNETTA M. EVANS, being sworn states:

Based on information obtained from my staff, I have set forth below my good faith estimates of the costs associated with obtaining and providing documentation to the Union in connection with the above-captioned arbitration proceedings.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Office of the Chief Financial Officer
FLSA Case Data Gathering - OCFO Cost Estimates

# Pages Copied:	70,800
# People Copying:	27
Estimated Total Hours Expended for 27 People:	2,360
Estimated Salary Costs Expended by 27 People:	73,991
Estimated Costs of Paper Used:	714

Type of Material Copied

HUD 25012 Time and Attendance Record Worksheets
SF 71 Leave Slips
HUD 260 Leave Records
HUD 25020 Employee Record and Certification of Extra hours of Work Forms
HUD 25018 Notification of Intent to Work Credit Hours Forms
HUD 25017 Work Schedule Request Form
HUD 1040 Overtime Authorization Forms
STARWEB Printouts
PC-Tare Printouts
Medical Documentation
Donated Leave Forms
Advanced Sick Leave Documentation
Leave Audits
eMail Documenting Leave Requested or Taken
Voluntary Leave Forms

Cost of Records Retrieval

Estimated Time Expended - 2 People:	18 days
Estimated Salary Costs - 2 People:	923.67

Laborious and Time Consuming Process

Sanitize documents by removing SSNs
Short due dates imposed - Caused time loss to complete regular duties
Removing staples, paper clips, binder clips from original documents
Make copy of entire fiscal year's documents
Sanitize SSNs from each page
Copy 2 more sets
Staple documents by pay period
Prepare cover sheets for each fiscal year's set of documents
Label boxes containing sets

* * *

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 13, 2006.

Jeannetta M. Evans
Acting Director, Management Staff
Office of Chief Financial Officer

EXHIBIT B

IN THE MATTER OF ARBITRATION
BEFORE ARBITRATOR SEAN J. ROGERS

THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 222, AFL-CIO Union, - and - U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Agency.	ISSUE: FLSA OVERTIME DECLARATION OF JUANINA B. HARRIS IN OPPOSITION TO UNION'S MOTION FOR DISCOVERY AND ADDITIONAL EQUITABLE RELIEF

JUANINA B. HARRIS, being sworn states:

I have set forth below my good faith estimates of the costs associated with obtaining and providing documentation to the Union in connection with the above-captioned arbitration proceedings.

The type and amount of material provided was:

Time and attendance records, leave slips, doctor's certificates, notes to file
Approximately 427,180 pages of material provided

Number of employees engaged in your efforts:

Five Employees

Barbara Britton
Ursula Davis
Nina Harris
Pierre Martin
Deborah Taylor

Number of Hours spent on Project:

Approximately 1,706 Hours

NAME	REGULAR HOURS	EXTRA HOURS
Barbara Britton	572	26
Ursula Davis	130	0
Nina Harris	638	26
Pierre Martin	184	0
Deborah Taylor	130	0

Dollar cost of the time spent by your staff:

NAME	HOURS	HOURLY RATE	COST
Barbara Britton	572	16.08	$9,197.76
Ursula Davis	130	23.64	$3,073.20
Nina Harris	638	36.36	$23,197.68
Pierre Martin	184	12.68	$2,333.12
Deborah Taylor	130	27.94	$3,632.20

NAME	EXTRA HOURS	COST
Barbara Britton	26	$627.12
Nina Harris	26	$1418.04

* * *

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 13, 2006.

Juanina B. Harris

Juanina B. Harris
Program Support Specialist
Office of Fair Housing & Equal Opportunity

BEFORE
SEAN J. ROGERS
ARBITRATOR

In the Matter of Arbitration between:

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 222, AFL-CIO

Union

and

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Agency.

