FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration Between	:	**Grievance**
NATIONAL COUNCIL OF EEOC LOCALS NO. 216, AFGE, AFL-CIO	:	Overtime Claims Under the Fair Labor Standards Act
-and-	:	
UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	:	
Case No. 071012-00226-A	:	

OPINION AND AWARD OF ARBITRATOR

BACKGROUND OF THE DISPUTE

On March 23, 208 I issued my Opinion and Award in the first phase of this dispute. The issues there involved the decision of the United States Equal Employment Opportunity Commission ("EEOC" or "Agency") to change the status of certain positions under the Fair Labor Standards Act of 1938 (29 U.S.C. §201 *et seq*.) ("FLSA") from non-exempt to exempt.

The current dispute, set forth in the Union's grievance of April 7, 2006, alleges the following, in relevant part:

> Beginning on April 1, 2003 and continuing to the present, the EEOC, in violation of the CBA, the law, and regulations, intentionally failed to pay overtime compensation to bargaining unit employees in the positions of Enforcement Investigators GS-1810-9, 11, and 12; positions of Alternative Dispute Resolution Mediators GS-301-12 and 13; and in the positions of

> Paralegal Specialists GS-950 – 9 and 11, in the EEOC's District, Field, Area and Local Offices. In addition, in violation of the CBA, law, and regulations, the aforementioned bargaining unit employees were required to accept compensatory time.
>
> Beginning on April 1, 2003 and continuing to the present, the EEOC, in violation of the CBA, the law, and regulations, intentionally suffered and permitted bargaining unit employees in the positions of Enforcement Investigators GS-1810-9, 11, and 12; positions of Alternative Dispute Resolution Mediators GS-301-12 and 13; and in the positions of Paralegal Specialists GS-950-9 and 11, in the EEOC's District, Field, Area and Local Offices, to work outside their regularly scheduled tour of duty, to work in excess of 40 hours per week; and to work in excess of eight hours per day without payment of overtime compensation for the hours worked.

In its grievance, the Union alleged violations of the parties' collective bargaining agreement ("Agreement"), specifically Article 31.00 ("Overtime"), Section 31.01, Sections 31.05-31.09, and 5 U.S.C. §5542, 29 U.S.C. §§207 and 216(b) of the Fair Labor Standards Act ("FLSA"), and 5 CFR §551.

The referenced sections of Article 31.00 provide as follows:

> Section 31.00 The assignment of overtime work is a function of the EMPLOYER. The EMPLOYER retains the right to determine the need for overtime work.
>
> …
>
> Section 31.05 Overtime work must be authorized in advance; however, all required or approved work performed outside the basic work week shall be compensated in accordance with applicable overtime laws and regulations of OPM. It is the EMPLOYER's responsibility to ensure that the employee's workload can reasonably be accomplished within the employee's regularly scheduled work day or work week. It shall be the employee's responsibility to inform the EMPLOYER whenever the assigned workload is requiring more time than normally scheduled.
>
> Section 31.06 Non-exempt employees who work overtime shall be paid at the rate of one and one-half (1-1/2) times the rate of regular pay or within regulatory limits. In accordance with applicable law, government-wide rules or regulations, these employees may elect to receive compensatory time in lieu of pay. Non-exempt employees shall not work overtime when overtime pay is not available.
>
> Section 31.07 All bargaining unit employees classified as non-exempt under the Fair Labor Standards Act shall be compensated in accordance with applicable laws and regulations for work performed as overtime. For employees to receive overtime, all overtime must be officially ordered or approved, and

(a) employees on a regular or flexible schedule must perform work beyond eight hours in a day or forty (40) hours in a week or,

(b) employees on a compressed schedule who perform work in excess of the established compressed schedule. (For example, an employee on a compressed four ten-hour-day weekly schedule is entitled to overtime pay for work officially ordered and performed beyond the daily ten (10) hours or forty (40) hours for the week.)

Section 31.08 Compensatory time is time off in lieu of occasional or irregular overtime which has been approved in advance by the supervisor. All employees in positions which are non-exempt under FLSA and those exempt employees in positions whose basic rate of pay is below the maximum rate of GS-10 may elect, but are not required to receive compensatory time in lieu of overtime. Compensatory time is earned in amounts equal to the overtime hours worked.

Section 31.09 Suffered or permitted work means any work performed by an employee for the benefit of the agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed. The concept of suffered and permitted is only applicable to non-exempt employees covered by the Fair Labor Standards Act (FLSA).

For approximately eight weeks, hearings were conducted on these matters, in four regional locations – Philadelphia, Pennsylvania; St. Louis, Missouri; Atlanta, Georgia; and Los Angeles, California.

Agency Pre-Hearing Issues

Prior to the commencement of the second, and current, phase of this dispute, the Agency submitted written Motions of June 25 and 29, 2007, and a Clarification of July 5, 2007. It argued that the matter was not properly before me because of the Union's alleged noncompliance with (1) the requirement of Section 41.07 of the Agreement that the Union identify the employees involved, office involved, date of occurrence, and how the incident violates the Agreement; and (2) the opt-in provision of the FLSA, 29 U.S.C. §216(b). The Agency asserts that the effect of this noncompliance is that it was denied

notice of a claim so that it would not be denied sufficient information before the hearing to understand the nature of the claim.

Section 41.07 of the Agreement ("Regular Grievance Procedure") provides as follows, to the extent relevant to the Agency's Motion:

> Step 1.
>
> …
>
> A written grievance at a minimum shall:
>
> (a) identify the employee and office;
>
> (b) identify the incident and the date it occurred;
>
> (c) cite specific Article(s) and Section(s) of this Agreement or regulation(s) or law(s) alleged to have been violated or misapplied;
>
> (d) specify how the Agreement, law or regulation has been violated;
>
> (e) specify the remedy sought; and
>
> (f) request discussion, if desired.
>
> The supervisor or other appropriate EMPLOYER Representative shall give full consideration to all available facts and issue a decision to the employee or designated UNION Representative in writing within 30 calendar days after filing of the written grievance.
>
> Step 2.
>
> If the matter is not satisfactorily resolved in Step 1, the employee or the designated UNION Representative may within 25 calendar days of the issuance of the Step 1 decision, file the matter in writing with the District or Headquarters Office Director or the Washington Field office Director, as appropriate.
>
> All matters dealing with the performance of Field Office Legal Unit staff, such as performance-based actions (promotion, assignment, etc.), shall be filed in writing with the Regional Attorney. If the Regional Attorney was the Step 1 EMPLOYER representative, then Step 2 shall be filed with the Deputy General Counsel or his/her designee. All other issues (non-performance-based issues) shall be filed with the District, Headquarters or Washington Field Office Director, as appropriate.
>
> Upon request, the EMPLOYER Representative shall meet and discuss the matter with the UNION Representative and the grievant, if the grievant so

> desires, prior to rendering a written decision. The EMPLOYER Representative shall issue a written decision to the employee or designated UNION Representative within 25 calendar days after filing of the Step 1 appeal. Any issues not raised in the grievance by Step 2 are waived.
> …

Section 216(b) of the FLSA (the "opt-in" provision) provides, as relevant here:

> …An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought….

The Union filed a written response to the Agency's Motions on July 12, 2007, asserting that the Agency's claims on timeliness and the adequacy of the written grievance were themselves time-barred, and that further Agency objections to the adequacy of detail concerning claimants and the manner of their identification were not founded.

My Rulings on the Motions found as follows: Paralegal Specialists are included the "suffered or permitted" phase of the dispute. On the issue of timeliness, the Agency's raising the Agreement's Section 41.07 specificity requirements did not go to the Section 41.03 issue of timeliness, which was an affirmative defense of the Agency, for which it bore the burden of proof. The Agency did not waive its right to information about claims, but did waive its right to assert timeliness. On the issues relating to Section 41.07 and on the issue of "opting in" under Section 216(b) of the FLSA, the Agency's motions were rejected, the latter based expressly on *United States Department of the Navy, Naval Explosive Ordnance Disposal Technology Division, Indian Head, Maryland and American Federation of Government Employees, Local 1923*, 57 FLRA 280 (2001). The

Agency now claims that, despite these Rulings, it was left in a position of identifying witnesses and exhibits for hearing without understanding any specifics relating to the Union's claims. It again asks that I dismiss this portion of the grievance on jurisdictional grounds.

I find that my Rulings have addressed and disposed of these issues completely. Insofar as the Agency has again raised such matters in its Post-Hearing Brief, I incorporate herein my previous Rulings. I note, for purposes of the current record, the Agency's continuing position that this series of hearings was conducted improperly by reason of my Ruling that the hearings would be conducted so as to receive testimony from representative witnesses on issues before me. To the extent this remains relevant, in light of my statements at the February 7, 2008 hearing in Philadelphia, I will address it in due course. Nevertheless, in light of the full discussion of these pre-hearing issues, and the full disposition thereof, these hearings proceeded with appropriate opportunities afforded throughout to both parties to present any and all relevant and material evidence, both through witnesses and documents.

An additional issue was raised concerning the extent, if any, to which the current phase of this dispute properly involves the Agency's Washington Field Office. I found that evidence concerning that location, to the extent it may be offered, would be limited to events occurring after September 13, 2006.

SELECTED FOUNDATION DOCUMENTS

While numerous documents will be referenced herein, at least in part, the following are set forth here in their entirety. Unless otherwise noted, referenced attachments are not included.

On September 19, 1995 Patricia Cornwell Johnson, then Director of the EEOC's Human Resources Management Services, issued the following Memorandum to the Agency's upper management personnel on the subject of "**OVERTIME**":

1. Introduction. The purpose of this memorandum is to clarify and change EEOC's overtime policy. These changes will be reflected in a revised EEOC Order 550.006, Overtime, which will be issued in the near future. This document applies to all employees and all supervisors and managers except for members of the Senior Executive Service (SES).

   Overtime compensation for EEOC employees is contained in two separate laws: Title 5, United States Code (USC) which applies to all employees except members of the Senior Executive Service; and the Fair Labor Standards Act (FLSA) which applies to only those employees that are not designated as exempt under the FLSA. Designation as "exempt" means that an employee's position meets the criteria that would exempt him or her from coverage by the provisions of the FLSA. The three (3) exemption categories are executive, administrative and professional. Designation as "nonexempt" means that an employee's position does not meet the criteria for exemption and that the employee is covered by the minimum wage and overtime provisions of the FLSA. The nonexempt employee continues to be covered by the other premium pay provisions of Title 5 (e.g., pay for Sunday work, pay for holiday work, night pay, etc.) The attached list shows the updated exemption status of positions in EEOC. The exemption status of a position is also recorded in item 7 of the OF-8 (position description) and in item 35 of an employee's Standard Form (SF) 50, Notification of Personnel Action.

   Overtime work for employees on a regular or flexible schedule is work that is officially ordered or approved and performed beyond eight hours in a day or forty (40) hours in a week. For employees on a compressed schedule, overtime work is work that is officially ordered or approved and performed in excess of the established compressed schedule. For example, an employee on a compressed four ten-hour day weekly schedule is entitled to overtime pay for work officially ordered and performed beyond the daily ten (10) hours or forty (40) for the week.

2. General Policy. **All** overtime for exempt and nonexempt employees (whether compensated by pay or time off) requires advance written approval by a Headquarters Office Director of District Director or their respective designees. Overtime will only be authorized when necessary and in the best interest of EEOC.

   Suffered or permitted work should not be allowed. Suffered or permitted work is any work performed by a nonexempt employee for the benefit of the agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed. Supervisors must assure that nonexempt employees perform no work for EEOC outside their scheduled tour of duty unless overtime is authorized. This includes work performed on off days, before or after the employee's established hours or during the prescribed lunch period.

   a. All employees in positions which are nonexempt under the FLSA and those employees in positions exempt from the provisions of the FLSA whose pay does not exceed the maximum rate for GS-10 may elect to receive overtime pay or compensatory off time for overtime worked. Management may not require that these employees accept compensatory time off instead of pay for overtime worked.

   b. Exempt employees whose pay exceeds the maximum rate for GS-10 will receive compensatory time off instead of pay for overtime worked**.**

   c. When either exempt or nonexempt employees are required to work on a holiday they are entitled to receive holiday pay for the work performed within their normal schedule for that day. Holiday pay is paid at two times the employee[']s basic rate of pay. Any work performed on a holiday outside of the employee's normal schedule for that day is compensated as overtime or compensatory time.

3. Computation of overtime pay

   a. For all exempt employees the overtime rate is one and one half times their hourly rate of basic pay or one and one half times the minimum hourly rate of GS-10, whichever is less. The total of basic pay and premium pay for any pay period may not exceed the maximum rate for GS-15.

   b. For all nonexempt employees, regardless of salary, the overtime rate is one and one half times their regular hourly rate of basic pay. There is no be-weekly maximum earning limitation.

4. Compensatory Time

a. Compensatory time is computed at the rate of one (1) hour earned for each hour of overtime worked.

b. Compensatory time must be used before annual leave and cannot be carried over from one leave year to the next. Unused compensatory time is automatically dropped by the GSA automated payroll system at the beginning of a new leave year.

1. Nonexempt employees who fail to take compensatory time by the end of the leave year (usually in early January) will be paid for the time at the overtime rate in effect for the period in which it was earned. Therefore, when compensatory time is not used, funds must be available by the end of the leave year to fulfill this obligation.

2. Exempt employees who fail to take compensatory time by the end of the leave year will lose their right to the compensatory time and to the overtime pay unless the failure was due to an exigency of the service beyond their control.

