

BEFORE STEVEN M. WOLF
ARBITRATOR

National Council of EEOC)
Local No. 216, AFGE,)
AFL-CIO,)
Union)
and) FMCS Case No. 071012-00226-A
) FLSA Grievance
)
Equal Employment Opportunity)
Commission,)
)

THE UNION’S POST-ARBITRATION BRIEF ON OVERTIME FOR
INVESTIGATORS, MEDIATORS, AND PARALEGALS

Background

The National Council of EEOC Locals No. 216, American Federation of Government Employees, AFL-CIO, (Union) filed a Step 1 Grievance, April 7, 2006, Joint Exhibit 2,¹ on behalf of the bargaining unit employees, in the positions of Enforcement Investigator GS-1810-9/11/12, Alternative Dispute Resolution Mediator GS-301-/12/13, and Paralegals GS950-9/11, asserting the Equal Employment Opportunity Commission, (EEOC), had since April 1, 2003 intentionally suffered and permitted bargaining unit employees to work outside their regularly scheduled tour of duty without payment of overtime compensation; suffered and permitted employees to work in excess of 40 hours per week without payment of overtime compensation; suffered and permitted employees to work in excess of eight hours per day without payment of overtime compensation; and required employees to accept compensatory time for hours in excess of the regularly scheduled work hours. The Union alleged violations of the Collective Bargaining Agreement (CBA), J-1, Articles 31, Section 31.01, Sections 31.05- 31.09, 5 U.S.C. § 5542, 29

¹ Joint Exhibits are denoted as “J-___.” Union exhibits are denoted as “U-___.” EEOC exhibits are denoted as “A-___.”

U.S.C. §§ 207 and 216(b) of the Fair Labor Standards Act (FLSA), and 5 C.F.R. § 551.

By agreement of the parties, regional hearings were scheduled in Philadelphia, St. Louis, Atlanta, and Los Angeles, for the purpose of receiving testimony on issues raised in the Union's grievance. The parties agreed representative witnesses would be presented to give testimony on the grievance, 3 *H.T.*2326-2329.²

The EEOC, by written motion raised procedural issues and timeliness of the grievance, by written motions, presented to the Union and the arbitrator on June 25 and 29, 2007. The Union filed a response to the EEOC's motion on July 12, 2007, which is incorporated herein by reference for purposes of any applicability to the final decision in this matter. The EEOC's motion to dismiss and for clarification and issue on timeliness was disposed in the Arbitrator's August 6, 2007 ruling, 3 *H.T.* 2340-2341.

For purposes of the suffered and/or permitted phase of the Union's grievance, the Washington Field Office evidence and/or testimony is limited to events occurring after September 13, 2006.

Statement of Facts

Because of the extensive nature of the factual testimony in this case, the Union is listing categories of facts, with the witnesses, in support of those facts. A Detailed Witness Attachment, organized according to hearing location and witness office location, is enclosed with this Brief.

Fact No. 1

For the period of January 1, 2003 and continuing until the present, Investigators, Mediators, and Paralegal Specialists worked in excess of their scheduled work

² References to the hearing transcript are denoted by volume and page numbers as “__H.T.__.”

hours. Managers and Supervisors were aware of the excess work hours and permitted employees, with or without advance approval, to work the excess work hours.

Philadelphia: Patricia Folino, Mediator; Novella West, Investigator; Brenda Hester Investigator; Mark Maddox, Investigator; Evangeline Hawthorne, Investigator; William Cook, Supervisor;

New York: Christopher Kwok, Mediator; Elizabeth Marcus, Mediator; Electra Yourke, Supervisor; Rosemary Wilkes, Supervisor; Esther Guitierrez, Investigator.

Newark: Jose Rosenberg, Supervisor; Eris Yarborough, Investigator;

Buffalo: Elizabeth Cadle, Director; Nelida Sanchez, Investigator;

Pittsburgh: Patrick Malley, Investigator; Susan Kelly, Investigator; Joseph Hardiman, Director.

Richmond: Patricia Gelisson, Director; Kathleen Harmon, Investigator;.

Baltimore: Debra Lawrence, Supervisory Trial Attorney; LaEunice Chapman, Paralegal Specialist; Yvonne Williams, Paralegal Specialist;.

Chicago: Tyrone Irvin, Enforcement Supervisor; Eileen Sotak, Enforcement Supervisor;

Regina Husar, Mediator; Nanisa Pereles, Investigator; Janel Smith, Investigator; Sarronda Harris, Investigator.

Milwaukee: Pamela Bloomer, Investigator; Lili Llanas, Investigator.

St. Louis: James Neely, Director; Penny Horne, Paralegal Specialist

Dallas: Janet Elizondo, Deputy Director; Gloria Smith, Mediator; Melva Best, Investigator.