DECISION AND ORDER
UNION'S MOTION TO COMPEL DISCOVERY OF ITS SEPTEMBER 7, 2006 REQUEST FOR INFORMATION
(Motion 12)

APPEARANCES:

On behalf of the American Federation of Government Employees, Council 222:

Michael J. Snider, Esq. and Jason Weisbrot, Esq., Snider & Associates, LLC – *representing the Union and the Grievants.*

Carolyn Federoff, Esq., President, AFGE, Council 222 – *representing the Union and the Grievants.*

On behalf of the Department of Housing and Urban Development:

Shlomo D. Katz, Esq., Epstein, Becker & Green, P.C. – *representing the Agency.*

Peter M. Panken, Esq., Epstein, Becker & Green, P.C. – *representing the Agency.*

Norman Mesewicz, Esq., Deputy Director of Labor Relations – *representing the Agency.*

I. PROCEDURAL BACKGROUND

On June 18, 2003, pursuant to the collective bargaining agreement between the parties (CBA), the American Federation of Government Employees, Council 222, AFL-CIO (AFGE or Union) filed a Grievance of the Parties (GoP) challenging the Department of Housing and Urban Development's (HUD or Agency) (collectively the Parties) alleged pattern and practice of directing bargaining unit employees to travel during non-duty hours without compensation (Travel grievance). On December 24, 2003, the Union filed a second GoP on behalf of all bargaining unit employees claiming that HUD improperly classified bargaining unit employees under FLSA overtime provisions and failed to properly and fully compensate these employees for overtime work (FLSA grievance).

The Parties were unable to resolve the grievances through the CBA grievance process. The Union invoked arbitration and the Parties agreed to join the two grievances for resolution by arbitration. I was selected as the Arbitrator to resolve the disputes from a panel of neutrals maintained by the Parties.

On or about September 7, 2006, during the arbitration proceedings, the Union submitted a written request for information (RFI) pursuant to the Federal Service Labor-Management Relations Statute (FSLMRS) at 5 USC § 7114(b). On or about September 18, 2006, the Agency responded to the RFI. On or about October 5, 2006, the Union filed with the Arbitrator a Motion to Compel Responses to § 7114 or In the Alternative for an Adverse Inference (Motion). On or about November 20, 2006, the Agency filed an Opposition to the Motion to Compel Responses (Opposition). On or about December 4, 2006, the Union filed a Reply to HUD's Opposition to Union's Motion to Compel Responses (Reply). On or about December 13, 2006, the Agency filed a Surreply to the Union's Motion to Compel Responses (Surreply).

This Decision and Order is based on the Parties' submission, the CBA, applicable statutes and case law.

II. APPLICABLE STATUTORY PROVISIONS AND CASE PRECEDENT

In previous Decision and Orders on the Union's RFIs, I have discussed the applicable statutory provisions and case precedent in detail. The following is a succinct statement of the controlling legal standards, statutes and case precedents.

A union's RFI must be based on 5 USC § 7114(b). The Federal Labor Relations Authority (FLRA) and Federal court precedent applying 5 USC § 7114(b) establish that a union must show a particularized need for its RFI to trigger an agency's statutory duty to furnish the information. A union must assert more than that the information is relevant or useful, and must state the particularized need for the information. The union's particularized need must be stated with sufficient clarity to permit an agency to make a reasoned judgment on whether the information must be disclosed. Specifically, the union must establish the information is actually required for it to fulfill its representational

responsibilities and to adequately represent bargaining unit employees. To deny the RFI, an agency must assert and establish countervailing non-disclosure interests. An agency's conclusory or bare assertions will not satisfy its burden.

The FLRA has articulated standards for establishing a union's particularized need in the following questions:

1. Exactly why did the union need the requested information?

2. What would the union have used the requested information for if it had been furnished?

3. How would that use of information relate to the union's role as the exclusive representative?

The FLRA has articulated standards for a successful agency claim of countervailing non-disclosure interests as follows:

1. Whether the agency informed the union in response to the request that it was asserting a countervailing non-disclosure interest; and

2. Whether the agency has established such an non-disclosure interest.

III. THE UNION'S RFI AND HUD'S RESPONSES

The Union's information requests and HUD's responses are as follows:

Request 1.

The Union requests:

Report titled "The State of Fair Housing: FY 2005 Annual Report on Fair Housing," and for FY 2000 through FY 2004.