5. Time spent traveling

a. Nonexempt employees are entitled to payment for overtime in the following situations:

1) The employee performs work while traveling (including travel as a driver of a privately owned vehicle, government owned vehicle or other);

2) The employee travels as a passenger to a temporary duty station and returns during the same day outside their regular hours of duty; or

3) The employee travels as a passenger on non-work days during hours which correspond to his or her regular working hours (i.e., between 9:00am and 5:30pm).

b. Exempt employees are entitled to payment for overtime in the following situations. However, it is unlikely that situations 1, 2 and 3 would apply to EEOC employees given the nature of the Commission's work. The situations are:

1) The travel involves the performance of work while traveling. This means work which can only be performed while traveling (such as monitoring communication, or signal devices used in air or rail traffic) and consequently, this provision will generally be inapplicable to EEOC employees. However, EEOC employees are entitled to compensation for any work

they are officially directed or approved to perform (such as preparing questions while on an airplane for the next day's deposition). Compensation for such work is limited to the time spent working rather then [sic] the total time in a travel status;

2) The travel is incident to travel that involves the performance of work while traveling (such as a truck driver deadheading to a point to pick up a truck to be driven to another destination);

3) The travel is carried out under arduous conditions (such as over unusually adverse terrain, during severe weather conditions, or to remote, barely accessible facilities).

The situation which would most likely apply to EEOC exempt employees and result in payment of overtime would be when the travel results from an event which could not be scheduled or controlled administratively. This means an executive branch agency or agencies was not responsible for the event and had no control over the scheduling. For example, a training course conducted by a private institution, not solely for the benefit of the Government, or a court hearing scheduled by a judge without input from the parties involved, are considered administratively uncontrollable events which entitle employees to compensation. [Emphasis supplied]

On March 3, 2003 Ms. Ibarguen, then Director of the Agency's Office of Human Resources (later Chief Human Capital Officer), issued the following Memorandum to the Agency's upper management personnel, along with Regional Attorneys and the General Counsel, again on the subject of overtime:

Consistent with the memorandum issued on December 23, 2002 and HRMS Memorandum No. 550-006, dated September 19, 1995 [the latter cited above], this is to remind you that compensatory time/overtime must be requested and approved in advance of it being worked. When approving compensatory time/overtime, you should consider the following:

- Exempt employees whose rate of basic pay is less than the maximum rate of GS-10, Step 10, will have the option of compensatory time off or overtime (premium) pay,

- Exempt employees whose rate of basic pay exceeds the maximum rate of GS-10, Step 10, receive compensatory time instead of overtime pay. Exempt employees must take the compensatory time within 26 pay periods from the

date the overtime is worked or lose their right to do so unless the failure was due to a[n] exigency of the service beyond their control,

- Non-exempt employees cannot be required to accept compensatory time in lieu of overtime pay. If a non-exempt employee voluntarily requests compensatory time, he/she must use the time within 26 pay periods or he/she will be paid for the time at the overtime rate in effect for the period in which it was earned.

Therefore, *before* granting/approving overtime or compensatory time for either exempt or non-exempt employees, you must first ensure that there are sufficient funds in your office's budget to cover the cost of premium pay for the time worked. Requests for funds to cover such costs should be made to the Director, Office of Field Programs or the General Counsel, as appropriate. [Emphasis supplied]

ADDITIONAL RELEVANT CONTRACT PROVISIONS

In addition to Article 31, regular reference has been made throughout these proceedings to certain provisions of Article 30.00 ("Hours of Work"). Most frequently cited are the following:

Section 30.04 For the purposes of this Article, the following definitions shall apply:

(a) The basic work week shall consist of five (5) work days, Monday through Friday.

(b) Flexible Work Schedule means a system of work scheduling which splits the work day into two (2) distinct kinds of time, core time and flexible time. The two (2) requirements under any flexible work schedule are:

(1) the employee must be at work during core time; and

(2) the employee must account for the total number of hours he/she is scheduled to work.

(c) The Flexible Work Schedule Program shall consist of:

(1) Flexitour which is a flexible schedule containing core time on each work day in which an employee having once selected starting and stopping times within the flexible band, continues to adhere to those times.

(2) Gliding Schedule which is a flexible schedule in which an employee has a basic work requirement of eight (8) hours in each day and 40 hours in each week, and may select an arrival time each day and may change the arrival time daily as long as it is within the established flexible time band.

(d) Compressed Work Schedule is any schedule under which a full-time employee fulfills an 80-hour biweekly work week in less than 10 work days. The Compressed Work Schedule Program shall consist of:

(1) 5/4/9 in which employees works [sic] 80 hours for the biweekly pay period: five (5) days in one week and four (4) days the next week with one (1) day off.

(2) 4/10 in which employees work a four (4) day week for a total of 40 hours each week with one (1) day off.

(3) 4/9/4 in which employees work four (4) nine (9) hour days and one four (4) hour day per week, for a total of 40 hours per week and 80 hours per pay period.

(e) Core time is designated hours and days during the biweekly pay period when an employee must be present for work. Core hours must be scheduled between six (6) a.m. and six (6) p.m.

(f) Flexible Time Band is that portion of the work day during which the employee has the option to request starting and finishing times within established limits.

…

Section 30.07 Credit Hours

Only employees working under a Flexible Work Schedule who work beyond their eight (8) hour work day may earn credit hours with supervisory approval. An employee may not earn more than eight (8) credit hours in a pay period or accrue or carryover more than eight (8) credit hours. Earned credit hours must be used by the employee with the approval of the supervisor. Earned credit hours must be used before compensatory time or annual leave. Credit hours are limited to eight (8) hours per pay period. Any hours authorized to be worked in excess of the eight (8) hours shall be treated as overtime.

In accordance with 5 U.S.C. §6121(4), employees on Compressed Work Schedule Programs may not earn credit hours.

SUMMARY OF THE POSITIONS OF THE PARTIES

The Union, in alleging that the Agency has violated Articles 30 and 31 of the Agreement, as well as 29 U.S.C. §§207 and 216, frames the issue before me to be whether the Agency has intentionally and willfully failed to pay overtime to Investigators, Mediators and Paralegal Specialists for hours of work beyond these employees' regularly scheduled work hours.

In so alleging, the Union asserts that, by its testimony and documentary evidence, it has established the following:

- That, for the period of January 1, 2003 and continuing until the present, Investigators, Mediators and Paralegal Specialists worked in excess of their scheduled work hours, and that Managers and Supervisors were aware of the excess work hours and permitted employees, with or without advance approval, to work the excess work hours;
- That the Agency 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 Paralegal Specialists;
- That, for the period of January 1, 2003 and continuing until the present, the Agency's Managers and Supervisors informed Investigators, Mediators and Paralegal Specialists that there was no money available to pay for excess work hours, informed Investigators, Mediators and Paralegal Specialists that the Agency 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 to choose between money payment or compensatory time for excess work hours; and

- That, while the Agency's policy required each office to have money in its budget to permit Investigators, Mediators and Paralegal Specialists to work excess hours for either 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, in furtherance of that decision, informed Managers and Supervisors that there was no overtime money and employees who chose to work excess work hours could do so for compensatory time.

The Agency, in addition to the FLSA, references FEPA as part of the statutory scheme governing the requirement to pay overtime to non-exempt employees. FEPA, at 5 U.S.C. 5542(a), provides, in relevant part:

> (a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS–10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:…

Regulations promulgated in furtherance of FEPA include 5 CFR §550.111(c), which provides:

> Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an

> officer or employee to whom this authority has been specifically delegated.

In addition, the Agency's policy, as set forth in its February 2004 Office of Human Resources "EMPLOYEE AND LABOR RELATIONS NEWSLETTER," issued regularly by Angelica Ibarguen, Chief Human Capital Officer, to District Directors, Headquarters Office Directors and the Director of the Washington Field Office, provides, in relevant part:

> Ordered or Approved Overtime
>
> Generally, all overtime requires advance written approval by a Headquarters Office Director or District Director or their respective designees. The FEPA requires that employees must be compensated for overtime that is "ordered or approved" [footnoting 5 U.S.C. §5542(a), above] beyond their scheduled tour of duty. Overtime should not be approved except under extraordinary circumstances. Overtime is considered to be "ordered or approved:"
>
> A. when an employee's request to work overtime has been approved by a properly designated manager and the employee performs the overtime,
>
> B. when an employee is specifically directed to perform overtime by a properly designated manager and the employee performs the overtime,
>
> C. when the agency's practice induces or coerces employees to perform overtime to complete assignments or fear reprisal, and
>
> D. when, on an episodic basis, the employee is working with a judge or opposing counsel and it would be inappropriate to cease work.

The Agency asserts that it is the Union's burden to establish all the elements of its claim, and that each activity for which overtime compensation is sought constitutes "work." It argues that the Union must establish not only that non-exempt employees worked more than their scheduled time on any given day, but that, in addition, it must prove that that such time actually constituted overtime, and, further, that such overtime was "suffered and permitted." It contends that, for overtime hours to be deemed "suffered or permitted," they must be hours not merely in excess of eight in a day but,

rather, in excess of forty in a week or eighty in a pay period. In addition, it argues that employees on a flexible schedule, whose hours in excess of forty in a week are converted to credit hours, are eligible for overtime under Federal law only if such time is officially ordered in advance, thus denying Flexible Schedule employees the opportunity to claim "suffered or permitted" overtime. Further, it asserts that the Union was likewise required to prove that any extra hours at issue could not have been worked at a later time, during a regular work day. Those Investigators, Mediators and Paralegal Specialists who may have worked beyond their regular work hours, the Agency notes, were aware that they would later be afforded equivalent time off from work in the form of credit or compensatory time, and, therefore, no overtime pay entitlement arose.

The above is intended solely as a general summary of the parties' arguments. Additional and related arguments will be referenced and addressed as appropriate.

THE BASIS OF THE "SUFFERED OR PERMITTED" CLAIM

As set forth above in Section 31.09 of the Agreement,

> [s]uffered or permitted work means any work performed by an employee for the benefit of the agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed. The concept of suffered and permitted is only applicable to non-exempt employees covered by the Fair Labor Standards Act (FLSA).

Virtually identical language defining "suffered or permitted" work is set forth in 5 CFR §551.104.

5 CFR §551.401(a), in turn, provides:

> (a) All time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency is "hours of work." Such time includes:

(1) Time during which an employee is required to be on duty;
(2) Time during which an employee is suffered or permitted to work; and
(3) Waiting time or idle time which is under the control of an agency and which is for the benefit of an agency.

In addition, 5 CFR §551.402 provides:

(a) An agency is responsible for exercising appropriate controls to assure that only that work for which it intends to make payment is performed.
(b) An agency shall keep complete and accurate records of all hours worked by its employees.

The concept of "work performed by an employee for the benefit of the agency" requires, for purposes of this case, a determination of what applicable law and regulations define such work to be. The principal issue in this case involves work allegedly performed by employees of the Agency that is in excess of employees' scheduled hours of work. By Section 31.09 of the Agreement, employees covered are only those non-exempt employees covered by the FLSA. Under 5 CFR §551.201, all employees are presumed non-exempt unless specific criteria for exemption are satisfied. For purposes of this case, all affected employees are non-exempt.

29 U.S.C. §207(a)(1) of the FLSA requires that

…no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. §216(b), in addition to containing the "opt-in" language cited above, and relied upon by the Agency, provides:

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

Further, 5 CFR §551.421(a) provides:

> Under the Act there is no requirement that a Federal employee have a regularly scheduled administrative workweek. However, under title 5 United States Code, and part 610 of this chapter, the head of an agency is required to establish work schedules for his or her employees. In determining what activities constitute hours of work under the Act, there is generally a distinction based on whether the activity is performed by an employee during regular working hours or outside regular working hours. For purposes of this part, "regular working hours" means the days and hours of an employee's regularly scheduled administrative workweek established under part 610 of this chapter.

ACTIVITIES OF INVESTIGATORS, ALTERNATIVE DISPUTE MEDIATORS AND PARALEGAL SPECIALISTS GIVING RISE TO THE UNION'S CLAIM OF "SUFFERED OR PERMITTED" OVERTIME

The Union asserts that the extensive record in this case has established numerous facts, already set forth above, that compel the requested relief, based both on the FLSA and the Agreement. These assertions are referenced here with the understanding that the *bona fides* of many such assertions are challenged by the Agency's own evidence. The Union's witnesses, which numbered not only Investigators, Alternative Dispute Mediators and Paralegal Specialists, but also others including those performing substantial timekeeping duties, described daily duties in terms of substantive activities, the regular work hours within which they were typically expected to complete those activities, and the circumstances that, by their accounting, required them to continue their duties beyond their regular hours of work. The activities described below are, for the most part, not unique to their locations. In the event any such activities are discrete in that way, this will be noted.

In general, when employees reported to work for their regular work shifts, they would note their actual time of arrival, and, on leaving for the day, their actual time of departure, on sign-in/sign-out sheets. These were typically located in an area of the

office where employees could conveniently enter their times. While not identical from location to location, the information to be entered was the same. Lunch times were for thirty minutes, and there was a designated fifteen-minute break in the morning and a fifteen-minute break in the afternoon. Employees commonly chose to combine these breaks with their designated half-hour lunch period.

Sign-in/sign-out sheets would normally reflect not only actual time of arrival and departure for the day, but also the kinds of activity in which the employee was engaged, other than regular work in the office. These activities frequently included Intake, On-Site visits and Outreach programs. Some offices either had no sign-in/sign-out sheets, or did have them at one time, only to discontinue them later. Opinions among supervisors differed as to their reliability, and the prevailing view, as I read the record, is that they were not sufficiently reliable to determine hours of work, but were useful to determine who was at work on a given day.

Intake consisted of designated hours and/or days of the week, depending on the office, during which the office would exclusively receive "walk-in" traffic, individuals who would personally come to file EEO complaints and participate in preliminary interviews with Investigators, who would assess the nature of the complaint and attempt to determine whether the complaint would constitute a legitimate charge and, if so, at what level. On-Site visits were activities in which Investigators engaged, when pursuing a charge, when the investigation required trips to the location of either a charging party or a respondent, or both. Outreach programs typically involved activities in which an office would interact with individuals or community groups with the goal of fostering racial and cultural cooperation, either at the initiation of the EEO office itself or a community

organization. Depending on the nature of the Intake, On-Site visit or Outreach activities, Investigators or other EEO employees may be participating during time periods outside their regular work hours, or, in the case of Outreach particularly, occasionally on weekends. Most Investigators' testimony reflected Outreach as a factor in their performance assessments.