San Antonio: Travis Hicks, Enforcement Manager; Guillermo Zamora, Supervisor; Katherine Sanchez Perez, ADR Coordinator; Craig Kempf, Mediator; Tonyaa Shiver, Investigator; Diane Webb, Investigator; John Ahlstrom, Investigator; Maria Minks, Investigator.

El Paso: Jose Guarany, Mediator; Mary Christine Bobadillo, Investigator; Arturo Carrion, Investigator.

Houston: Deborah Ubanski, ADR Coordinator; Joseph deLeon, Supervisor; Laverne Morrision, Mediator; Elaine Weintritt, Investigator; Pamela Edwards, Investigator.

Oklahoma City: Donald Stevens, Director; Robert Hill, Investigator.

Louisville: Susan Ryan, Supervisor; Sharon Baker, Mediator; Darrick Anderson, Investigator.

Indianapolis: Karen Bellinger, ADR Coordinator; John Davis, Mediator; Joseph Tedesco, Investigator.

Detroit: Gail Cober, Director; Patricia McNeil.

Cincinnati: Wilma Javey, Director; Thomas Feiertag, Investigator; Maria Saldivar, Investigator.

Atlanta: John Fitzgerald, Deputy Director; Sandra Gill, Supervisor; Kenneth Warford, Mediator; Rosalyn Williams, Investigator; Helen Garrett, Paralegal Specialist.

Savannah: John Fitzgerald, Deputy Director; Diego Torres, Investigator.

Birmingham: Booker T. Lewis, Supervisor; Glenda Bryan-Brooks, Investigator; Julia Hodge, Investigator.

Charlotte: Melvin hardy, Supervisor; Sandra Chavez, Investigator.

Greensboro: Thomas Colclough, Director; Jannes James, Investigator.

Raleigh: Thomas Colclough, Director.

Memphis: Audrey Bonner, Enforcement Manager; Irma Boyce, Mediator.

Nashville: Sarah Smith, Director.\

Little Rock: Wanda Milton, Area Director.

Miami: Juan Gonzalez, Supervisor; Rosemary Caddle, Investigator

Tampa: Sylvia Pouncy, Supervisor; Beverly Collins, Investigator; Julia Diaz, Investigator; Doralisa Wroblewski, Investigator.

Los Angeles: Deborah Lichten, Investigator.

Honolulu: Timothy Riera, Director; Raymond Griffith, Jr., Investigator.

San Diego: Deborah Kinzel-Barnes, Investigator.

Phoenix: Chester Bailey, Director; Yvonne Gloria-Johnson, ADR Supervisor; David Bruce Rucker, Supervisor.

Albuquerque: Georgia Marchbanks, Director; Kathlyn Johnson, Investigator; Rita Montoya, Mediator.

San Francisco: Jonathan Peck, Supervisory Trial Attorney; David Skillman, Paralegal Specialist.

Seattle: Roderick Ustanik, Supervisor.

Fact No. 2

The EEOC permitted records of excess hours of work to be kept outside the official time and attendance records and did not assure accurate records were kept for all hours worked by Investigators, Mediators, and Paralegals.

Philadelphia: Louise Garcia, Secretary; Adrian Rhaney, Program Assistant; Barbara Marcucci, Secretary; Novella West, Investigator; Brenda Hester Investigator; Diane Vallejo-Benus, Investigator; Bettina Dunn, Paralegal Specialist; William Cook, Supervisor;

New York: Christopher Kwok, Mediator; Electra Yourke, Supervisor; Rosemary Wilkes, Supervisor; Esther Guterrez, Investigator.

Newark: Jose Rosenberg, Supervisor; Eris Yarborough, Investigator;

Buffalo: Elizabeth Cadle, Director; Nelida Sanchez, Investigator;

Pittsburgh: Marilee Hallam, IT Specialist; Joanne Frankwich-Bly, Mediation Assistant; Patrick Malley, Investigator; Susan Kelly, Investigator; Joseph Hardiman, Director.

Richmond: Patricia Gelisson, Director; Brinda George, Investigator.

Chicago: Horice Taylor, Secretary; Tyrone Irvin, Enforcement Supervisor; Eileen Sotak, Enforcement Supervisor; Regina Husar, Mediator; Nanisa Pereles, Investigator; Janel Smith, Investigator; Sarronda Harris, Investigator.

Milwaukee: Felicia Sykes, Information Technology Assistant; Pamela Bloomer, Investigator; Lili Llanas, Investigator.

St. Louis: James Neely, Director; Carol Abernathy, State & Local Clerk.

Dallas: Janet Elizondo, Deputy Director; Gloria Smith, Mediator.