HUD responds as follows:

This information will be provided.

Request 2.

The Union requests:

Regional Directors Monthly Performance Reports for May 2000, 2001, 2002,

2003, 2004, 2005, and 2006. (We understand this is a monthly report. If May is not available, please substitute another month within the fiscal year.)

HUD responds as follows:

This information will be provided.

Request 3.

The Union requests:

For each employee identified, . . . provide his/her name, position, series, grade and FLSA status, and advise if s/he was compensated of non-duty hour travel. If any person is GS-11 or below and the agency has determined that s/he is FLSA exempt, . . . provide a copy of the person's position description.

HUD responds as follows:

This data is not reasonably available under 5 U.S.C. 7114(b)(4). It would require a manual search of each individual travel order. This response was conveyed to the Union prior to it filing of the GoP FLSA Overtime [grievance]. If the Union elects to submit additional justification for its request, Management will reconsider its decision.

Request 3.

The Union requests:

If Request No. 1 is not provided, please provide a Full Time Employee (FTE) list for each year since 2000 through present for FHEO on or about January 1st of each year.

HUD responds as follows:

n/a

Request 4.

The Union requests:

List of the number of FTEs for each cylinder since 2000 until current, on or about January 1 of each year.

HUD responds as follows:

This information is maintained on a fiscal year basis only and will be provided to the extent reasonably available.

Request 5.

The Union requests:

All travel data requested in connection with the Travel Grievance filed in June 2000 that is not specifically covered elsewhere in this RFI.

HUD responds as follows:

This information was provided previously to the extent it is reasonably available.

Request 6.

The Union requests:

Daily vehicle utilization reports for each car used by any GS-360 grades 11-15, since June 18, 2000 (see attached Form HUD 21016).

HUD responds as follows:

HUD is researching whether this information is reasonably available and will provided [sic] an updated response if and when one is available.

Request 7.

The Union requests:

All Daily Vehicle utilization reports for each car used by any GS-10 and below, since June 18, 2000 (see attached Form HUD 21016).

HUD responds as follows:

HUD is researching whether this information is reasonably available and will provided [sic] an updated response if and when one is available.

Request 8.

The Union requests:

All Daily Vehicle utilization reports for each car used by all other bargaining unit employees, since June 18, 2000 (see attached Form HUD 21016).

HUD responds as follows:

HUD is researching whether this information is reasonably available and will provided [sic] an updated response if and when one is available.

Request 9.

The Union requests:

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.

HUD responds as follows:

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.

Request 10.

The Union requests:

All documents indicating travel on Saturday or Sunday by GS-10 and below during hours corresponding to their normal tour of duty, since June 18, 2000.

HUD responds as follows:

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.

Request 11.

The Union requests:

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

HUD responds as follows:

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.

Request 12.

The Union requests:

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.

HUD responds as follows:

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.

Request 13.

The Union requests:

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.

HUD responds as follows:

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.

Request 14.

The Union requests:

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.

HUD responds as follows:

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.

Request 15.

The Union requests:

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

HUD responds as follows:

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.

Request 16.

The Union requests:

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

HUD responds as follows:

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.

Request 17.

The Union requests:

HTMS records indicating time of Departure and time of arrival for all other bargaining unit employees on travel since June 18, 2000.

HUD responds as follows:

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.

Request 18.

The Union requests:

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

HUD responds as follows:

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.

IV. THE UNION'S MOTION AND HUD'S RESPONSES

A. AFGE's Motion

AFGE's Motion seeks to compel HUD to answer requests 9, 10, 11, 12, 13 14, 15, 16, 17 and 18. The Motion also asserts that HUD's responses to requests 9 and 12 are insufficient. In the alternative, for good cause shown and if HUD refuses to answer the requests, AFGE requests that the Arbitrator take an adverse inference. The RFI states the AFGE's particularized need for the information as follows:

Particularized need: The Union believes that the Agency has violated the Grievants' rights to be properly compensated with Overtime Pay for work

performed by the Grievants. The Union needs the requested information to prove the underlying facts and contentions in its Grievance.