The sign-in/sign-out time sheets were collected by Timekeepers and were thereafter typically reviewed by supervisors. Supervisors, or in some cases, subordinate employees themselves, would then enter the employees' regular scheduled work hours (as opposed to the actual hours worked, if different) onto a form entitled "EEOC Cost Accounting Bi-weekly Time Sheet." The Cost Accounting Bi-weekly Time Sheet grid allowed entries for hours worked from Monday to Friday for a two-week period (with Saturdays and Sundays frequently shaded out) and contained entries for a variety of programs and activities, among them "Administrative Charge Processing," "Mediation," "Litigation" and "Outreach," both fee-based and non fee-based. In addition, it contained entries for certain leave categories, including "Annual Leave Used," Sick Leave Used," and "Other Leave Used." In this last category, compensatory time, if taken, would sometimes, although not always, be reflected.

Requests for compensatory time were submitted in various ways, depending on the office location. These might be reflected through an e-mail or handwritten sheet from the employee to his or her supervisor, or through a form devised for the express purpose of requesting compensatory time. The employees had no consistent method of keeping personal track of these excess hours, if they did so at all, sometimes simply noting them in a personal calendar. The data in the Cost Accounting Bi-weekly Time Sheet would

then be normally be passed on by Timekeepers to supervision, who entered these time data into the Federal Personnel Payroll System ("FPPS"). Compensatory time would normally not be reflected in the FPPS unless a form authorizing such time was furnished by the supervisor to the Timekeeper. As a rule, employees themselves may neither enter nor review information on the FPPS.

The activities of Investigators, Alternative Dispute Mediators and Paralegal Specialists are such that it is not always practical for their work assignments to be completed within their regular work hours. I acknowledge the Agency's strongly urged position that this is not, in fact, the case, either by necessity or expectation, but, rather, a free and voluntary choice of employees. I note, for example, the opinion of Guillermo Zamora, Supervisory Investigator in the San Antonio Field Office, that nothing his subordinates do requires them to stay late. However, as I believe the evidence amply demonstrates, extra hours were frequently worked, and these were, for the most part, not in any way attributable to mere employee preference and/or convenience. As noted by Glenda Bryan-Brooks, Investigator in the Birmingham District Office, with over one hundred cases in her inventory, she found it not possible to complete her work in her regular assigned hours, particularly when she had to conduct telephone business as well. She viewed the successful conduct of her job as being "about the numbers."

Onsite visits by Investigators may necessitate numerous interviews, sometimes with individuals whose own work schedules do not conform with the Investigators' own regular work hours. In addition, such visits may, depending on the geographic jurisdiction of the office, sometimes require travel time to and from the location that does not permit completion of the visit within the Investigators' regular work hours and may

even require an overnight stay. This latter circumstance, as some testimony reflected, cannot always be foreseen. As noted by Doralisa Wroblewski, Investigator in the Buffalo Local Office, while it may be within the discretion of an Investigator to cut short an Onsite visit, the timing of the Onsite likewise remains within the Investigator's control.

Moreover, as noted above, Outreach activities, whether sponsored by the Agency or by a community group, frequently take place outside regular work hours, although these are, for the most part, known in advance. To be sure, the record was not entirely consistent with respect to the extent of Outreach activities that take place, by necessity or convenience, outside regular work hours. While James Neely, Director of the St. Louis District Office, believed more than seventy-five percent of Outreach activities occurred during regular work hours, others, such as Darrick Anderson, Investigator in the Louisville Area Office, viewed Outreach as a "forced volunteering" activity, much of which, in fact, cannot be accomplished during regular work hours. The nature of some Outreach activities required that they be undertaken outside regular work hours. Many of the Outreach activities in which Rita Montoya, Mediator in the Albuquerque Area office, was asked to participate by her supervisor, Yvonne Johnson, such as TAPS activities, fell on Friday or Saturday. Such weekend Outreach typically cannot be changed, as noted by Jae Richardson, Senior Investigator in the Phoenix District Office.

With respect to Investigators' Intake duties, the need to complete them within regular work hours would vary with the circumstances. Some Investigators testified that it was not practicable to complete Intake activities during designated Intake hours. If a complainant came into the office and an Investigator was able to complete the Intake process during the Investigator's work hours, no relevant compensation issue would

arise. However, if, for example, a charging party came to an office during an Intake period at an hour close to the office's closing time, alternatives would be presented to the Investigator that he or she would be required to assess with respect to whether additional time, and, therefore, additional compensation issues, would be presented. One such alternative, typically when a complainant had traveled some distance, would be to complete the Intake process on that visit, so as to spare the charging party inconvenience. In addition, a charging party may be presenting a potential cause of action when the time limit for filing the action is about to expire and the charging party's legal rights will expire if the complaint is not taken immediately. Finally, if the Investigator concludes that time is not of the essence, he or she has the alternative of avoiding additional compensation issues by advising the charging party either to visit the office on another day or to complete the Intake process over the telephone.

With respect to the duties of Alternative Dispute Mediators, they would involve, among other matters, arranging meetings with charging parties and respondents so that a settlement to a charge believed by the office to have merit might be achieved. Depending on the individual Mediator's preference and/or workload, one or more mediations might be scheduled on a given day, with the expectation of supervision normally being that this business could be concluded within the Mediator's regular work hours. In those cases where a mediation could not be concluded within the Mediator's regular work hours, the Mediator might, in his or her judgment, adjourn the mediation and reconvene it at the parties' convenience, in which case no issue of premium time would be involved. Otherwise, if the Mediator believed the issue had to be concluded quickly, or if he or she believed the parties were close to a settlement, the session might continue past regular

work hours. In some circumstances, a Mediator's job may be difficult to conclude within regular work hours because of the broad geographic jurisdiction of the office. Some Mediators testified that they received no training on how to report extra hours, and that they are not reflected anywhere.

With respect to the duties of Paralegal Specialists, the record revealed that most instances when the issue of work beyond regular work hours arose would occur when the attorney or attorneys with whom the Paralegal Specialist worked were involved in litigation where trial schedules or matters of document production required an unusual time commitment. In such cases, considerable extra hours were generated and, whether directed or not, needed to be worked.

The common thread throughout these activities was that, when employees had occasion to be required to work beyond their regular work hours (normally not by express direction of supervision, but by what they believed was necessary to complete work assignments), they would request compensatory time (or, as occasionally referenced by witnesses at the Atlanta hearings, "cuff time"). This was so because, in the great majority of cases, they were advised by supervision, or were otherwise aware, that there was no money available to pay overtime, and that compensatory time was the only means to acknowledge these extra hours. In a very few cases, the employee, by reason of his or her personal situation, actually preferred compensatory time.

THE CIRCUMSTANCES UNDER WHICH "SUFFERED OR PERMITTED" OVERTIME IS COMPENSABLE

The Agency contends that "suffered or permitted" overtime is not compensable merely if an employee works more than eight hours in a workday, but, rather, that the

employee must also be shown to have worked over forty hours in a week or eighty hours in a pay period.

The concept of "suffered or permitted" overtime is, in one respect, a residual category of overtime under the Federal statutory and regulatory scheme. The fundamental idea of overtime as applicable to non-exempt employees refers generally to those "hours of work" falling outside an employee's "regular working hours."

5 CFR §551.421(a) references "regular working hours" as "the days and hours of an employee's regularly scheduled administrative workweek…." If there is occasion for an employee to work beyond such "regular working hours," these continue to constitute "hours of work" as referenced in 5 CFR §551.401(a) so long as these hours all constitute "time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency…." Such time, to the extent relevant in this case, embraces two categories. The first, set forth in 5 CFR §551.401(a)(1), is "[t]ime during which an employee is required to be on duty…," typically time where an employee is expressly ordered to perform work beyond "regular working hours." The second, set forth in 5 CFR §551.401(a)(2), is "[t]ime during which an employee is suffered or permitted to work…." The FLSA itself, at 29 U.S.C. §203(g), defines "[e]mploy" to include "to suffer or permit to work."

As noted further below, the Federal Employees Pay Act ("FEPA"), whose enactment postdates that of the FLSA, speaks, along with its regulations (5 CFR §550.111), of overtime in terms of time ordered or approved in writing by an individual authorized to do so. As such, it does not, unlike the FLSA, have occasion to reference overtime in terms of time that may be "induced," rather than expressly directed to be

worked. Thus, 5 CFR §550.111 speaks in terms of overtime, or work "in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek" as work that is "[o]fficially ordered or approved." *Doe v. United States*, 372 F.3d 1347 (Fed. Cir. 2004), *cert. denied* 125 S.Ct. 1591 (2005), cited by the Agency in its Post-Hearing Brief, likewise notes approvingly FEPA's "ordered or approved" language as reasonably being interpreted to require a more formal means of authorization.

Notwithstanding this, there is nothing in FEPA that disturbs the fundamental right of non-exempt employees to receive overtime compensation under the FLSA. As will be noted below, the only relevance of FEPA to this case is whether "suffered or permitted" overtime may include hours in excess of eight in a regular workday, as well as those in excess of forty in a regular workweek.

The Agency directs me further to 5 CFR §551.501(a)(2), which, while referencing overtime as "all hours of work in excess of 8 in a day or 40 in a workweek," notes an exception to the requirement to pay overtime for "hours of work in excess of 8 hours in a day that are not overtime hours of work under…part 550 of this chapter…" Therefore, as noted above, if such hours are not officially ordered or approved, they are not deemed payable as overtime. In fact, 5 CFR §550.111(a) sets forth the requirement that work in excess of eight hours in a day is deemed "overtime hours of work" only if such hours are "[o]fficially ordered or approved…"

Thus, inasmuch as the hours at issue in this matter are alleged by the Union as overtime that has been "suffered or permitted" by the Agency, they obviously cannot qualify as hours "[o]fficially ordered or approved." Indeed, Section 31.07 of the Agreement contains the same restriction, as it provides that, "[f]or employees to receive

overtime, all overtime must be officially ordered or approved…." It is acknowledged that, when the Agreement goes on to speak of "[s]uffered or permitted work" in Section 31.09, it does not, by its own terms, exclude work in excess of eight hours in a day as qualifying for the payment of overtime, if it is indeed "suffered or permitted." Nevertheless, it is the OPM regulations that I have already referenced, along with case law, that, in my view, mandates such an exclusion.

This result is reaffirmed in *Christofferson v. United States*, 64 Fed. Cl. 316 (2005), likewise cited by the Agency in its Post-Hearing Brief. In *Christofferson*, the plaintiffs claimed that certain non-exempt employees were entitled to overtime compensation under the FLSA for hours worked in excess of eight hours in a single workday. In so claiming, they argued that such overtime need not have been "ordered and approved in writing," as would be the case under FEPA. Rather, they argued that such overtime remained payable even if they were "suffered and permitted," and that, therefore, there was a substantive right under the FLSA to overtime pay for suffered or permitted overtime hours worked in excess of eight in one day.

That claim was rejected by reason of the interplay between 5 CFR §551 and 5 CFR §550, already set forth. *Christofferson* found that, while 5 CFR §551.501 sets forth the requirement that an agency compensate a nonexempt employee at the overtime rate "for all hours of work in excess of 8 in a day or 40 in a workweek," this is not an unfettered entitlement to overtime under the FLSA. This is so by reason of the requirement in 5 CFR §550.111(a)(1) (one of the OPM regulations that pertains to FEPA) that excludes from FLSA coverage hours in excess of eight in a day that do not qualify as overtime hours under FEPA. Since "suffered or permitted" overtime hours are, by their

nature, not hours "ordered and approved in writing," hours worked in excess of eight in one day but not in excess of forty in a workweek do not qualify as hours that may be included in the Union's claim here. There is, however, nothing in *Christofferson* or in other applicable case law or regulations that would bar the Union's claim to FLSA "suffered or permitted" overtime for hours worked in excess of forty in a single workweek. Evidence pertaining to this will be examined below.

I acknowledge here the Agency's argument with respect to the thirty-minute lunch period. It asserts that, for purposes of reckoning "hours of work" in an administrative workweek, the lunch period is expressly excluded and, thus, may not be counted as time worked for pay purposes. It argues further that, since employees commonly added their fifteen-minute morning and afternoon breaks to their lunch period, that lunch period was effectively one hour long. I agree with the first argument and disagree with the second.

As a general proposition, this dispute requires, in part, an assessment of "hours of work." OPM regulations on this subject are specific and dispositive. 5 CFR §551.411(c) provides: "*Bona fide* meal periods are not considered hours of work…[with exceptions not applicable here]." 5 CFR §551.411(b) provides: "Any rest period authorized by an agency that does not exceed 20 minutes and that is within the workday shall be considered hours of work."

Article 32.00 ("Rest Periods"), Section 32.01 of the Agreement provides: "Employees shall be granted by their supervisors a rest period not to exceed 15 minutes during each four (4) hours of duty."

Based on the above, therefore, I find the Agency's position that the thirty-minute lunch period may not be included as time worked for pay purposes to be correct.

However, I disagree that the morning and afternoon break periods, or one additional half-hour per day, should be added to the thirty-minute lunch period, thereby effectively extending the daily "hours of work" exclusion to one hour. The Agency would have me find that, because, in its view, employees typically use these morning and afternoon break periods to expand their lunch period to one hour, "hours of work" should be calculated on the basis of a 7 ½-hour day, and not an eight-hour day.

The Agency asks that I not effectively turn its "largesse" against it, in view of its conclusion that "in reality employees still take one-hour lunch breaks," and that, for the two fifteen-minute "rest" periods, they "are rarely performing Agency work." It asserts further that, by my failing to recognize that the employees' lunch period is, in reality, one hour, any action I may take that credits "time set aside for eating" as "hours of work" is an abuse of my discretion and violative of law.

With due respect, this has nothing to do with "largesse" or Agency generosity. Lunch is lunch and is not deemed "hours of work." A rest period is a rest period and *is* deemed "hours of work." I need go no further. Whatever the Agency chooses to accept with respect to how these rest periods are allocated is its affair. Moreover, I reject the Agency's suggestion that the Union bears the burden to demonstrate that Agency work was being performed during this "rest period" time. Inasmuch as 5 CFR §551.411(b) deems this time "hours of work," there is no such burden.