San Antonio: Katherine Sanchez Perez, ADR Coordinator; Craig Kempf, Mediator; Tonyaa Shiver, Investigator; Diane Webb, Investigator; John Ahlstrom, Investigator; Maria Minks, Investigator.

El Paso: Patricia Province, Information Technology Specialist; Mary Christine

Bobadillo, Investigator; Arturo Carrion, Investigator; Sandra Cox, Investigator.

Houston: Phyllis, Fletcher, ADR Program Assistant; Deborah Ubanski, ADR Coordinator; Joseph deLeon, Supervisor; Laverne Morrision, Mediator; Pamela Edwards, Investigator.

Oklahoma City: Kerie Frantzen, Investigative Support Assistant; Donald Stevens, Director.

Louisville: Douglas Cave, Office Automation Assistant.

Indianapolis: Karen Bellinger, ADR Coordinator; Joseph Tedesco, Investigator.

Detroit: Gail Cober, Director; Patricia McNeil.

Cincinnati: Rosa Moore, Office Automation Assistant; Wilma Javey, Director; Thomas Feiertag, Investigator; Maria Saldivar, Investigator.

Atlanta: John Fitzgerald, Deputy Director; Sandra Gill, Supervisor; Kenneth Warford, Mediator; Rosalyn Williams, Investigator; Helen Garrett, Paralegal Specialist.

Savannah: Richelle Durr, Office Automation Assistant; John Fitzgerald, Deputy Director; Diego Torres, Investigator.

Birmingham: Glenda Bryan-Brooks, Investigator; Julia Hodge, Investigator.

Charlotte: Melvin hardy, Supervisor; Sandra Chavez, Investigator.

Greensboro: Peggy Saunders, Information Technology Specialist; Jannes James, Investigator.

Raleigh: Thomas Colclough, Director.

Memphis: Linda Hudson, Office Automation Assistant; Audrey Bonner, Enforcement Manager.

Nashville: Sarah Smith, Director.

Little Rock: Wanda Milton, Area Director.

Miami: Juan Gonzalez, Supervisor; Rosemary Caddle, Investigator

Tampa: Louise Garcia, Secretary; Sylvia Pouncy, Supervisor; Beverly Collins, Investigator; Julia Diaz, Investigator; Doralisa Wroblewski, Investigator.

Los Angeles: Deborah Lichten, Investigator.

Honolulu: Raymond Griffith, Jr., Investigator.

San Diego: Deborah Kinzel-Barnes, Investigator.

Phoenix: David Bruce Rucker, Supervisor.

San Francisco: David Skillman, Paralegal Specialist.

Seattle: Roderick Ustanik, Supervisor.

Fact No. 3

From January 1, 2003 and continuing to the present, EEOC's Managers and Supervisors informed Investigators, Mediators, and Paralegal Specialists there was no money available to pay for excess work hours; informed Investigators, Mediators, and Paralegal Specialists, the EEOC would give the employees hour for hour compensatory time for excess work hours; gave credit time to employees on compressed work schedules; and did not permit employees to elect money payment or compensatory time for excess work hours..

Philadelphia: Mark Maddox, Investigator; Evangeline Hawthorne, Investigator; Novella West, Investigator; Brenda Hester Investigator; Diane Vallejo-Benus, Investigator; Bettina Dunn, Paralegal Specialist; Sylvia Williams, Paralegal Specialist; William Cook,

Supervisor; Phil Goldman.

New York: Christopher Kwok, Mediator; Electra Yourke, Supervisor; Rosemary Wilkes, Supervisor; Esther Guterrez, Investigator.

Newark: Jose Rosenberg, Supervisor; Eris Yarborough, Investigator;

Buffalo: Elizabeth Cadle, Director; Nelida Sanchez, Investigator;

Pittsburgh: Marilee Hallam, IT Specialist; Patrick Malley, Investigator; Susan Kelly, Investigator; Joseph Hardiman, Director.

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Milwaukee: Chester Bailey; Pamela Bloomer, Investigator; Lili Llanas, Investigator.

St. Louis: James Neely, Director; Penny Horne, Paralegal Specialist.

Dallas: Janet Elizondo, Deputy Director; Gloria Smith, Mediator; Azella Dykman, Investigator; Melva Best, Investigator.

San Antonio: Travis Hicks, Supervisor; Guillermo Zamora, Supervisor; Katherine Sanchez Perez, ADR Coordinator; Craig Kempf, Mediator; Tonyaa Shiver, Investigator; Diane Webb, Investigator; John Ahlstrom, Investigator; Maria Minks, Investigator.

El Paso: Mary Christine Bobadillo, Investigator; Arturo Carrion, Investigator; Rollin

Wickenden, Investigator; Sandra Cox, Investigator.