The information is needed to indicate the amount of employees within the FHEO and 360 series, their corresponding work load and case load. The Union was [sic] believes that the work load/case load are [sic] indicative of working overtime hours in order to have case [sic] turnaround pursuant to HUD regulations.

Travel documents are needed to prove that Grievants did Agency work before their tour of duty, beyond their tour of duty, worked through lunch, [and] on traveling days. These travel documents are also needed to demonstrate that Grievants have done Agency work and traveled on behalf of the Agency on weekends without compensation.

The vehicle logs are required to show the usage of government vehicles outside of normal tour of duty hours without compensation or without proper compensation.

HUD forms 25017 will show the exact tour of duty selected by bargaining unit employees.

Based on the substance of the RFI and the arguments in the Motion, the Motion may be best considered in four parts:

1. information requests 9, 10, 11 concern bargaining unit employee travel on Saturday or Sunday during hours corresponding to the employee's normal tour of duty since June 18, 2000;[1]

2. information requests 12, 13, 14 concern bargaining unit employee travel prior to the beginning of the employee's normal tour of duty since June 18, 2000;

3. information requests 15, 16, 17 concern HUD Travel Management System (HTMS) records indicating bargaining unit employee travel departure and arrival times since June 18, 2000; and

4. information request 18 concerns HUD forms 25017[2] for bargaining unit employees since May 1, 1998.

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[1] June 18, 2000 is the date AFGE asserts is the outside limit of its claim for back pay and damages.

[2] The HUD form 25017 records an employee's tour of duty hours.

Regarding part 1., requests 9, 10 and 11, the Motion asserts even if some grievants maintained travel records, AFGE should not be precluded from receiving the records of bargaining unit employees who did not keep the records. AFGE argues that only HUD is obligated to keep and maintain these records. AFGE requests that HUD be ordered to provide the requested records, in addition to time and attendance records that HUD intends to produce at hearing. AFGE argues that FLSA § 11(c) requires employers to "make, keep and preserve records" of employees and "their wages, hours, and other conditions and practices of employment." (See: 29 USC § 211(c) and 29 CFR § 516.1).

Regarding part 2., requests 12, 13 and 14, the Motion asserts that HUD's response is insufficient because excessive cost and displacement of HUD's workforce is an improper basis for objecting to a request which is overly burdensome. AFGE argues that the documents requested are integral to the grievance because bargaining unit employees are entitled to compensation for travel time in excess of normal commuting time. AFGE says that it needs the documents to calculate damages for hearings and settlement discussions. (See: 29 CFR § 785.34, § 785.35, § 785.36 and § 785.41). AFGE reiterates its argument concerning travel records maintained by the grievants and HUD's obligation to keep and maintain these records under the FLSA, 29 USC § 211(c) and 29 CFR. § 516.1.

Regarding part 3., requests 15, 16 and 17 for HTMS documents, AFGE reiterates its argument above.

Regarding part 4., request 18 for HUD forms 25017, AFGE restates its argument concerning the insufficiency of HUD's argument supporting not providing the forms based on excessive cost and displacement of the agency's workforce. AFGE argues that the requested forms are integral to the grievance because bargaining unit employees are entitled to compensation for travel time outside their normal tour-of-duty. AFGE says that the forms will not used by it to determine whether work was performed prior to the applicable FLSA damages time period. But, AFGE says it needs the forms, which were instituted by HUD in May 1998, to determine each grievant's tour-of-duty selected when first employed. AFGE argues that since some employees made their tour of duty elections prior to June 18, 2000 (the relevant time period for the grievance), AFGE needs the forms back to May 1998 to determine the tour of duty hours for grievants on June 18, 2000.

AFGE asserts that HUD's failure to provide the requested information creates a prejudicial disadvantage for AFGE in preparing for damages hearings. AFGE asserts HUD did not engage in any interactive process with the AFGE or conduct a factor analysis associated with cost-shifting to determine whether the information could be produced without excessive cost to HUD. AFGE asserts that HUD cannot claim documents were deleted from computers since it is well established that deleted computer files are discoverable.