AGENCY EFFORTS TO ADVISE EMPLOYEES ON OVERTIME ISSUES

Apart from the parties' legal and factual contentions, as set forth in the record both orally and in writing, the Agency has, on various occasions and in different regions throughout the country, advised relevant employees generally of their obligations concerning approval for overtime, as well as the avoidance of "suffered or permitted" overtime. The examples below, while not all-inclusive, are representative, and supplement those set forth in **SELECTED FOUNDATION DOCUMENTS**, above.

Philadelphia District Office

On August 6, 2004 Marie Tomasso, Philadelphia District Director, sent the following Memorandum to all employees in the Philadelphia District Office on the subject of overtime:

> This is a reminder that our employees are not authorized to work overtime unless approved by their supervisors. Pursu[ant] to the CBA Section 3105 "Overtime work must be authorized in advance; however, all required or approved work performed outside the basic work week shall be compensated in accordance with applicable overtime laws and regulations of OPM…."
>
> Due to the end of the year budgetary constraints, it is unlikely that there will be any authorized overtime. Please be advised that you are only expected to work your normal tour of duty and conversely, you are not expected to work on nights or weekends.
>
> I warmly appreciate all your hard work and dedication to the mission of the agency, however, we must abide by the policy of this agency and adhere to the Collective Bargaining Agreement.
>
> If you believe you need to work extra hours to complete your work, consult with your supervisor and secure his or her written approval before actually working any such additional hours.

Dallas District Office

On February 2, 2001 Chester Bailey, Acting Dallas District Director, sent a Memorandum to all employees in the Dallas District Office and the Oklahoma Area Office on the subject of overtime and compensatory time, relevant portions of which provided:

> We have been getting numerous inquiries from staff regarding their earning overtime or compensatory time and there seems to be a lot of confusion regarding the subject, so I would like to try to clarify our policy for the staff.
>
> All overtime for exempt and nonexempt employees (whether compensated by overtime pay or compensatory time off), **must be approved in advance by the District Director or his designee AND funding MUST be available within our budget PRIOR TO an employee working either overtime or compensatory time.** Overtime/Compensatory time is only authorized when necessary and in the best interest of the EEOC.
>
> **The Dallas District Office, as well as the Oklahoma Area Office DO NOT HAVE OVERTIME FUNDS AVAILABLE.**
>
> Therefore, if an employee believes that their workload requires them to request either overtime or compensatory time, they must inform their supervisor and provide a detailed justification for the request, so that funding can be requested. Employees **MUST** allow sufficient time to request funding PRIOR to being authorized to work overtime or compensatory time. The more advance notice, the better. Funding **NEVER** happens overnight, so please plan as far in advance as possible (preferably 3 weeks before the expected date).
>
> …
>
> Suffered or permitted work is NOT allowed. Suffered or permitted work is any work performed by a nonexempt employee for the benefit of the agency, **whether requested or not**, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed. Supervisors **MUST** ensure that nonexempt employees perform no work for EEOC outside their scheduled tour of duty unless overtime/compensatory time is authorized. This includes work performed on off days, before or after the employee's established hours or during the prescribed lunch period.
>
> All employees in positions which are nonexempt under the FLSA and those employees in positions exempt from the provisions of the FLSA whose pay does not exceed the maximum rate for GS-10 may elect to receive overtime pay or compensatory time off for overtime worked. Management may not require that these employees accept compensatory time off instead of pay for overtime

> worked. However, because no overtime funding is available, any nonexempt employees, or exempt employees at a GS-10 or below, whose duties extend beyond their tour of duty will wither have to cease performing those duties at the end of their work day, or request and obtain approval for, **in advance**, compensatory time in lieu of overtime pay. **Again, if no overtime funding is available, compensatory time cannot be worked**.
> [Emphasis supplied]

This message was essentially reissued to employees in the Dallas District Office on October 5, 2001 by Janet Elizondo, then Acting District Director.

St. Louis District Office

On April 8, 2004 Lynn Bruner, St. Louis District Director, sent a Memorandum to managers and supervisors, and attached thereto a Memorandum she directed to all St. Louis District employees. In the first, she noted, among other matters, that "[t]his memorandum is to serve as a reminder of your responsibility on Suffer and Permit work as well as the rules on overtime addressed in the memo that went to all employees today. Please review the overtime memo and be aware of your role in regards to overtime."

In her Memorandum of the same date to all employees, she wrote, in pertinent part:

> …
>
> Overtime work must be authorized in advance. For employees to receive overtime, all overtime must be officially ordered or approved.
>
> Employees may not work "informal" overtime by simply staying over, where specific supervisory approval has not been granted in writing. Employees are expected to complete all their work within the time allotted by their specific schedule, whether they are working on site or off site. To work overtime, employees must submit a request for overtime to their supervisor, and the supervisor must approve it.
>
> Compensatory time is time off in lieu of occasional or irregular overtime which has been approved in advance by the supervisor. All employees in positions which are non-exempt under FLSA and those exempt employees inn positions whose basic rate of pay is below the maximum rate of GS-10 (step 10) may elect, but are not required to accept, compensatory time in lieu of overtime.

> In order to facilitate occasional unplanned overtime that investigators, mediators or other employees may need in order to complete tasks that extend beyond the scheduled work day, supervisors will work [with] the employees to adjust reporting time, grant credit time and make other appropriate arrangements, including the payment of overtime, to allow the prompt completion of work. Employees should advise their supervisor in advance whenever they foresee that such a need may arise. In general, however, work should be planned in anticipation of being completed within the parameters of a given work day.
> …

THE ISSUE OF WHETHER THE CONCEPT OF "SUFFERED OR PERMITTED" OVERTIME IS APPLICABLE TO EMPLOYEES ON A FLEXIBLE SCHEDULE

The Agency contends, among other matters, that, as a matter of law, the concept of "suffered or permitted" overtime is not applicable to employees who work under a Flexible schedule.

The Agreement, at Section 30.04(c), sets forth the parties' understanding of what constitutes a "Flexible Work Schedule Program." It provides the following:

> (c) The Flexible Work Schedule Program shall consist of:
>
> (1) Flexitour which is a flexible schedule containing core time on each work day in which an employee having once selected starting and stopping times within the flexible band, continues to adhere to those times.
>
> (2) Gliding Schedule which is a flexible schedule in which an employee has a basic work requirement of eight (8) hours in each day and 40 hours in each week, and may select an arrival time each day and may change the arrival time daily as long as it is within the established flexible time band.

This provision stands in contrast with Section 30.04(d), which sets forth various configurations of what the parties agree constitutes a "Compressed Work Schedule." It provides:

> (d) Compressed Work Schedule is any schedule under which a full-time employee fulfills an 80-hour biweekly work week in less than 10 work

days. The Compressed Work Schedule Program shall consist of:

(1) 5/4/9 in which employees works [sic] 80 hours for the biweekly pay period: five (5) days in one week and four (4) days the next week with one (1) day off.

(2) 4/10 in which employees work a four (4) day week for a total of 40 hours each week with one (1) day off.

(3) 4/9/4 in which employees work four (4) nine (9) hour days and one four (4) hour day per week, for a total of 40 hours per week and 80 hours per pay period.

Further, Section 30.07 ("Credit Hours") of the Agreement sets out certain differences between these two schedules and provides:

> Only employees working under a Flexible Work Schedule who work beyond their eight (8) hour work day may earn credit hours with supervisory approval. An employee may not earn more than eight (8) credit hours in a pay period or accrue or carryover more than eight (8) credit hours. Earned credit hours must be used by the employee with the approval of the supervisor. Earned credit hours must be used before compensatory time or annual leave. Credit hours are limited to eight (8) hours per pay period. Any hours authorized to be worked in excess of the eight (8) hours shall be treated as overtime.
>
> In accordance with 5 U.S.C. §6121(4), employees on Compressed Work Schedule Programs may not earn credit hours.

The Agency draws my attention to the Federal Employees Flexible and Compressed Work Schedules Act of 1982, 5 U.S.C. §6120 *et seq*., which established a method whereby Federal agencies could create employee work schedules that would both achieve program goals and accommodate the personal needs of employees. As noted above, the Agency here argues that employees on a Flexible schedule may not earn "suffered or permitted" overtime. The reason, it explains, is that such employees earn credit hours for time worked beyond their eight-hour work day, pursuant to Section 30.07. This is consistent with the Federal Employees Flexible and Compressed Work Schedules Act except for the Act's 24-credit-hours-per-pay-period accumulation

provision (5 U.S.C. §6126(a)), where Section 30.07 of the Agreement limits such accumulation to eight hours.

As the Agency argues further, 5 U.S.C. §6121(6) defines "overtime hours" for employees under flexible schedule programs as "all hours in excess of 8 hours in a day or 40 hours in a week which are officially ordered in advance, but does not include credit hours…." Taken together with the provisions of Section 30.07 of the Agreement, the result is that an employee on a Flexible schedule who elects to work beyond eight hours in a day or forty in a week owing to a desire to vary the length of his or her work week or work day, as opposed to supervisory direction, will thereby earn credit hours. By Section 30.07, such hours are limited to eight per pay period. They are not deemed overtime hours for two reasons: (1) they are not officially ordered in advance; and (2) even if beyond the limit of eight per pay period, they are deemed overtime hours only if, under Section 30.07, they are "authorized to be worked."

I note further the Agency's reference to the Federal Court of Claims decision in *Aletta v. United States*, 70 Fed. Cl. 600 (2006). In *Aletta*, attorneys for the Internal Revenue Service who worked flexible schedules claimed they were entitled to payment for overtime hours that were "induced, encouraged, or expected," and thus "authorized," even absent a written order. Relying on the *Doe* case, the Court denied the claim as a matter of law, refusing to adopt a liberal approach to the notion of "authorized approval."

For these reasons, therefore, the Agency is correct in asserting that employees on a Flexible schedule are not eligible for "suffered or permitted" overtime. As will be seen below, this conclusion is not so with respect to employees on Regular and Compressed

work scheduled who perform work that satisfied the elements of "suffered or permitted" overtime.

In this respect, I note the Agency's further assertion that "even those on compressed schedules were de facto flexible schedule employees." The Agency argues, in support of this assertion, that, since employees on Compressed schedules "routinely availed themselves of the flexibilities permitted by most supervisors to modify their schedules…," these employees, like those actually on Flexible schedules, should merit no overtime payment for any extra hours not ordered in advance. In so arguing, the Agency has analogized, in detail, the work schedules of employees who work some variation of a Compressed schedule with employees who, in turn, work some variation of a Flexible schedule, and urges that I treat them similarly – namely, by declaring them ineligible for "suffered or permitted" overtime.

I reject this argument. On the one hand, the Agency expressly acknowledges that employees on Compressed or Regular schedules may be eligible to meet the preconditions for "suffered or permitted" overtime. On the other, the Agency would have me disqualify them because, as it explains, supervision permits them flexibility to modify their schedules. Thus, presumably, the very same Agency "largesse" it argued should not have denied it the right to exclude employees' daily thirty-minute "rest periods" from being counted as "hours of work" should likewise permit its supervisors' "flexibility" to transform Compressed schedule employees into Flexible schedule employees, thus *per se* denying them the opportunity to claim "suffered or permitted" overtime, presuming they otherwise qualify.

No less importantly, the Agency would, by this argument, have me overlook the fundamental fact that these parties negotiated the "Flexible Work Schedule" and the "Compressed Work Schedule" as two distinct work systems. They freely and collectively chose to segregate them at the bargaining table. The Agency must now be directed to adhere to its bargain. By its argument here, it effectively asks me to facilitate an altering of that bargain. Grievance arbitration is not the proper means of effecting that change.

THE MATTER OF THE AGENCY'S LIABILITY FOR "SUFFERED OR PERMITTED" OVERTIME

As already noted, the concept of "suffered or permitted" overtime is plainly set forth in Federal regulations. It is, for example, expressly referenced in 5 CFR §551.401(a)(2) and in 5 CFR §551.104. The latter language is tracked virtually verbatim in Section 31.09 of the Agreement. The parties may therefore be presumed to be very familiar with this concept and under what circumstances it may be applied. In this respect, I conclude that hours that are "suffered or permitted" may, but need not, meet the standard of hours that are "induced, encouraged, or expected," as referenced in *Aletta v. United States*, above.

The first inquiry on the matter of the Agency's liability for "suffered or permitted overtime is what must be proved. I note the Agency's position, set forth in it Post-Hearing Brief, that "the Union would have to have proven that, not only did non-exempt employees work extra hours on a particular day, but also the work performed needed to be performed during that extra time, rather than during the next work day or later." It

makes this assertion because, in its view of the record, "the overwhelming weight of the evidence was that most extra hours were either without the knowledge of the manager or were completely voluntary and at the request of the employee for his or her convenience or personal desires, and neither ordered or required by management nor necessary for business reasons."

I do not accept this theory of the Union's burden because, with due respect to the Agency, I find it wrong as a matter of law. By its approach, it grafts elements onto the concept of "suffered or permitted" overtime that nowhere appear in OPM regulations, not to mention Section 31.09 of the Agreement. No showing is needed that the work performed *had* to be performed outside regular work hours. The mere fact that it *was* performed outside regular work hours is what potentially qualifies it as "suffered or permitted" overtime. Furthermore, to the extent any such work may have been without the "knowledge" of the manager, such knowledge, by the very terms of the definition of "suffered or permitted" overtime, need not be actual, but may also be imputed, owing to the "knows or has reason to believe" language in Section 31.09 and 5 CFR §551.104. I will examine the issue of supervisory knowledge further below in greater detail.

A corollary point is the Agency's argument that, absent proof from the Union that EEOC management had reason to believe that assigned work could not be performed within the 40 hours per week/80 hours per pay period time frames, it could not be shown that management had reason to believe that "suffered or permitted" overtime was being worked. There is no denying the evidence in the record from some supervisors reflecting their belief that their subordinates could complete their assignments within these time

frames. Given this belief, however, it bears no relation whatever to whether they knew or should have known that such extra work was, in fact, being performed.