Houston: Deborah Ubanski, ADR Coordinator; Joseph deLeon, Supervisor; Laverne Morrison, Mediator; Samantha Chan, Investigator; Elaine Weintritt, Investigator; Pamela Edwards, Investigator.

Oklahoma City: Donald Stevens, Director; Robert Hill, Investigator.

Louisville: Douglas Cave, Office Automation Assistant; Susan Ryan, Supervisor; Sharon Baker, Mediator; Darrick Anderson, Investigator.

Indianapolis: Karen Bellinger, ADR Coordinator; Joseph Tedesco, Investigator; John Davis, Mediator.

Detroit: Gail Cober, Director; Patricia McNeil.

Cincinnati: Wilma Javey, Director; Thomas Feiertag, Investigator; Maria Saldivar, Investigator.

Atlanta: John Fitzgerald, Deputy Director; Sandra Gill, Supervisor; Kenneth Warford, Mediator; Rosalyn Williams, Investigator; Helen Garrett, Paralegal Specialist.

Savannah: John Fitzgerald, Deputy Director; Diego Torres, Investigator.

Birmingham: Booker T. Lewis, Supervisor; Glenda Bryan-Brooks, Investigator; Julia Hodge, Investigator.

Charlotte: Melvin Hardy, Supervisor; Sandra Chavez, Investigator.

Greensboro: Thomas Colclough, Director; Jannes James, Investigator.

Raleigh: Thomas Colclough, Director.

Memphis: Audrey Bonner, Enforcement Manager; Irma Boyce, Mediator. .

Nashville: Sarah Smith, Director.

Little Rock: Wanda Milton, Area Director.

Miami: Juan Gonzalez, Supervisor; Rosemary Caddle, Investigator

Tampa: Sylvia Pouncy, Supervisor; Beverly Collins, Investigator; Julia Diaz,
Investigator; Doralisa Wroblewski, Investigator.

Los Angeles: Deborah Lichten, Investigator.

Honolulu: Timothy Riera, Director; Raymond Griffith, Jr., Investigator.

San Diego: Deborah Kinzel-Barnes, Investigator.

Phoenix: Chester Bailey, Director; David Bruce Rucker, Supervisor; Yvonne Gloria-
Johnson, ADR Supervisor.

Albuquerque: Gerogia Marchbanks, Director; Kathlyn Johnson, Investigator; Rita
Montoya, Mediator.

San Francisco: Jonathan Peck, Supervisory Trial Attorney; David Skillman, Paralegal
Specialist.

Seattle: Roderick Ustanik, Supervisor.

Fact No. 4

The EEOC policy required each office to have money in its office budget to permit Investigators, Mediators, and Paralegals to work excess hours for overtime money or compensatory time. The EEOC Headquarters Office of Field Programs and Office of Finance made a decision to deny money payment to Investigators, Mediators, and Paralegal Specialists for excess work hours; and informed Managers and Supervisors there was no overtime money and employees could work for compensatory time.

Angelica Ibarguen, (Ms. Ibarguen), Chief Human Capital Officer for EEOC, has responsibility for human resources including compensation, benefits, recruitment, training and labor and employment relations, 2 *H.T.* 412-413. Ms. Ibarguen's immediate supervisor is the Chair of the EEOC, *Id.* Joann Riggs, is the head of Labor Relations and reports directly to Ms. Ibarguen, 2*H.T.* 416. Ms. Ibarguen testified the U.S. Office of Personnel Management sets the policies and procedures for overtime under the FLSA and her responsibility is to clarify the policies and disseminate the information to employees, 2 *H.T.* 419-422. Ms. Ibarguen testified if her office issues policies or guidance, the District Directors are required to follow the policy and/or guidance, 2 *H.T.* 447. On March 3, 2003, Ms. Ibarguen issued a memorandum , A-5-D, as a reminder and guidance on the manner in which the EEOC administers overtime, 2 *H.T.* 432-434. Ms. Ibarguen testified from the date of issuance of the March 3, 2003 memorandum through the date of her testimony, on January 23, 2008, no managers or supervisors had requested any changes to the overtime policy, 2 *H.T.* 448-449. Ms. Ibarguen testified she had been informed by the Union, a long time ago, that the policies for overtime were not being followed, 2 *H.T.* 449-451. Ms. Ibarguen told Nicholas Inzeo, head of the Office of Field Programs, about the Union's complaint and a conference call was held with the district directors on the overtime policies, *Id.*

Ms. Ibarguen testified her understanding is nonexempt employees may choose to take overtime money payment or compensatory time for hours of work beyond their scheduled work hours, 2 *H.T.* 434-436. Ms. Ibarguen stated nonexempt employees could not receive compensatory time if overtime money was not available, 2 *H.T.* 437-441. Ms. Ibarguen stated since she became employed with the EEOC, money for overtime has been available in the

EEOC budget each fiscal year, 2 *H.T.* 442-443.