For all these reasons, AFGE requests that the Arbitrator order HUD to produce the requested information or, in the alternative and for good cause shown, that the Arbitrator take an adverse inference from HUD's refusal to provide the requested information.

B. HUD's Opposition

HUD's Opposition asserts that it has already provided the requested information and any remaining information AFGE seeks is neither necessary nor reasonably available within the meaning of 5 USC § 7114(b) and controlling legal authority. HUD also asserts that because AFGE is not legally entitled to the information, common sense and fairness dictate that no adverse inference is warranted based on HUD's inability or refusal to provide the requested information. HUD argues that the RFI contains 18 separate requests for HUD reports, records, forms and additional responses to demands for documents. HUD argues that AFGE already appears to possess the travel documents connected to live testimony and 26 affidavits submitted at hearing in the GS-360 dispute.

HUD asserts that request 18 is for documents already provided or made available to the AFGE and also for a time that is outside the scope of the grievances. HUD argues that AFGE has no need for the information because the FLSA remedial provisions do not extend to work in 1998 and 1999 and AFGE does not need some of the other requested travel records which already have been provided.

HUD asserts the requested information is not necessary because it relates to potential damages. HUD argues that to date there has been no finding that any employee is non-exempt and HUD has not agreed to reclassify any employee above the GS-10 level, except GS-950 paralegals. Therefore, HUD says AFGE's need for this information is premature and not presently necessary.

HUD also asserts that information is not reasonably available. HUD says it is impossible to know exactly how many pages the RFI involves, but HUD estimates that the request may generate 93,000 or more photocopies at a cost of as much as $300,000.[3] HUD says that these costs do not take into account regular work not performed while retrieving and copying documents, thereby interfering with the Congressional goal of maintaining effective and efficient governmental operations. For these reasons, HUD asserts that to expend another $100,000-$300,000 responding to this RFI is unreasonable.

Accordingly, HUD asks that the AFGE's motion to compel be denied.

C. AFGE's Reply and HUD's Surreply

For the most part, with some sharpening and shading of the arguments, AFGE's Reply and HUD's Surreply reiterate the assertions and arguments in their respective Motion and Opposition.

Briefly, AFGE's reasserts that the requested information is necessary and reasonably available. Therefore, AFGE says, under applicable Federal Court and FLRA

[3] However, HUD's Surreply appears to estimate the cost to be $100,000.

precedent should be provided to AFGE even if the RFI involves a massive number of documents and places a heavy burden on HUD. AFGE argues that HUD could avoid collecting and copying the requested information through simple stipulations. If HUD continues to fail to preserve and/or produce the requested information, then AFGE is entitled to an adverse inference.

Similarly, HUD reasserts that it is not legally required to provide the request information because it is not necessary or reasonably available to the grievance and therefore, AFGE is not entitled an adverse inference as well. HUD reiterates with supporting affidavits the cost of producing the requested information. HUD concludes by asserting the AFGE is not entitled to an adverse inference because HUD cannot be penalized for not doing that which it had no obligation to do.

V. DISCUSSION AND FINDINGS

Based on the record developed by the Parties and for the reasons discussed below, the Arbitrator finds that the AFGE has stated: exactly why it needs the requested information; what the AFGE will use the requested information for when it has been furnished; and how the use of information relates to the AFGE's role as the exclusive representative. The Arbitrator also finds that HUD has not established a non-disclosure interest regarding the requested documents. For these reasons, AFGE's Motion is granted, but its request for an adverse inference is premature and denied without prejudice. Recognizing the RFI encompasses a potentially large number of documents and that AFGE needs the requested information incrementally over the course of the arbitration litigation, the Order gives the Parties an opportunity to develop a schedule for HUD to provide the requested information to AFGE. If they are unable to agree on a schedule, then the Arbitrator will set a schedule for HUD to provide the requested information to AFGE.

The starting point for determining whether to compel HUD to respond to AFGE's RFI is the Parties CBA. The CBA Article 22, Section 22.11 - Informal Resolution states,

> Many grievances arise from a misunderstanding or disputes which can be settled promptly and satisfactorily on an informal basis at the immediate supervisor level. Employees are encouraged to discuss issues of concern to them, informally, with their supervisor at any time. Every appropriate effort shall be made by the parties to settle grievances at the lowest possible level. (Jx 1).