Whether such extra hours "were completely voluntary and at the request of the employee for his or her convenience or personal desires" is likewise not relevant to the current determination of "suffered or permitted" overtime. Once again, that the hours were worked in the first instance is the objective prerequisite. The Agency's argument of extra hours being "voluntary" is, with due respect, disingenuous. Such extra hours surely are "voluntary" to the extent that they are not directed by supervision. Furthermore, "convenience or personal desires" is, in virtually all the circumstances revealed by this record, not in play. These employees worked these extra hours not because it was convenient or because that is what they wanted; they did so in order to ensure that their work was completed. That is the only "voluntary" element that is relevant. Only in a very few cases was "convenience or personal desires" a reason, and that was because a few employees truly wanted compensatory time, typically to counter a low or exhausted leave bank. Indeed, the only way in which the element of choice enters into this case is whether an employee's "choice" of compensatory time versus overtime payment is uncoerced, as referenced in 5 CFR §551.531(c).

On the matter of "choice," I emphasize further that I do not liken the case before me to that of *American Federation of Government Employees, Local 507 and United States Department of Veterans Affairs Medical Center, West Palm Beach, Florida*, 58 FLRA 378 (2003)("*VA Medical Center*"). There, the Authority deferred to the arbitrator's factual finding that employees could freely select between working for

compensatory time or not working at all, and that "the employees' main motivation in choosing compensatory time was personal convenience." *Id.* at 381. I recognize that the Agency makes this "personal convenience" argument to me here. As already stated, and with the few exceptions I have here recognized, I expressly find that the employees at issue here worked extra time, for which they received compensatory time, in order to ensure completion of their work duties, and not for reasons of personal convenience.

Finally on this point, if such hours are "neither ordered or required by management," that is the very fact that potentially qualifies them as "suffered or permitted." As to whether they are "necessary for business reasons," I can find nothing in the voluminous record of this case, by way of testimony or documents, that suggests anything other than that these disputed hours were, as provided in 5 CFR §551.401(a), "for the benefit of [the A]gency and under the control or direction of the [A]gency" and, thus, deemed "hours of work." Indeed, I was able to note no Agency witness, supervisory or otherwise, who disputed the proposition that the hours at issue constituted "hours of work," as that term is employed in 5 CFR §551.401(a) and 421. Wanda Milton, for example, Director of the Little Rock Area Office, endorsed the proposition that all hours here at issue constituted "hours of work," as did John Fitzgerald, Deputy Director of the Atlanta District Office. I find that this responds completely to the Agency's argument that the Union bore the burden of establishing that each activity for which overtime compensation is sought constitutes "work."

In light of my findings above, I conclude that what must be demonstrated by the Union in order to establish that work in question constitutes "suffered or permitted"

overtime are those very elements set forth in Section 31.09 and 5 CFR §551.104. All the work at issue was accepted by supervision, in the form of some type of compensatory time, irrespective of whether it was solicited. In addition, the mere act of establishing employee schedules is not, in my view, sufficient under the FLSA to avoid a finding of "suffered or permitted" overtime. Supervision must, in addition, assure that these employees work only the scheduled hours. Moreover, by my reading of the Agreement and applicable OPM regulations, a finding of "suffered or permitted" overtime is not avoided merely by a supervisor's telling employees, as did, for example, Wilma Javey, Cincinnati Area Office Director, that they are free to go home at the end of their scheduled tours, much less if they are asked to stay. All of this is so irrespective of whether or not it may be found that "sign-in/sign-out" sheets used in some offices may be found to be accurate or reliable.

The principal issue that must be addressed is the matter of compensatory time being granted in lieu of the payment of overtime for hours found to be "suffered or permitted." I will examine this in considerable detail as I review the extensive testimony that bears on this issue. Nevertheless, one point that must now be made, and which I explain below, is that "overtime" and "compensatory time" are not legal equivalents.

Section 31.08 of the Agreement provides, among other matters, that non-exempt employees at issue here "may elect, but are not required to receive compensatory time in lieu of overtime." Similarly, under 5 CFR §551.531(a), such employees may make such a request. However, as I note above, these two methods of "payment" are not equivalent options. There is an *entitlement* to overtime, whereas compensatory time operates as an

alternative, should the employee request it. Put another way, it is incorrect to view the FLSA as providing non-exempt employees with the option of selecting either overtime or compensatory time. The right is to overtime; compensatory time is the option.

Clearly, the option of receiving compensatory time must be an uncoerced one. 5 CFR §551.531(c) so provides. In reaffirming this, the Federal Labor Relations Authority in the *VA Medical Center* case went on to find that "there is no indication that pay is required if the employee is permitted to refuse to work overtime hours but chooses to work those hours in return for compensatory time." *Id.* at 380. It found further, echoing one of the points the Agency has stressed in the case before me, that, "[p]ut simply, nothing in the regulation prohibits an employer from offering the employee the choice of overtime work for compensatory time or no overtime work at all." *Id.* It need hardly be said that implicit in this choice is that the work at issue has yet to be performed. Once performed, and an unfettered choice has not been made, if overtime pay is not available, this "choice" is extinguished.

THE RECORD EVIDENCE ON THE MATTER OF WORK CLAIMED BY THE UNION TO MERIT "SUFFERED OR PERMITTED" OVERTIME

I have earlier set forth the contractual, statutory and regulatory bases on which the Union's claim herein rests. These include also the relevant case law that has interpreted these standards.

What must now be addressed is the manner in which Agency supervision has dealt, as a matter of consistent supervisory practice, with time worked that qualifies as

"suffered or permitted" overtime. It bears repeating that both the Agreement and OPM regulations are clear on how such time must be treated for pay purposes.

Starting with the Agreement, Section 31.06 provides that "[n]on-exempt employees shall not work overtime when overtime pay is not available." The record is replete with documentation from numerous Agency offices throughout the country, as well as with the consistent testimony of Agency supervision, that overtime pay was not available. By "not available," this means that it was not available to any of the employees at issue in this case. As noted elsewhere herein, overtime monies were sometimes made available to lower-level clerical employees. Thus, by the clear prohibitory language of Section 31.06, the Agency is not permitted to allow non-exempt employees to perform work deemed to be overtime in the absence of available monies to fund such work. In addition, despite the belief of some supervisors, such as Gail Cober, Detroit Field Office Director, this language does not apply only when employees are *directed* to work overtime hours.

Furthermore, 5 CFR §551.531(c) prohibits the Agency from requiring "that an employee be compensated for overtime work under this subpart with an equivalent amount of compensatory time off from the employee's tour of duty." It goes on the provide that "[a]n employee may not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten or coerce any other employee for the purpose of interfering with such employee's rights to request or not to request compensatory time off in lieu of payment for overtime hours."

I have already documented the Agency's institutional recognition of the above

requirements. Ms. Cornwell Johnson's September 19, 1995 Memorandum expressly provided, among other matters, that "[m]anagement may not require that these employees accept compensatory time off instead of pay for overtime worked." The March 3, 2003 Ibarguen Memorandum reiterated this, and also required that "you must first ensure that there are sufficient funds in your office's budget to cover the cost of premium pay for the time worked." Supervisors generally testified here that they considered this to be Agency policy, an example being Thomas Colclough, Director of the Raleigh Area Office, although, for her part, Georgia Marchbanks, Director of the Albuquerque Area Office, called it "guidance."

As seen earlier, under "**AGENCY EFFORTS TO ADVISE EMPLOYEES ON OVERTIME ISSUES**," lower level Agency offices communicated the message that, absent the rare availability of overtime funds, extra hours were not to be worked unless compensatory time, not overtime pay, was requested. From both the contractual and regulatory schemes already outlined, this result is impermissible.

Testimony from supervision, as well as non-exempt employees, was consistent in its theme that compensatory time was the only available recognition for working excess hours because overtime funds were nonexistent. One example of this was Regina Husar, a Mediator in the Chicago District Office and formerly an Enforcement Supervisor. Her perception was that there were never funds for overtime in the past, nor will there ever be.

While this theme was replicated throughout these hearings, I must note that upper management in the Agency appeared to view it differently. Ralph Soto, Supervisory

Program Analyst in the Office of Field Programs, stated that he encouraged Directors to pay compensatory time for extra work hours. While he believed the Agency was bound by 5 CFR §551.402(a) ("An agency is responsible for exercising appropriate controls to assure that only that work for which it intends to make payment is performed."), he stated further his belief that work beyond regular hours in exchange for compensatory time is appropriate even if no overtime funds are available in that particular office, so long as such monies are available at Headquarters. In this, he appeared to disagree with that portion of the March 3, 2003 Ibarguen Memorandum which required such funds to be in "your office's budget." So did Nicholas Inzeo, Director of the Office of Field Programs, although he acknowledged the authority of Section 31.06 of the Agreement and 5 CFR §551.402(a), and acknowledged further that supervision in the Agency offices generally shared the perception, incorrect in his view, that lack of overtime funds in an office's budget meant that overtime was *per se* unavailable.

From this come such misapprehensions as that of Karen Bellinger, Supervisory ADR Coordinator in the Indianapolis District Office. On the matter of whether an employee who works extra hours has a right to make an election between overtime and compensatory time, she noted that no one ever asked for overtime, when, in fact, as I noted above, it is an entitlement. Moreover, she believed she could not offer the election for the very reason that she has authority over what is in *her office's budget*.

The Agency explains this division in perception by asserting that it is a function solely of its desire to comply with the Anti-Deficiency Act, which requires available funds before such funds are obligated, and which is not at issue here. I acknowledge that

argument and will allow the record to speak for itself.

As noted previously, further misjudgments of supervisors included the belief that it was appropriate to grant credit time to employees not on a Flexible schedule. As the Agreement sets forth in Section 30.07, contrary to the actions of Donald Stevens, Director of the Oklahoma City Area Office, and others, such as Audrey Bonner, Enforcement Manager in the Memphis District Office, their granting of credit time to Compressed schedule employees was in violation of law. Among the others wrongly granted credit time were Rosalyn Williams, Senior Investigator in the Atlanta District Office, and Irma Boyce, a Mediator in the Memphis District Office. The notion of supervisors such as Wilma Javey, Director of the Cincinnati Area Office, that compensatory and credit time could be used interchangeably, was clearly wrong.

I now take up the matter of the Union's claim for "suffered or permitted" overtime payment on behalf of Investigators, Alternative Dispute Mediators and Paralegal Specialists. This claim arises from several categories of work-related events, some of which have earlier been referenced generally. Among these are Intake, Onsite visits, Outreach, Mediation sessions and activities related to litigation support. I will examine these below in turn.

Intake Activities of Investigators

As previously noted, Intake activities are a common, regularly recurring event in each Agency office employing non-exempt Investigators. While the schedule established for these activities varies from office to office, both by frequency and by the block of

time regularly dedicated (typically, either an entire day or an entire week at a time), the nature of these activities is relatively uniform across locations.

Intake periods are those dedicated to "walk-in" traffic. While I recognize the Agency's position that these activities, if properly managed, could be undertaken and completed within the hours set aside by the office for this purpose, the evidence is far from uniform in its support for this conclusion.

Irrespective of an employee's normal work schedule, when he or she was scheduled to perform Intake functions, that employee's workday or workweek (depending on how a particular office scheduled this activity), would revert to a regular eight-hour schedule. This was acknowledged by numerous supervisors, among them Agency witness Alma Anderson, Enforcement Manager in the Dallas District Office. This schedule was sometimes communicated through a Memorandum of Understanding. While Ms. Anderson asserted that it was rare for Investigators to exceed their regular Intake work schedules, it did occur with sufficient frequency that her office generated a "Credit/Comp Time" form to document these occasions. These and other similarly designed forms in other offices were not intended to reflect any excess hours as "overtime," and there was therefore a clear understanding that no such hours were to be so compensated. Just as significant, in my view, is that these forms were generated in the first instance, as they are a recognition that Intake is an activity that may necessitate extra hours that may, in turn, qualify as "suffered or permitted" overtime. Such hours are clearly anticipated, regardless of their frequency, and, rather than being prevented, a mechanism is purposefully put in place to record them.

This pattern is repeated consistently throughout the record. Pamela Edwards, an Investigator in the Houston District Office, rotated through Intake every six weeks and testified that, from her experience as an Investigator dating to 1981, it was almost impossible to complete her Intake duties within scheduled hours. Typically, all she did by way of reporting excess hours to her supervisor, Joel Lara, was to take the excess time off later, although when the issue of overtime later became a "hot" item, she recorded her hours. In either event, compensatory time was all that was ever offered.

Similarly, Marie Minks, an Investigator in the San Antonio Field Office, testified that she regularly went beyond her scheduled hours on Intake, and that her supervisor, Austin Jaycox (and, before him, Travis Hicks), knowing this was to be expected on Intake, simply gave her equivalent compensatory time, a pattern that was understood and not recorded, except through its usage as "Other Leave Used" on the Cost Accounting Bi-weekly Time Sheets. Mr. Hicks himself expressly singled out Intake as an activity of Investigators that could not practicably be completed within the forty-hour work week, a view supported by Diego Torres, a Bi-Lingual Investigator in the Savannah Local Office. In addition, Ms. Minks, along with numerous other similarly situated Investigators, observed that, when she faced the necessity of exceeding her time to complete her Intake, she typically would not "chase" the complainant out of the office. She plainly acknowledged the alternatives available – to finish the session by telephone (which she viewed as difficult and, thus, less desirable), to complete the process by mail, or to ask her supervisor to assist her.

Furthermore, as will frequently be seen through the testimony of other witnesses, in both Intake and other circumstances, Ms. Minks was permitted to use her

compensatory time as needed, if within twenty-six pay periods, although she was encouraged to take the time as soon as possible, an approach shared by supervisors such as Roderick Ustanik, Enforcement Supervisor in the Seattle Field Office. The significance of this is that, while adopting the Agency's position that "suffered or permitted" overtime is reckoned by hours in excess of forty in a week, rather than those merely in excess of eight in a day, compensatory time taken outside this time frame does not bring the total hours worked back within the forty in a week, so as to disqualify them from being treated as "suffered or permitted" overtime hours. This flexibility to use compensatory time within twenty-six pay periods appears relatively uniform throughout Agency locations, as noted, among others, by Katherine Sanchez Perez, ADR Coordinator in the San Antonio Field Office; Joseph de Leon, Supervisory Investigator in the Houston District Office; and James Neely, District Director in the St. Louis District Office.