Joann Riggs, (Ms. Riggs) Assistant Director, Office of Human Resources, began employment with EEOC in June 1988 and has responsibility for labor and employee relations, workers' compensation, and reasonable accommodation, 9 *H.T.* 2880-2881. Ms. Riggs administers the CBA, processes first step grievances for the Office of the Chair of EEOC, handles unfair labor practices, adverse actions, and performance based actions, *Id.* Ms. Riggs became familiar with the FLSA as it applies to federal employees beginning in 1988, when she began employment with EEOC, 9 *H.T.* 2923. Ms. Riggs testified the EEOC has made clear to managers and supervisors that all time spent by an employee performing work which benefits the agency is hours of work which must be compensated, 9 *H.T.* 2924-2925. Ms. Riggs testified the Federal Personnel Payroll System, (FPPS), is used to track hours of work and leave of employees; entry of leave and work hours in FPPS is mandatory; and she had no knowledge of certain types of work hours not being entered into FPPS, 9 *H.T.* 2928-2929. Ms. Riggs testified she was told by prior chief financial officers it was a violation of the Anti-Deficiency Act to let someone work compensatory time and not have money on the books to pay for the time, 9 *H.T.* 2935. Ms. Riggs testified the EEOC made clear, to managers and supervisors, through day to day customer service and by including the information in the Management Development Institute, employees could not work for compensatory time if the office had no money in their office budgets for overtime, 9 *H.T.* 2934-2936. Ms. Riggs testified the March 3, 2003 memorandum was given to EEOC senior managers; the memorandum was EEOC policy; and managers and supervisors were bound to follow the memorandum, 9 *H.T.* 2932-2933.

Ralph Soto, (Mr. Soto), Supervisory Program Analyst, Office of Field Programs has

responsibility for assisting the Director of the Office of Field Programs in overseeing and managing the enforcement operations by setting goals for the district directors; monitoring and assessing the director's performance; recommending the allocation of staff; allocating money to the field, and approving requests for overtime, 9 *H.T.* 2941, 2943. Mr. Soto testified the EEOC does not pay overtime for investigators and mediators and encourages directors to use compensatory time for overtime, 9*H.T.* 2944. Mr. Soto testified there is money in the budget for overtime to comply with the Anti-Deficiency Act, 9 *H.T.* 2944-2945. Mr. Soto testified the EEOC requires field offices to keep records of time worked beyond the scheduled work hours of mediators but does not require the hours to be recorded in the FPPS, *Id.* Mr. Soto testified he had no formal training in the administration of overtime policies, rules, and regulations but had been involved in labor relations matters with Ms. Riggs for many years, who had taught him a great deal, 9*H.T.* 2954. Mr. Soto testified he understood employees may only perform work for which the government is prepared to make payment, 9 *H.T.* 2954-2955. Mr. Soto testified the Office of the Chief Financial Officer of EEOC decided an employee could work for compensatory time , when the Director had no money for overtime in the office budget, as long as there was overtime money in the headquarters budget, 9 *H.T.* 2959-2961. Mr. Soto testified the EEOC's practice is to recommend compensatory time when overtime money is requested for investigators, *Id.* Mr. Soto testified his office and the Office of the Chief Financial officer told supervisors and managers, there was no requirement to have money in their office budget for an employee to work for compensatory time, 9 *H.T.* 2961-2962. Mr. Soto testified when an office requests overtime for an investigator the overtime for the investigator is denied and the office is told to use compensatory time, 9*H.T.* 2966-67. Mr. Soto testified the practice of denying

overtime money payment to investigators has existed, since the question arose from Lynn Bruner, a District Director, until today, 9 *H.T.* 2970-2971.

Mr. Soto testified the purpose of the FPPS was to keep track of the hours employees actually worked; the EEOC does not mandate all hours of work be input into FPPS; supervisors and managers were permitted to maintain an informal system for hours beyond an employee's scheduled work hours; and the FPPS does not track every single minute of hours worked; 9 *H.T.* 2978-2979. Mr. Soto testified the EEOC does not require a specific recording system for compensatory time and compensatory time is not part of the EEOC's official records, 9 *H.T.* 2982-2983. Mr. Soto testified if a Governmentwide regulation or the law required recording of excess work hours the EEOC would be required to record the excess work hours and he had never asked what the law required for recording excess hours of work, 9 *H.T.* 2984.