The Parties' litigation of the instant grievances has resulted in AFGE seeking the discovery of HUD documents and information normally maintained by the agency in the regular course of business. An exclusive representative's right to agency documents and information is entwined with the duty of an agency and an exclusive representative to negotiate in good faith. Specifically, 5 USC § 7114(b) states:

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data –

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining . . .

The CBA language and the FSLMRS form the framework for the Arbitrator's decision on AFGE's Motion.

The Parties have estimated at several junctures in the instant arbitration litigation that the grievances involve approximately 9300 current and former bargaining unit employees and may result in back pay and damages back to June 18, 2000.[4] The potentially massive scope of the instant grievances coupled with the Parties' CBA, particularly Article 22, Section 22.11, create an obligation on both Parties to settle grievances at the lowest possible level.

The duty of an agency to negotiate in good faith includes the obligation to furnish to the exclusive representative upon request data which is normally maintained by the agency in the regular course of business and which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. Furthermore, it is well established that under § 7114(b)(4), an exclusive representative is entitled to information that is necessary to enable it to carry out effectively its representational functions and responsibilities. Information requested by an

[4] HUD Surreply, p.6.

exclusive representative is necessary, within the meaning of § 7114(b)(4), if it would be useful to the exclusive representative in the investigation, evaluation and/or presentation of a potential or actual grievance. (*U.S. Department of Labor and National Council of Field Labor Locals, American Federation of Government Employees, AFL-CIO*, 39 FLRA No. 43 (1991)).

Despite this CBA and FSLMRS mandates, both Parties have pressed issues in the arbitration litigation to the metaphorical bitter end. The Arbitrator recognizes that this bitter-end litigation approach is the right of both Parties and recognizes that he also shares some of the responsibility for the protracted nature of the dispute resolution process.

At times during the arbitration litigation both Parties have conceded that scope of the dispute is potentially massive and each has admitted that the litigation could, if played out to the bitter end, take years to resolve. Indeed the dispute has extended over more than a year already. However, the Parties have often ignored or missed opportunities to settle components of the dispute as the result of bitter-end behavior, in the Arbitrator's opinion.

The record establishes that AFGE's particularized need for the requested information arises out of the CBA grievance and arbitration provisions and therefore, is founded on its representational rights to investigate, evaluate and pursue grievances. The specific documents and information that AFGE requests from HUD constitute evidence establishing when a grievant may have performed compensable overtime work before and after their normal tour of duty or while in travel status, and evidence establishing a grievant's tour-of-duty thereby aiding in identifying compensable overtime work, in the case of request 18. It is uncontested that these documents are normally maintained by HUD in the regular course of business.

Specifically, the requested information is in the form of documents or electronic data collected, stored and maintained by HUD in the normal course of its business operations, including for example travel documents such as HTMS records and HUD forms 25017.

HUD argues the requested information: is not necessary or reasonably available; is already in AFGE's possession; is premature since no determinations of FLSA liability have been made and; is for a time outside the FLSA damages provision, in the case of request 18.

The core of HUD's argument that the requested information is not necessary is based on the assertion that:

> [t]o date there has not been a single finding by the arbitrator that any employee at any level is nonexempt, nor has HUD agreed to reclassify any employee above the GS-10 level with the possible exception of paralegals. (Opposition p. 5-6).

For this reason, HUD says AFGE's request is premature and "not presently 'necessary.'" (Opposition p. 6).