The nature and volume of Intake work, as the evidence clearly portrays, presents time demands that may be so severe that, as testified by Jannés James, an Investigator in the Greensboro Local Office, there is insufficient time for effective enforcement activity. In Ms. James' case, she noted that her Intake volume was so high and so intrusive of her non-Intake responsibilities that she felt it was necessary to take the matter up with her Union representative. Even Guillermo Zamora, Supervisory Investigator in the San Antonio Field Office, expressly recalled Intake as a time when excess hours were typically worked, principally due to charging parties' coming to the office near the end of the designated Intake hours. In this respect, and in order properly to acknowledge Mr. Zamora's testimony, he added that there are no activities of Investigators that *require*

them to work beyond their regular tours. Nonetheless, when Investigators have found it necessary to discharge their Intake duties by staying beyond their regular tour in order to service a charging party, and if this extra time is not balanced within the same workweek by compensatory time, "suffered or permitted" overtime is generated, consistent with my findings above.

In furtherance of Mr. Zamora's testimony, one of his Investigators, Tonya Shiver, noted that, if a charging party were to come into the office on Intake shortly before closing, and if that person had traveled a long distance, she found it improper to ask that person to come back at an earlier time of day merely because she (Shiver) would not be earning overtime for the time spent beyond her regular tour. These are plainly among the hours Investigators worked beyond their tours of which they had no advance notice. The understanding from supervision that such extra hours were likely to be generated was affirmed by Rollin Wickenden and Sandra Cox, Investigators in the El Paso Area Office. Moreover, such hours would almost certainly be generated if a charging party arrived late in the day and, but for that individual's charge being processed, it would be statutorily time-barred, as noted by Rosalyn Williams, a Senior Investigator in the Atlanta District Office. The alternative, apparently much less frequently employed, would be for the charging party to complete the Intake questionnaire, date stamp it and reschedule the remainder of the interview, as noted by Ms. James in Greensboro.

It is to be expected that, from office to office, similar Intake-related circumstances would not necessarily be handled in an entirely uniform manner. For example, Darrick Anderson, an Investigator in the Louisville Area Office, testified that he would have a need to stay late while on Intake (his office conducted Intake every three weeks for a

week at a time), and that his supervisor, Susan Ryan, would have occasion to see him staying late and would say nothing, apart from offering no overtime payment. Travis Hicks, Enforcement Manager at the San Antonio Field Office (referenced above), reported to the contrary, maintaining that none of his subordinate Investigators had ever worked beyond their regular tours without his knowing and not preventing its occurring. In the event they did so and only reported it to him later, as he noted, he had no opportunity to prevent it.

Far more common, however, were the circumstances such as that of Rosemary Caddle, Investigator in the Miami District Office, who reported that, if she found it necessary to stay late to complete performance of her Intake duties, she would act in accordance with a verbal arrangement with her supervisor, Robert Metaxa, to take a day off later. On occasions when she made calls from home on Intake-related matters, or when she took such work home, she was not compensated for such time, although, as she reported, Mr. Metaxa was aware of this activity as well and she acknowledged having failed to request it. Furthermore, as reported by Investigator Diane Webb of the San Antonio Field Office, her supervisor had occasion to see her working late while on Intake and no discussions ensued, including any instruction for her to stop working.

Onsite Activities of Investigators and Mediators

Onsite activities of Investigators, like Intake, are a necessary element of Investigators' duties, and are a frequent occurrence for Mediators as well. Occasions commonly arise when, during the process of gathering evidence on a charge, an Investigator is required to visit the location of a charging party and/or a respondent. As the evidence summarized below reveals, a fair portion of such activities would have to be

pursued by Investigators during hours beyond their regular tours of duty and, depending on the amount of such time, and how such time was then handled by supervision, a claim for "suffered or permitted" overtime might arise. As will also be demonstrated below, the nature of Onsite activities, frequently involving significant travel and the necessity to adjust such visits to the schedules of those being interviewed, were undertaken with the knowledge and approval of supervision, such knowledge including the necessity for excess hours.

There was scattered testimony in the record purporting to assert that Onsite activities would be conducted within regular business hours, such as that of Mediator José Gurany, who testified that, during his tenure as Enforcement Supervisor in the El Paso Area Office, that was, in fact, his belief. With due respect, the whole of the record does not support this view.

One example of how much extra time might be required for Onsite activities was that of Investigator Kathlyn Johnson of the Albuquerque Area Office, who, in working on a priority third party charge in March 2006, entered a request with her supervisor, Georgia Marchbanks, for nineteen hours of compensatory time, including eleven total Saturday hours. While Ms. Johnson acknowledged she had use for the compensatory time, she was told that overtime pay was not an option.

Frequently, as testified by Diego Torres, a Bilingual Investigator in the Savannah Local Office, Investigators would fill out forms acknowledging that no overtime was available, knowing that travel requirements would generate extra work hours, and knowing also that compensatory time was the only available option. In Mr. Torres' case, he was advised to use his compensatory time within the next two pay periods. Others

were instructed simply to use their compensatory time before using either annual or sick leave. In either event, should the result be a workweek greater than forty hours, a "suffered or permitted" overtime claim might be established. This would likewise be the case with subordinates of Nicholas Alwine, Supervisory Investigator in the Houston District Office, who acknowledged his awareness of extra hours being worked by Investigators, not only with Onsites but with Outreach as well, and who attempted to have them take their compensatory time within the same pay period, which, depending on the timing, might not overcome a "suffered or permitted" overtime claim.

Mediators, depending in part on their office location, may, like Investigators, have frequent occasion to spend time away from their "home" office. Some, like many who work under Karen Bellinger, Supervisory ADR Coordinator in the Indianapolis District Office, are essentially, as Ms. Bellinger described it, on an honor system, since their whereabouts at any give moment cannot always be determined. Ms. Bellinger's Mediators may travel as far as three and one-half hours to a mediation, and may be on the road as frequently as four days a week. In addition, while Katherine Sanchez Perez, ADR Coordinator in the San Antonio Field Office, expressed her belief that Mediators can handle their job responsibilities within regular work hours, she does not ask them if it is possible to do so. In fact, her advice to her Mediators is that, if it is necessary to go beyond regular work hours, it is their job to assist the parties. This is a reflection of the "hands on" element of a Mediator's function, one which would be difficult to accomplish, even in part, if attempted over the phone merely to avoid excess work hours.

Outreach Activities of Investigators and Mediators

In addition to the principal activities of Investigators and Mediators already referenced, Outreach was an activity in which most Investigators and Mediators engaged in the ordinary course of their duties. The extent of these activities varied both with the location and geographic jurisdiction of the office. An additional variable was the extent to which given communities would have the need and/or would request the Agency to provide this service. It would be provided both at the initiation of Agency personnel and of community groups who might approach the Agency to provide Outreach activities and programs (the latter referenced as "CST," or customer-specific training). Commonly, these activities would take place outside employees' regular work hours and, at time, on weekends.

The preponderance of the evidence reflects Outreach as an element of Performance Standards, although some offices do not view as a deficiency an employee's failure or refusal to participate. This raises the question of whether Outreach is truly a "voluntary" activity, although, in the end, there is no issue whether such activity constitutes "hours of work…for the benefit of [the A]gency," under 5 CFR §551.401(a). Furthermore, as a rule, Outreach is a supervisory-initiated activity.

While, according to some witnesses, such as Samantha Chan, an Investigator in the Houston District Office, most Outreach activities occur on weekends, Janet Elizondo, Deputy Director of the Dallas District Office, maintained that the vast majority of Outreach was capable of being worked within regular work hours. For those hours falling outside regular hours, Ms. Elizondo would solicit volunteers, with the understanding that any claim to overtime pay was waived and that "double compensatory time" would be given to volunteers.

Irrespective of the amount of Outreach capable of being performed within regular work hours, however, some Outreach, by its very nature, could not be. These kinds of Outreach included CST, noted above, and, specifically, TAPS programs and Juneteenth events, for all of which compensatory time was the only option. Furthermore, Susan Ryan, Supervisory Investigator in the Louisville Area Office, acknowledged that some Outreach activities had no flexibility in their scheduling and, thus, had to occur after hours or on weekends. One of numerous such examples was that of two of Ms. Ryan's Investigators, Edward Bagley and Ralph Calvin, both of whom (along with a third employee, Mediator Sharon Baker) had volunteered to participate in an Expo Outreach event that involved both evening and Saturday hours. All such time, as these employees were expressly made aware by the "Expo Volunteer Schedule" forms, was processed for compensatory time only. Another involved Maria Saldivar, an Investigator in the Cincinnati Area office, who volunteered for several Outreach events outside regular hours, among these being Saturday events involving assistance to the Mexican Consulate. For both, compensatory time only was offered.

Ms. Ryan went on to note that, while it may have been rare that she was only informed of Outreach events after the fact, she approved compensatory time in either instance. This is significant, in my view, because, even if some activities, such as after hours or weekend Outreach do not expressly come to the attention of supervision in advance of their performance (and, thus, technically, could not be "prevent[ed]," as that term is used in Section 31.09 of the Agreement), it would be treated in the same way (i.e., through compensatory time) for the very reason that the supervisor "knows or has reason to believe that the work is being performed," and, by its nature, would have no reason to

prevent its being performed. This, therefore, is among the categories of work eligible for "suffered or permitted" overtime, providing it results in work hours exceeding forty in a given week.

Activities of Paralegal Specialists

Paralegal Specialists perform a key support function for Agency Trial Attorneys. Among the activities in which they regularly engage are those relating to depositions, document procurement, and the processing of Freedom of Information Act ("FOIA") requests. In the opinion of Jacqueline McNair, Regional Attorney in the Philadelphia District Office, there has been no need for Paralegal Specialists to work more than forty hours in a week. If that circumstance were to arise, she noted, there was flexibility but such extra time was voluntary, and the only recognition for that is compensatory time, although Ms. McNair acknowledged her awareness that the FLSA requires the overtime option.

Penny Horne, a Paralegal Specialist in the Kansas City Area Office, likewise was not given the opportunity to work extra hours for overtime pay, but, as the only Paralegal Specialist in the office, has been required to perform work outside her regular work hours. Such extra work includes document procurement for all four states in her office's jurisdiction in preparation for trial. Touching on an issue that has been discussed previously, Ms. Horne noted that she was never informed she had the option of working the extra hours or being able to decline the work.

Similarly, Jonathan Peck, Supervisory Trial Attorney in the San Francisco District Office, has had occasion to ask his two Paralegal Specialists (who work on a Compressed schedule) to work extra hours on occasions when a Trial Attorney is working on a

project. In these cases, according to Mr. Peck, they usually request compensatory time owing to their limited bank of sick leave.

Additional examples of activities of Paralegal Specialists for which compensatory time only was offered included several from the Memphis District Office. Among these were activities such as digesting depositions, drafting responses to summary judgment motions and conducting telephone interviews with applicants for employment at respondent companies.

In this respect, there was evidence clearly indicating that activities beyond regular work hours for which Paralegal Specialists would be eligible to receive compensatory time frequently were such that the work itself occurred first, only then followed by the request that such work be acknowledged. Yvonne Williams, a retired Paralegal Specialist in the Baltimore District Office, and who worked on a 5/4/9 Compressed schedule, recalled that it was the normal practice to work the time and then submit the documentation for it. She was not told she could go home rather than perform the extra duties which, in her case, involved a significant volume of work on, among other matters, a large class action case against LA Weight Loss. While she was not required to put in this extra time, she viewed it as a necessity, remarking: "Just look at what's on your desk." Overtime pay was not an option and, while the form documenting her extra hours included a printed entry "**COMPTIME REQUESTED ONLY**," Ms. Williams testified further that she made no such request.

FURTHER EVIDENCE OF HOURS WORKED IN EXCESS OF FORTY IN A WORKWEEK

As I have already found, if an employee at issue in this case works over forty hours in a given workweek, and those excess hours qualify as "suffered or permitted" under Section 31.09 of the Agreement, they are subject to overtime payment under the FLSA. I will now examine the record to determine whether it reveals that at least some employees were likely to have been eligible thereunder.

I begin with concluding that, unless all employees relevant to this case that are shown to have worked extra, non-supervisor-directed, hours in a given workday also utilized compensatory time that would cause the hours worked in that work week not to exceed forty, there are legitimate and viable claims for "suffered or permitted" overtime. This is so, of course, barring the further showing that overtime pay and compensatory time were both available and that the employee consciously, and without coercion, chose the latter.

There are no circumstances to speak of in this record in which overtime was offered in exchange for excess hours worked. Instead, employees were informed, orally and/or by written directive from supervision, that overtime pay was not available, and that compensatory time was the only form of recompense. Interestingly, in many such cases, the forms utilized contained a statement that "I understand the requirements of the Fair Labor Standards Act," while, at the same time, affording an employee the option only of compensatory or credit time "in lieu of any overtime payment."

There was considerable evidence with regard to the time frames within which compensatory time was to be taken. I have already made some reference to this when addressing such matters as Intake. It varied generally from directives to take the compensatory time within the same work week, within the same two-week pay period, to

as far distant as within twenty-six pay periods. The relevance of this is that "suffered or permitted" overtime would not be generated if all extra hours in a given workday, or workdays, were countered in kind by compensatory time taken within the same work week.

Ms. Elizondo spoke of the availability of compensatory time by noting her understanding that such time could be approved in lieu of overtime, and with employees being advised they would have to agree to waive their entitlement to overtime and utilize their compensatory time before the end of the leave year. Thus, under this arrangement, it clearly was not incumbent on an employee to utilize his or her compensatory time within the same workweek or, for that matter, even within the same pay period. As a consequence, "suffered or permitted" overtime, as previously defined, might well be generated.