Nicholas Inzeo, . Director Office of Field Programs, has responsibility for all field offices, *H.T.*(5/22) 827-828. On direct examination, Mr. Inzeo testified there has always been money available to pay for overtime; there is a perception that there is no money available; he doesn't believe there is a connection between money for overtime and giving compensatory time; and he believes he can give compensatory time without having money to pay overtime, *H.T.*(5/22)834-838. Mr. Inzeo testified the EEOC does not require offices to have money in their budget when employees work excess hours for compensatory time, *H.T.*(5/22) 838, 841-842, and A-5D.

On cross-examination, Mr. Inzeo testified the EEOC is bound by the CBA requirement that nonexempt employees may not work excess work hours when money is not available; stated he tell supervisors, if asked, money is available; tells district directors three times a year money is available for overtime; sends a budget to district directors that money is available for overtime;

and sends nothing to the Investigators on money being available for overtime, *H.T.* 843-846, J-1, and U-156. Mr. Inzeo testified the only written communication he sent out to clear up the false perception about overtime was the budget sent to district directors, *H.T.*(522) 846-848. Mr. Inzeo testified he reached a different opinion about the March 3, 2003 memorandum two-three weeks ago; it was a long-standing practice in the EEOC to permit managers and supervisors to give compensatory time for excess work hours, even though money is not available for overtime; and managers and supervisors were not trained that the CBA prohibited employees working excess work hours when money was not available, *H.T.*(5/22)853 -859, J-1, and A-5D.

Applicable Legal Authority

29 U.S.C. §§ 207 and 216(b) of the FLSA, 5 C.F.R. § 551.201 et.seq., Article 31, Sec. 31.05-31.07 and 31.09 of the CBA, require an employer to pay employees for all work performed in excess of an employee's regularly scheduled work hours. Federal employees employed in General Schedule (GS) positions are entitled to overtime payment under the FLSA and all regulations applicable to federal employees are administered consistent with regulations issued by the Secretary of Labor, *Lanehart v. Horner*, 818 F.2d.1574, 1578(D.C.Cir. 1987) ; *Dept. Of Health and Human Services, Social Security Administration and American Federation of Government Employees*, 44 F.L.R.A. 773(1992). 5 C.F.R. §§ 551.401(a) and 551.402 provide all time spent by an employee performing work for the benefit of the agency is hours of work. An agency is responsible for assuring only work for which it is prepared to pay is performed and must keep complete and accurate records of all hours worked, *Id.* Sec. 31.06 of the CBA requires payment at the rate of one and one-half times the regular pay rate for all hours of overtime and requires nonexempt employees not work overtime, when overtime pay is not

available. Sec. 31.07(a) requires employees on a flexible work schedule to be paid for all hours beyond 8 in a day or 40 hours in a week. Sec. 31.07(b) requires employees on a compressed schedule be paid for all hours in excess of the established compressed schedule. Sec. 31.09 of the CBA requires the agency to pay for all work performed by an employee, for the benefit of the agency, beyond scheduled work hours, when the employer's supervisor knew or had reason to believe the work was being performed. *Herman v. Paolo Group Foster Home, Inc.*, 183 F.3d. 468, 472(6th Cir. 1999), held an employer is required to keep accurate records of hours worked by employees and when an employer's records are inaccurate or inadequate, an employee meets the burden of establishing a violation by proving the employee in fact performed work for which the employee was improperly compensated.

In *Dept. of the Navy, Naval Explosive Ordnance and American Federation of Government Employees, Local 1923*, 57 F.L.R.A. 280, 284-285(2001), the Authority, relying on its ruling in *National Treasury Employees Union and Federal Deposit Insurance Corporation*, 53 F.L.R.A. 1469 (1998), held the substantive provisions of the FLSA are applicable in arbitration and grievance proceedings. In arbitration proceedings, the applicable statute of limitations and awards of damages are governed by the requirements of the FLSA, *Id.*

The period of relief for claims of unpaid wages under the FLSA is two years from the date of the filing of the grievance and three years for intentional violations of the Act, *Nat'l Treasury Employees v. F.D.I.C.*, 53 F.L.R.A. 1469. Liquidated damages must be awarded when an employer does not submit evidence that the denial of the payment of overtime was in good faith and the employer had a reasonable belief the employer was in compliance with the law, *Id.* The burden is on the employer to submit substantial evidence showing the employer made an effort to

determine what the law required, *Id.* “[F]ailure to request ‘any specific advice,’ is evidence that the employer did not act in good faith,” *Id.*

Evidence that employees are working outside their scheduled work hours; supervisors and the agency know the work is being performed; the agency took no steps to maintain control of overtime; and instructed employees to record only scheduled work hours in the time and attendance system, is sufficient evidence to support a willful violation of the FLSA, *Equal Employment Opportunity Commission, Baltimore Field Office and American Federation of Government Employees, National Council of EEOC Locals No. 216*, 59 F.L.R.A. 688, 692-694 (2004).