The Arbitrator finds that HUD's argument is without merit for several reasons. First, the reclassification of the GS-10's and below, and the paralegals were the result of a settlement agreement. However, there has not been a settlement regarding the damages HUD may owe these employees and the Parties have determined to vigorously litigate the issue. Therefore, the damages issue is still at issue and the requested information is necessary for AFGE to develop evidence on damages for these grievants, absent settlement. Second, the issue of GS-360's damages also has been vigorously litigated by the Parties and the requested information is directly relevant and material to that damages determination, absent settlement. Third, the litigation of the grievances as to all other bargaining unit employees is ongoing and active, and encompasses potentially 9300 current and former bargaining unit employees and may result in damages back to July 18, 2000, according to HUD. The requested information is clearly and directly relevant and material regarding grievants whose damages claims have not been litigated or settled yet. Recognizing the massive scope of the grievances, delay in the collection of the information until a time that HUD believes is appropriate does not aid in resolving these disputes at the lowest level. Delay in the discovery of relevant, material and competent evidence will only further protract the process of dispute resolution which is contrary to the Parties CBA, Article 22, Section 22.11. Finally, when HUD asserts that information is not "presently necessary," it is admitting that the information is necessary, just not now, based on its unilateral determination of the progress of the litigation. Absent an agreement between the Parties on a schedule for the collection and delivery of the requested information, HUD's unilateral determination of when it will give AFGE the necessary, requested information will is unacceptable, and a violation of the CBA and § 7114(b).[5]

For all these reasons, the Arbitrator finds that the requested information is necessary for the resolution of the grievances.

HUD next says the requested information is not reasonably available because it estimates that the cost to collect the information will be $100,000-$300,000 and the retrieving and copying the documents will displace employees from regular work thereby interfering with Congress's stated goal of maintaining effective and efficient governmental operations. HUD's argument arises out of 5 USC § 7101. **Findings and purpose.**

The Congressional findings and purpose at 5 USC § 7101, also states that "labor organizations and collective bargaining in the civil service are in the public interest." Therefore, AFGE's 5 USC § 7114(b) right to the requested information, which is "in the

[5] However, there is merit to a rational, organized, orderly, appropriately timed collection and delivery of the requested information to AFGE in a manner which supports the dispute resolution. The Arbitrator's Order, below, sets boundaries for a collection and delivery process between the parties in recognition of the need for orderly discovery while providing the Parties the opportunity to control the process by mutual agreement.

public interest," "should be interpreted in a manner consistent with the requirements of an effective and efficient Government." These two Congressional findings are not inconsistent and in the instant grievances, each statutory provision plainly reconciles with the other.

HUD has determined, for the effective and efficient administration of agency operations, that it should collect, store and maintain information on each employee's travel and tour-of-duty. Employees are expressly required by HUD's work rules to complete forms reporting in detail the times, days and activities of their travel on HUD's business. When an employee uses a government vehicle on HUD business, the employee is required by HUD's work rules to complete a vehicle use form. Some travel forms are the basis of an employee's travel reimbursement. Pursuant to HUD policy, the forms are stored, maintained and, when necessary, retrieved by HUD's administrative staff. Some information is stored the HUD Travel Management System (HTMS). Therefore, HUD's policy and work rules reflects a decision by the agency to store and maintain this information for future uses. The records are normally maintained by HUD in the regular course of business.

Now, AFGE seeks the information in the records and documents, which HUD has required employees to report, to enforce the bargaining unit employees' grievance rights in the instant grievances. HUD says it is too costly to retrieve the documents and information, and the retrieval would require the displacement of staff because of the massive amount of documents that need to be collected and copied. HUD's claim is both in genuine and dissembling in light of HUD's policy to collect, store and maintain the information on an agency-wide scale, arguably, in excruciating detail. The Arbitrator accepts, without question, HUD's decision to collect, store and maintain the information is for effective and efficient agency operations. At this time, AFGE seeks the stored information in aid of bargaining employees' grievance rights pursuant to 5 USC § 7101, *et seq.*, the same rights which Congress has declared are "in the public interest." Under these circumstances, the purpose each Party seeks to achieve is consistent. Therefore, the Arbitrator finds that since HUD's policy is to collect, store and maintain this information, then the retrieval at AFGE's request, for a purpose that is in the public interest, cannot be contrary to effective and efficient agency operations.

The potentially massive scale of HUD's retrieval of the information that AFGE has requested flows from the scale of the grievances and not from the nature of the RFI. Put another way, HUD's obligation to respond to this potentially massive RFI is expanded by the scope of the grievances.