Similar scenarios are present throughout this record. Glenda Bryan-Brooks, an Investigator in the Birmingham District Office, working on a 4/10 compressed schedule, testified that it was possible for her to work on a day off and be permitted to take a compensatory day in another pay period altogether. Alma Anderson, Enforcement Manager in the Dallas District Office, reported that compensatory time was required to be used only by the end of the leave year. Mr. Torres, Bilingual Investigator in the Savannah Local Office, testified that he would typically take his compensatory time within the next two pay periods. Julia Hodge, Investigator in the Birmingham District Office, likewise testified that she would not always be able to take a compensatory day (after working an her off day) within the same pay period.

Nicholas Inzeo, Director of the Office of Field Programs, himself testified that compensatory time that an employee "elects" is permitted to remain in the employee's bank for twenty-six pay periods. Only if it remains unused after that time is overtime pay required. This, of course, presumes that receipt of compensatory time was a true election, for which the record provides scant support. What may be said of Mr. Inzeo's testimony on this point is that it is consistent with Ms. Ibarguen's March 3, 2003 Memorandum, wherein she references the circumstance of a non-exempt employee "voluntarily request[ing]" compensatory time in lieu of overtime pay.

THE ABSENCE OF AN ELECTION TO RECEIVE OVERTIME

The record is unmistakably clear, in my view, that most employees at issue in this case who were granted compensatory time for extra hours worked received such time by means of supervisory directive, and not from a true "election." With rare exception in this record, the concept of "requesting" compensatory time was a fiction. The offer of compensatory time was the only means made available to acknowledge extra hours worked. This was a function of the uniform directive, repeatedly referenced both by supervision and by non-exempt employees, that overtime pay was not available at any time.

By law, and to the extent extra hours worked satisfied the definition of "suffered or permitted" overtime, the entitlement is to overtime pay, with the option of compensatory time should an eligible employee genuinely elect it. To act in dereliction of this is violative of 5 CFR §551.531(c), as well as Section 31.08 of the Agreement. Furthermore, it expressly contravenes the internal Agency directive contained in the March 3, 2003 Ibarguen Memorandum.

The only true exceptions to this requirement consisted of those occasional employees who genuinely did request compensatory time for reasons that were clearly expressed. Illustrations of this included one of Houston District Office Supervisory Investigator Joseph deLeon's Investigators, Ray Bautista, who wanted to accumulate extra time for reasons of health; one of Albuquerque Area Office Director Georgia Marchbanks' Investigators, Kathlyn Johnson, who was also looking to build her leave bank; Rita Montoya, a Mediator in the Albuquerque Area Office, also viewing compensatory time as a convenient way of countering a low leave balance; and two Paralegal Assistants of Jonathan Peck, Supervisory Trial Attorney in the San Francisco District Office, for the same reason, as well as for attending to family caretaking responsibilities.

Certain Agency forms, on their face, purported to be intended to document requests for overtime, along with authorizations thereof, and reports of actual overtime hours worked. One such form, entitled "Request, Authorization, and Report of Overtime" included with its printed text the following: "Authority is hereby requested for the performance of the overtime described below which is beyond the regularly established eight-hour day or 40-hour workweek:…" In practice, however, this form, while utilized, was not intended to document hours for which overtime would be paid. Rather, the hours reflected compensatory (or, in some instances, credit) time.

With reference to this form, Gail Cober, Director of the Detroit Field Office, testified that it was used when the office had some overtime hours to use. She added, however, that she did not know if such hours were meant for Investigators or Mediators. In fact, it was quite clear from the record how such forms were actually used for

Investigators and Mediators, and equally clear for whom actual overtime hours would, on occasion, actually be utilized.

On this first point, it was instructive to examine such a form utilized by Azella Dykman, an Investigator in the Dallas District Office under Deputy Director, Janet Elizondo. The form contained a line in the middle, appended to the form as originally printed, for the Investigator's signature, preceded by the words "WAIVE OVERTIME." By this, and perhaps by notification in other forms as well, the employees were uniformly informed that extra hours, no matter how they were categorized, would not be acknowledged with overtime payment. Indeed, other Agency forms included one entitled "Request to Work for Compensatory or Credit Time," in which hours requested to be worked as "hours of overtime" were followed by an acknowledgment by the employee that "I understand the requirements of the [F]air [L]abor [S]tandards [A]ct" and go on to say that "[i]n lieu of any overtime payment I request approval to work…" either compensatory time or credit time.

Still others were printed with the title "Request for Compensatory Time In Lieu of Overtime," or with "Overtime" crossed out and "Compensatory Time" written in. One form, utilized in the St. Louis District Office and entitled "Report of Overtime Worked," was accompanied by an entirely separate explanatory document on District Office letterhead, with one signature line for the employee and the other for James Neely, District Director. It was entitled "**AGREEMENT CONCERNING COMPENSATORY TIME**" and provided: "The undersigned employee has submitted the attached request for compensatory time for work performed beyond the regular work week. Overtime pay is not available. The undersigned employee will not seek overtime pay for this work and is

requesting only compensatory time. In return, the undersigned District Director or her [sic] designee will allow the requested extra work and will provide compensatory time for it."

On the second point, the occasions when overtime hours might actually be acknowledged with payment, Ms. Cober's suggestion that these occasions might not have been for Investigators or Mediators was correct. In this respect, I note the Agency's observation that the Union cannot point to any instance where overtime was ordered and approved and not paid for. This is true. The reason for this is that virtually the only occasions the Agency did order and approve overtime were not for any employees involved in this case, but for lower-level clerical and I.T. employees, typically to ensure that end-of-the-quarter paperwork backlogs were cleared. This was addressed and affirmed, among others, by William Cook, Enforcement Manager in the Philadelphia District Office; Elizabeth Cadle, Director of the Buffalo Local Office; Eileen Sotak, Enforcement Supervisor of the Chicago District Office; Ralph Soto, Supervisory Program Analyst in the Office of Field Programs; and Carolyn Abernathy, State and Local Clerk in the St. Louis District Office.

The fundamental flaws in the Agency's practice of forcing compensatory time on employees who worked extra hours that arguably were "suffered or permitted" are twofold. The first is that the "choice" that supervision purported to give them, as noted above, was not a genuine choice. Short of choosing not to work in the first instance, and therefore not incurring this extra time at all, that significant universe of employees who did work this extra time, and who would have preferred the monetary payment, were required, typically by filling out a form, to "choose" compensatory time and, in many

cases, to state on these forms their "waiver " of overtime entitlement. It is difficult to conclude that this was not coercion, under 5 CFR §551.531(c).

The second flaw in the Agency's practice is apparent when one examines Section 31.08 of the Agreement. It provides, in part, that "[a]ll employees in positions which are non-exempt under FLSA and those exempt employees in positions whose basic rate of pay is below the maximum rate of GS-10 may elect, but are not required to receive compensatory time in lieu of overtime." 5 CFR §551.531(c) affirms this election, as do both the September 19, 1995 Cornwell Johnson and the March 3, 2003 Ibarguen Memoranda. Both Memoranda clearly provide that all non-exempt employees, as well as exempt employees whose basic pay does not exceed the maximum rate for GS-10, have the option to elect overtime pay or compensatory time. Both go on to say that exempt employees who exceed the maximum GS-10 rate *will receive compensatory time instead of overtime pay*. The result of the above, clearly impermissible in this case, is that, by the consistent practice of Agency supervision in denying overtime pay as an entitlement to those non-exempt employees in this case whose excess work hours merit it, these employees are treated identically with *exempt* employees who are paid more than the maximum GS -10 rate.

EVIDENCE OF SUPERVISORY KNOWLEDGE

A finding of "suffered or permitted" overtime is premised, in part, on a showing that an employee's supervisor "has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed." This is set forth in 5 CFR §551.104, as well as in Section 31.09 of the Agreement.

One of the Agency's assertions, in furtherance of its position that the evidence does not sustain a finding of "suffered or permitted" overtime is that employees who first performed the work at issue, and only later approached supervision for appropriate recognition of such work, were not "suffered or permitted," owing to a lack of supervisory knowledge acquired in time to prevent the work from being performed.

My view of the evidence in this regard requires me to conclude that, while there may have been isolated occurrences that conformed to the Agency's argument, the preponderance of instances reveals the opposite. It reveals that supervision was not only generally aware of the kinds of work that lent themselves, by their nature, to generate extra work hours, but, in addition, and in recognition of this (as already referenced herein) had mechanisms in place to deal with these extra hours and to compensate them in the manner supervision themselves prescribed.

One conclusion is worth restating in this regard. It is that, despite Agency management's not *requiring* work beyond forty hours in a week, that bears no relation to the legal issues relevant to "suffered or permitted" overtime. The Agency would argue that it does, as it asserts that "[i]n virtually every case of alleged overtime, the employee had the choice to work the extra time for comp time or not work the extra time at all." While, in a number of instances, that is factually true, the reasoning is circular. By its argument, the Agency has simply found another way of saying the work at issue was not

required. However, the very fact of its not having been required (or, as the Agency would define it, ordered in advance) is what makes such work potentially "suffered or permitted."

The matter of supervisory knowledge is reflected with great frequency and regularity in this record. As a general proposition, any form used by supervision (examples of which have previously been referenced) that gave employees the opportunity to record excess work hours revealed two circumstances. The first is a certain supervisory anticipation, as well as recognition, that such excess work hours would be generated. The second is that employees, by these forms, were expressly advised that compensatory time was to be given, overtime pay being just as expressly ruled out.

I turn to numerous specific instances in the record in support of this general proposition. According to Ralph Soto, Supervisory Program Analyst in the Office of Field Programs, just as supervisors in the field might be inclined to grant overtime pay to clerical employees, they were equally inclined, as a matter of policy, to deny it to Investigators and encourage that extra hours be worked for compensatory time. The Agency might argue that, even with this being so, its supervisors required that compensatory time be approved in advance. The facts do not bear this out.

Beverly Collins, Investigator in the Tampa Field Office, testified that if she or one of her colleagues works extra hours, they are to advise their supervisor so that it can be recorded in a "comp time" book. The same was reported by Julia Diaz and Doralisa Wroblewski, also Investigators in Tampa. Indeed, Ms. Diaz reported further that, after awhile, as she continued to work extra hours, she failed even to receive compensatory

time because other employees apparently were abusing it. Notably, on the matter of whether supervisory permission to work extra hours was required in advance, Ms. Collins noted that was the case under the Agreement, but it did not hold true in practice.

The evidence plainly reveals that the use of forms in order to record compensatory time worked and/or used was ubiquitous. An example is the Cost Accounting Bi-weekly Time Sheet utilized by Sandra Chavez, Investigator in the Charlotte District Office, which identified the entries under "Other Leave Used" as compensatory time. Inasmuch as her supervisor instructed her to report compensatory time in this way, this form *solicits* this information and evinces clear supervisory knowledge. Moreover, even though her instructions were to notify her supervisor in advance, she received the compensatory time even absent such notice. In either event, no effort is made to prevent the work from being performed.

For the most part, this is so whether the extra hours are "pre-arranged" or not. Maria Saldivar, Investigator in the Cincinnati Area Office, noted that, when she pre-arranged her extra hours, it was usually documented by an e-mail, but if the work could not be pre-arranged, she would notify her supervisor after the work was performed. Whether pre-arranged or not, therefore, this establishes two things: (1) that supervisors were aware extra hours were being worked; and (2) that they permitted this to occur, knowing that it would not result in any payment of overtime.

One example of Ms. Saldivar's extra hours is found in e-mail exchanges between her and Cincinnati Area Office Director, Wilma Javey. Apart from apparently being another case of an employee on a Compressed schedule wrongly granted credit time, Ms. Saldivar would inform Ms. Javey of extra hours she worked for various reasons, among

these being processing a charge from a walk-in, conducting a Fact-Finding Conference in Dayton, Ohio, and working on the settlement of a case. One of Ms. Javey's responses stated, in part: "Give me a memo or e-mail when you wis[h] to use the time. Thanks for your willingness to stay over to provide excellent customer service to one of our stakeholders. It is very much appreciated."

This is significant in a few respects. One is that, for this extra time, overtime pay is not offered. Another is that the opportunity given to Ms. Saldivar to use the time appears not to be limited to the same work week, or even the same pay period. However, for purposes of the issue of supervisory knowledge specifically, Ms. Javey has not only failed to prevent recurrences of Ms. Saldivar's working beyond her regular hours, but, indeed, she praises her dedication for doing so. Therefore, while this highlights, on the one hand, Ms. Javey's desire to serve the Agency's customers, it also helps qualify such extra time as "suffered or permitted."

Craig Kempf, a Mediator in the San Antonio Field Office, testified that, if his mediation activities ended after regular work hours, he would inform his supervisor, Kathy Perez, who advised him to let her know so she could grant him credit time. (This was yet another instance where employees who did not work a Flexible schedule wrongly received credit time.) Ms. Perez, as Mr. Kempf noted, never advised him not to work late without advance approval. Similarly, Tonya Shiver, Investigator in the San Antonio Field Office, noted that her supervisor, Guillermo Zamora, had observed her working excess hours and said nothing further than possibly inquiring whether she was going home soon. This was so irrespective of whether the "sign-in/sign-out" sheet had recorded her as having already signed out, and happened most frequently on Intake. In her opinion

(which I acknowledge as such), management knew employees continued to work beyond their regular tours, but their interest was in making sure production goals were reached. Such was also the case with Mary-Christine Bobadillo, who, as an Investigator in the El Paso Area Office, worked excess hours while her supervisor witnessed it and did not direct her to cease working.

John Fitzgerald, Deputy Director of the Atlanta District Office, noted that, in his area, the concept was "cuff time," but, so far as I could observe, was not qualitatively distinguishable from compensatory time. Much as compensatory time, cuff time would be recorded verbally or documented by e-mail between the employee and supervision. It operated on an "honor system" and would not be reflected either on the Cost Accounting Bi-weekly time Sheet or in FPPS, nor did supervisors themselves typically maintain cuff time records.

Mr. Fitzgerald was forthcoming in his acknowledgment that he knew, for example, that Diego Torres, Senior Investigator in the Savannah Local Office, was active in creating the Hispanic Outreach Team and probably performed at least some such work outside regular work hours. For this, he received cuff time. He characterized arrangements of this kind a "long practice" of the Agency and, apparently for that reason, assumed it was not a violation of law. The significance of this is that it is another illustration of a category of non-exempt employees' activities that, while not directed, were performed outside regular work hours with the knowledge of supervision, with no attempt to prevent its occurrence, and with a mechanism in place to account for a return of this time to the employee that categorically excepts the payment of overtime.