Article 31, Sec. 31.08 governs compensatory time for Investigators, Mediators, and Paralegal Specialists. Sec. 31.08 requires employees elect compensatory time in lieu of overtime. In *American Federation of Government Employees Local 507 and Dept. Of Veterans Affairs, Medical Center, West Palm Beach*, 58 F.L.R.A. 378, 380 (2003), the Authority in interpreting the regulatory requirement held an agency must give employees an uncoerced option of whether or not to request compensatory time.

ISSUE: Did the EEOC, in violation of Articles 30 and 31, 29 U.S.C. §§ 207 and 216, intentionally and willfully, fail to pay overtime to Investigators, Mediators, and Paralegal Specialist for hours of work beyond the employees’ regularly scheduled work hours?

Argument

In this case, the EEOC does not dispute that it adopted a practice, of refusing to pay Investigators, Mediators, and Paralegal Specialists, overtime money for excess work hours. Mr. Inzeo, Mr. Soto, managers, and supervisors throughout the hearings conducted in Philadelphia,

St. Louis, Atlanta, and Los Angeles, testified that overtime pay was not available. Mr. Inzeo and Mr. Soto testified the EEOC had money to pay for overtime, but elected not to pay the money. Mr. Inzeo and Mr. Soto admitted they took no action to curb or halt the practice of employees working for compensatory time and took no action to determine if the practice complied with the law. Ms. Ibarguen, Ms. Riggs, managers, and supervisors admitted the EEOC policy required employees not be permitted to work for overtime or compensatory time, when money was not in an office budget. The EEOC resorted to a system of informing employees there was no money for overtime and keeping excess work hours off the official time and attendance records, to avoid payment in compliance with the CBA and the law. The practice of the EEOC resulted in Investigators, Mediators, and Paralegal Specialists being deprived of overtime pay. Article 31, Sec. 31.06 specifically prohibited non-exempt employees working overtime when overtime pay was not available.

Supervisors and managers regularly approved excess work hours, before the work was performed and after the work was performed, for Outreach, Intake, and the completion of work assignments. The evidence shows the EEOC consistently violated Article 31, Sec. 31.09 by permitting Investigators, Mediators, and Paralegal Specialists to work beyond their scheduled work hours on a regular basis.

William Cook in Philadelphia permitted Investigators to work and refused to pay Brenda Hester overtime, when she requested money payment. James Neely and Janet Elizondo used an overtime form, which inserted a statement requiring waiver of overtime. Joseph Hardiman, II, Thomas Colclough, Wanda Milton, and other managers maintained separate records recording excess work hours, while informing employees overtime money was not available. The

testimony of Electra Yourke, Wanda Milton, and other managers showed the supervisors falsely verified time and attendance records showing employees were at work, when the employees were on leave for unofficial compensatory time. John Fitzgerald testified to a term he called “cuff time,” which he admitted was compensatory time not recorded on the official time and attendance records.

These actions of the EEOC are in direct violation of the FLSA. The FLSA and 5 C.F.R. § 551.402 require an agency keep accurate records of all time worked, *Herman, supra.*, at 472. The failure to keep accurate records raises the inference that employees were improperly compensated, *Id.* In this case, the inference is supported by witness testimony as well. Supervisors, managers, and employees testified employees were instructed to sign-in/out at their scheduled work hours and to not record excess hours on the CABTS. In fact, the CABTS contained no space for recording excess work hours. Diego Torres, Investigator, in Savannah, testified due to the workload he was not able to take all the excess work hours he accumulated. Lilli Llanas, Investigator, Minneapolis testified she did not know if she was compensated for all the overtime hours she accrued in visiting an employer’s work site. Supervisors and managers signed off on time sheets showing excess work hours; took no action to see employees received overtime compensation for the hours; and actively participated in not reporting the actual hours worked by employees. Supervisors and managers testified they took no action to determine if money was available for money payment for overtime. The EEOC totally disregarded the laws, regulations, and the CBA requiring the recording of work hours and made no effort to assure it maintained any controls over overtime work, *Equal Employment Opportunity Commission, Baltimore Field Office, supra.* at 693. .