Finally, on the issue of HUD's claims that AFGE already has some or a part of the information, HUD's claim is too vague for the Arbitrator to rule on. However, to the extent HUD has provided the information AFGE has requested, then it has discharged its obligation under § 7114(b) regarding the RFI. HUD's only clear reference to information that AFGE already has received concerned attachments to 26 employee affidavits introduced by AFGE at hearing. Regarding these affidavits, HUD vigorously objected to their admission. Yet later, HUD sought to introduce supervisors' affidavits in rebuttal to

AFGE's affidavits and HUD's affidavits were accepted, without objection from AFGE. If HUD believes it has given any requested information to AFGE in response to its earlier requests for information, HUD need only identify the information and circumstances of the release to AFGE and assert that it has discharged it duty under the CBA and § 7114.

The Arbitrator reminds the Parties that there are other choices of approaches to resolving the disputes over damages other than bitter-ending each other. For example, a few other choices include: the Parties could agree to a representational-averaging approach based on statistical significant sampling; the Parties could select an neutral expert, auditor, economist or statistician, to develop an evaluative model; or the Parties could develop their own averaging approach for small, medium and large offices. These systems or any other system which produces a reasonable, equitable distribution of the FLSA damages could achieve a settlement and avoid the protracted, albeit civilized, combat to the bitter end that the Parties seem to have initiated.

Based on the record developed by the Parties and for the reasons discussed above, the AFGE's October 5, 2006 Motion to Compel Responses to § 7114 or in the Alternative for an Adverse Inference is granted. If HUD does not have the information requested by AFGE; if it does not exist; if HUD cannot find it; if HUD has already provided it to AFGE or, for any reason, if HUD cannot provide the requested information, then HUD must expressly so state in response to AFGE's information requests. HUD's responses to AFGE's RFI must be accurate, complete, clearly stated and up-to-date.

HUD has asserted based on the progress of the arbitration litigation that some of the RFI is premature. This is a timing issue which has validity based on the scope of the grievances. It is reasonable for HUD to seek to pace the release of the information in a manner that suits efficient and effective agency operations and the pace of the arbitration litigation. Therefore, the Parties are ordered to discuss a schedule for delivery of the requested information to AFGE that suits an agreed schedule of litigation of the grievances issues arbitration. Absent an agreement, the Arbitrator will direct the Parties to submit proposed schedules and the Arbitrator will develop a schedule based on the more reasonable proposal.

In the alternative, AFGE's Motion requests that the Arbitrator draw an adverse inference from HUD's failure to produce the requested information. Since HUD is now being ordered to respond to AFGE's information requests, this evidentiary remedy is premature and denied without prejudice. AFGE may renew its request for an adverse inference, at hearing or in writing, if HUD fails to comply with the Arbitrator's Order.

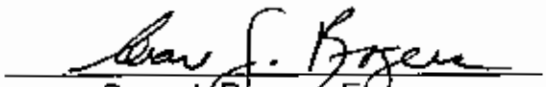
VI. ORDER:

A. HUD must provide AFGE with the information in requests 9, 10, 11, 12, 12, 14, 15, 16, 17 and 18.

B. If HUD does not have the information requested by AFGE; if it does not exist; if HUD cannot find it; if HUD has already provided it to AFGE or, for any reason, if HUD cannot provide the requested information, then HUD must expressly so state in response to AFGE's information requests.

C. Within 30-calendar days of receipt of this Decision and Order, the Parties must discuss a schedule for delivery of the requested information to AFGE that suits an agreed schedule of litigation of the grievances issues at arbitration. Absent an agreement within that time, the Arbitrator will direct the Parties to submit proposed schedules and the Arbitrator will develop a schedule based on the more reasonable proposal.

D. AFGE's Motion in the alternative for the Arbitrator to draw an adverse inference from HUD's failure to produce the requested information is premature and denied without prejudice. AFGE may renew its request for an adverse inference, at hearing or in writing, if HUD fails to comply with the Arbitrator's Order.



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January 3, 2007