The EEOC contends that it compensated employees by permitting the employees to have compensatory time. Compensatory time must be requested by an employee, . The EEOC did not give the employees the election of having compensatory time or not working at all. Susan Kelly's testimony, Investigator, Pittsburgh, and the testimony of other employees on Outreach is evidence that the election was not voluntary. Outreach, as conceded by managers and supervisors was part of each office's goals and became a part of each Investigator and Mediator's performance standards. Outreach was not a voluntary assignment but an expected work assignment. Completion of Intake work assignments were also not voluntary. Managers, supervisor, and employees testified charges from members of the public were to be completed even, if the employee had to stay beyond scheduled work hours. John Fitzgerald attested to the fact that emergency FOIA work was required to be performed by a Paralegal Specialist. Mr. Fitzgerald did not give the employee the option of not performing the work at all. Booker T. Lewis, supervisor, Birmingham resorted to shifting days off for employees on compressed work schedules to avoid paying overtime. Donald Stevens, Director, Oklahoma City violated the law and CBA by granting an employee on a compressed work schedule credit time to avoid paying overtime. The witness testimony shows the EEOC never gave the employee an option of not working at all. No employee was told you can perform this work at another time. In fact, the testimony of Rosemary Wilkes, Supervisor, New York City, is evidence the practice was not voluntary. Ms. Wilkes testified she was never told an employee could elect to have compensatory time; she would tell employees we can't give you overtime; and it's the nature of the beast that the job has to get done, 8 *H.T.* 2634-2635. A grant of compensatory time which does not contain an option not to work at all is not permitted by the law and may not substitute

for payment of overtime, *American Federation of Government Employees Local 507, supra.* at 380.

The EEOC's practice of substituting forced compensatory time for overtime payment was an intentional violation of the law and the CBA. Mr. Inzeo and Mr. Soto both testified they made no effort to determine whether compensatory time could be substituted as payment for the excess work hours. Mr. Soto specifically testified he did not know if the practice complied with the law and he made no effort to determine if the practice complied with the law. Mr. Inzeo testified he was aware of the practice; thought it complied with the law; he did nothing to dispel the perception that overtime money was not available; and he understood the CBA required employees not work overtime if overtime money was not available. The incomplete records, the recording of time outside the official time and attendance system; the violations of the law regarding employees on compressed work schedules, support a finding the EEOC's actions were willful and intentional. The burden is on the EEOC to produce evidence that its actions were reasonable and comported with the law or produce evidence that it took steps to assure it was complying with the law. No managers or supervisors could attest to having taken any steps to determine if overtime money was available for employees working excess work hours. Managers and supervisors consistently testified no overtime money was available, when the EEOC records, A-12 and Ms. Ibarguen, Ms. Riggs, Mr. Soto, and Mr. Inzeo testified money was available every year. The EEOC engaged in intentional actions to avoid paying overtime compensation, in violation of the FLSA and the CBA. Liquidated damages are warranted when an employer intentionally fails to pay overtime compensation.

Conclusion

The Union has met its burden of showing that the EEOC, intentionally, failed to properly compensate Investigators, Mediators, and Paralegal Specialists for excess work hours. The evidence shows the hours were worked; the EEOC kept inaccurate and incomplete records of the work; the compensatory time was not voluntary; and the EEOC practice was a means of avoiding overtime payment for excess work hours. The Union is entitled to a finding that the EEOC engaged in a practice of intentionally violating Article 30 and 31 of the CBA and the FLSA. The Union is entitled to liquidated damages in an amount equal to all monies payable for the excess work hours performed by Investigators, Mediators, and Paralegal Specialists.

The Union requests the Arbitrator schedule hearings for claims to be presented by employees for the excess work hours of Investigators, Mediators, and Paralegal Specialists. The Union requests the EEOC be required to supply all records, including e-mails, notes, electronic, and hard copy records in the possession of the EEOC, managers, and supervisors for the claims process to the Union. The Union requests the EEOC be required to issue a written notice, approved by the Arbitrator, to each employee, current and past for the period of April 1, 2003 to the present concerning the claims process and to provide the Union with a list with names and addresses of each employee notified..

29 U.S.C. § 216(b) provides employees may be awarded lost wages, liquidated damages and attorney fees and costs for actions brought to enforce violations of the FLSA.. The substantive provisions of the FLSA are applicable in arbitration, *Dept. Of Navy, Naval Explosive Ordnance, supra.* at 284. 5 U.S.C. § 5596 requires an award of attorney fees and costs for an unjustified personnel action, which results in a loss of pay to an employee, *Dept. Of Health and Human*

Services, Social Security Administration, supra. at *Sec.D.* In the present case, the EEOC's violations of the FLSA have resulted in a loss of pay to employees in positions of Investigator, Mediator, and Paralegal Specialist. Employees received no pay for excess work hours and/or received less than time and one-half for excess hours worked in violation of the FLSA and the CBA. The Union seeks attorney fees and costs and requests the arbitrator retain jurisdiction of this matter for 30 days, after the issuance of a final decision, including any claims process, for purposes of submission of attorney fees and costs in this action..

Respectfully Submitted,

Barbara B. Hutchinson
7907 Powhatan Street
New Carrollton, MD. 20784
Telephone: (301) 577-3387
Facsimile: (301) 577-3764
Attorney for the Union