Some Investigators testified that they were not certain whether they had received instructions about working excess hours, but they still proceeded to record them in some way, and these excess hours clearly would not have been acknowledged with compensatory time had they not been approved. Whether this approval came in advance of these excess hours or after, it was the rare case that genuinely presented the prospect of supervision's attempting to prevent these excess hours from being worked.

David Kingsberry, Investigator in the Greensboro Local Office, testified to his having frequently worked excess hours despite not recalling any instruction from his current supervisor, José Rosenberg, or his prior supervisors, Thomas Colclaw and Michael Whitlow, about working such hours. Jannés James, Investigator in the Greensboro Local Office, acknowledged that Mr. Colclaw had communicated by e-mail the message that extra hours should not be worked, but, in fact, the effect of such a communication, though more locally targeted than the March 3, 2003 Ibarguen Memorandum, is not really different qualitatively. Furthermore, it does not bear in any probative way on the matter of supervisory knowledge or actions on their part to prevent extra hours from being worked. In fact, Ms. James testified that her supervisors were indeed aware of her having to work excess hours, and "Comp Time/No Overtime" sheets were made available to document them.

Yet another example of supervisory knowledge of extra hours worked and the failure to prevent them involved Robert Hill, an Investigator in the Oklahoma City Area Office. Through numerous e-mails exchanged between Mr. Hill and Donald Stevens, Area Office Director, Mr. Hill requested, and Mr. Stevens consistently approved, the extra hours that Mr. Hill informed Mr. Stevens he worked in pursuance of his duties.

This is also a further illustration (noted previously) of Agency supervision's wrongly granting credit time to an employee who worked on a Compressed schedule.

Similarly, as previously noted, the work demands of Mediators are such that these requirements inevitably resulted in work beyond regular work hours. This is because, as supervisors know, Mediator effectiveness is a function of settlements reached between charging parties and respondents, and if effectiveness means staying with the parties as long as it takes to narrow and, hopefully, to resolve outstanding issues, that is how it gets done. As Yvonne Gloria-Johnson, ADR Coordinator in the Phoenix District Office, testified, the Mediator is in control, and, while she stated she never required Mediators to work past their regular work hours, that is not the issue here, as previously noted. What is relevant, as Ms. Gloria-Johnson went on to testify, is that, when these highly anticipated extra work hours were spent by Mediators, she solicited and approved requests for compensatory time.

There was no attempt to prevent these hours from being worked. Rather, this is an acknowledgment that overtime is being suffered or permitted (to the extent consistent with my findings herein); it is simply not being paid for. As Ms. Gloria-Johnson noted, she never said to her subordinates: "We have no money for overtime and you can't do this anymore." She went on to acknowledge that she knew the law requires that they be given a choice between the entitlement to overtime and the option of compensatory time. Similarly, as noted by David Rucker, Supervisory Investigator in the Phoenix District Office, it is up to his Investigators to determine if they work beyond their regular hours. Once again, this evinces not only the knowledge of supervision that such work is being

performed, but also the determination that no attempt will be made to prevent it by telling them no overtime funds are available to pay for it.

Ultimately, on the issue of supervisory knowledge, I certainly acknowledge the written instructions that have been issued at various supervisory levels, from Headquarters down to lower-level offices, counseling against subordinates' working suffered or permitted overtime. However, I must conclude that these are not a shield against the pattern, revealed in this record, of supervisors in the field who have, for the most part, followed a practice of knowing this work will frequently be performed, for the benefit of the Agency, and will not avail themselves of the opportunity to prevent it.

AGENCY RESPONSIBILITY FOR MAINTENANCE OF TIME RECORDS

OPM regulations speak expressly to the Agency's responsibility not only to control the work performed by its employees for its benefit, but, further, to maintain appropriate records of all time spent performing such work.

5 CFR §551.402 ("**Agency responsibility**") provides as follows:

> (a) An agency is responsible for exercising appropriate controls to assure that only that work for which it intends to make payment is performed.
> (b) An agency shall keep complete and accurate records of all hours worked by its employees.

The considerable evidence before me on the matter of how work performed beyond regular work hours was managed by Agency supervision reveals an approach not only inconsistent in the extreme, but also so informal and unstructured as virtually to ensure that no reliable "trail" of all hours worked could be created. It is apparent first that no concrete methodology was communicated institutionally by the Agency to its offices with respect not only to how extra hours should be categorized, but to how and

where they were to be documented in the first instance. The result is that, even forms in consistent use, like the Cost Accounting Bi-weekly Time Sheet, would be administered differently from location to location with respect to how much employee work time they would actually reflect. Ultimately, the result, as I view it, was that, not only was work knowingly performed for which the Agency was not prepared to pay with money, but that maintenance of complete and accurate records of all hours worked by employees was not possible.

There are many examples in the record revealing the Agency's incomplete and inconsistent maintenance of such time records. Some, but not all, of these will be noted.

Eileen Sotak, Enforcement Supervisor in the Chicago District Office, testified that she never saw anything on the Cost Accounting Bi-weekly Time Sheets reflecting more than eighty hours in a pay period. She was responsible for certifying the Timekeepers' entries on these forms, and she affirmed that compensatory time was not reflected on them. It was only by practice that employees took the step of either e-mailing her or informing her orally of their excess hours.

This kind of practice raises additional questions. The September 19, 1995 Cornwell Johnson Memorandum noted, among other matters, under "Compensatory Time," that "[u]nused compensatory time is automatically dropped by the GSA automated payroll system at the beginning of a new leave year." However, according to Ms. Sotak, compensatory time was not entered into the FPPS in the first instance.

If hours worked in excess of an employee's regular tour are not documented, it is clearly a problem and raises issues of oversight. José Gurany, currently a Mediator and formerly Enforcement Supervisor in the El Paso Area Office, in addition to observing

that Time and Attendance sheets were only as reliable as those employees filling them in, stated that he did not regularly check on the hours worked by his subordinates and, therefore, could only know from what was written down.

Donald Stevens, Director of the Oklahoma City Area Office, had succeeded Joyce Powers in that position. He acknowledged having maintained improper Time and Attendance records by failing to record excess hours, and, as noted elsewhere, he issued credit time to one of his Investigators, Robert Hill, who was not on a Flexible schedule. He acknowledged that this appeared to violate the law, but, as he explained, he had only continued what Ms. Powers herself had done.

Similarly, Wilma Javey, Director of the Cincinnati Area Office, noted that she did not instruct her employees to enter excess hours on the Cost Accounting Bi-weekly Time Sheets. Further, her office's Timekeeper was not instructed to enter credit time, as it was unofficial. She herself was not told that any of these data on extra hours was to be entered in the FPPS. The lack of consistency on this from office to office is significant because, as Joann Riggs, Assistant Director of the Agency's Office of Human Resources, testified, entries into the FPPS are mandatory for each Agency office, and individual offices are not at liberty to decide whether to enter certain hours into the FPPS.

There are further examples of this inconsistency. Janet Elizondo, Deputy Director of the Dallas District Office, stated that excess hours worked by her subordinates were not reflected on the Cost Accounting Bi-weekly Time Sheets because, as she noted, she trusted her employees and, in addition, her office had limited resources, with little time available to fill out forms. Kenneth Warford, a Mediator in the Atlanta District Office, as well as Deborah ("D.J.") Lichen, an Investigator in the same office, and Raymond

Griffin, a Senior Investigator in the Honolulu Local Office, likewise recalled that compensatory time, being "unofficial," did not find its way onto the Cost Accounting Bi-weekly Time Sheet. However, as noted by Georgia Marchbanks, Albuquerque Area Office Director, if an employee worked beyond his or her regular tour, and it was requested and approved in advance, it was, in fact, recorded on the Cost Accounting Bi-weekly Time Sheet. It was also the experience of Lorraine Strayhorn, a Paralegal Specialist in the San Francisco District Office, that extra work hours were to be recorded on this form. Yet Kathlyn Johnson, one of Ms. Marchbanks' Investigators, believed its reflection on the Cost Accounting Bi-weekly Time Sheet was "rare,"

The weight of the testimony concerning how extra hours were documented is that it was pursued in *ad hoc* fashion. Sharon Baker, a Mediator in the Louisville Area Office, testified that her manner of recording excess work hours was simply to make a note of them in her personal calendar. Pamela Edwards, Investigator in the Houston District Office, noted that her supervisor, Joel Lara, instructed her that it was not necessary for her to record her excess hours at all, and that she simply should take the time off. It appeared to work, as testified by Patricia McNeil, a Mediator in the Detroit Field Office, on an "honor system." A frequent means of documenting extra work hours when they were recorded, was for the employee to e-mail his or her supervisor, as done, for example, by Sandra Chavez, an Investigator in the Charlotte District Office, with her supervisor, Melvin Hardy.

As noted above, the inconsistency in these matters included whether, and how, compensatory time would find its way into the FPPS. Richelle Durr, an Office Automation Assistant in the Savannah Local Office, testified that she was instructed that

compensatory time was not to be entered into the FPPS, and that it was a matter between the Investigator and his or her supervisor. To the contrary, however, Thomas Colclough, Director of the Raleigh Area Office, stated, in his capacity as Certifier for the Investigators, that compensatory time should, in fact, be entered into the FPPS. Indeed, the most painstaking approach to this seemed to be followed by Maria Garrido, an Office Automation Assistant in the Miami District Office. She explained that, if an employee works excess hours, they should be entered on the Cost Accounting Bi-weekly time Sheet under "Other Leave Used." If the form contains no explanation, she either calls the individual or the supervisor, or sends an e-mail. After the time is sent to the Certifier, it is returned to her electronically, after which she releases it to the FPPS.

As previously noted, the examples set forth here concerning the inconsistent, or nonexistent, tracking of employees' compensatory time are illustrative and not all-inclusive. They demonstrate, in my view, that the Agency did not act in a manner consistent with its responsibilities as set forth in 5 CFR §551.402.

CONCLUSION

In developing the extensive record before me, counsel for both parties have presented their respective cases with skill and professionalism. This is so particularly in view of the numerous difficulties that arose by reason of the length of these proceedings and the challenges in managing them in several venues.

It is appropriate to restate again what the issue before me is and, as importantly, what it is not. The issue is whether the Agency, by the manner in which its supervision have managed the excess work hours of Investigators, Mediators and Paralegal

Specialists, has violated the FLSA by engaging in a pattern of conduct which, if established, resulted in the creation of suffered or permitted overtime that, in the absence of an employee's genuine choice, wrongly resulted in the granting of compensatory time instead of the payment of overtime. For all the reasons I have set forth herein, I find that it has.

In so finding, I also note what was not before me for decision. The Agency would have me conclude that, as it describes it, its practice of permitting these employees voluntarily to modify their schedules for their own convenience without working more than forty hours a week or eighty hours a pay period is a reasonable, good faith effort to provide flexibility for these employees. I do not believe that this is what this case required me to decide, nor, for that matter, was it what the great weight of the evidence revealed.

Rather, I conclude that the Agency's actions, in violation of the FLSA, and in a manner reasonably consistent from office to office throughout the country (to the extent represented in this record), failed to provide employees with the choice to have their excess work hours, to the extent they may qualify, compensated by overtime pay rather than by the sole alternative offered, that of compensatory time. While Agency policies from Headquarters surely purported to set forth a framework for proper action under the FLSA, it was equally clear that, in virtually every Agency office here represented, express policies were in place that were in derogation of that framework. This action was not inadvertent, and, both by documents and by supervisory instructions, conveyed to employees that an FLSA entitlement to overtime pay, if excess hours qualified for it, would not be available under any circumstance.

There is some testimony in the record to the effect that employees did not "ask for overtime." That may have been so in some instances. Given that, however, it does not mean that these employees, by failing to ask, were understood to have chosen against it, even if it had been offered. A failure to ask may as likely have meant that they were informed it was not an option. In addition, the mere fact, as noted frequently by Agency supervisors, that there were no employee complaints is not relevant to the legal issue of overtime entitlement. Likewise, the statements of numerous Agency supervisors that they never "required" anyone to work beyond their regular tour, or beyond forty hours a week or eighty hours a pay period is of no legal consequence. "Suffered or permitted" is not about *directing* work to be performed. Furthermore, as some supervisors observed about their subordinates, they had the option to stop working but chose to continue. This is relevant only as it might tend to show that such supervisors themselves chose not to direct this work to stop.

The basis for a finding of "suffered or permitted" overtime as a practice of Agency supervision has, in my view, been established by this record. Liability need not wait for a discrete determination of each employee who may have been suffered or permitted to work. The record, as developed by representative witnesses, goes to liability. Whether others may be similarly situated goes to the extent of the remedy. If a supervisor states that his or her office policy is to grant compensatory time and not overtime for extra hours that otherwise qualify as suffered or permitted, that establishes liability. This is equally the case if such extra hours were approved in advance, so long as no opportunity for overtime pay is available.

REMEDY

The remedy due the Union and/or individual employees for any suffered or permitted overtime not properly compensated cannot be determined based on the testimony and records of representative witnesses alone. As I have found liability on the part of the Agency for its regular practice of denying overtime pay for hours that may be found to be suffered or permitted, a determination of what, if any, amounts may be due must be ascertained on an employee-by-employee basis. Such amounts may not, in my view, be imputed to employees the validity of whose claims has not yet been established.

The Union asks that I schedule additional hearing so that individual employee claims for excess work hours may be presented and adjudged. Without prejudice to the Union, I direct first that the parties, within thirty (30) days of the issuance of this Award, meet and earnestly attempt to ascertain what, if any, individual claims of Investigators, Mediators and Paralegal Specialists may qualify for suffered or permitted overtime pay, consistent with my findings herein, and attempt finally to dispose of such claims. I urge the parties to recognize that this method is likely to be no less accurate than the results obtained through further litigation, and is also likely to be more efficient. With the parties' consent, I shall retain jurisdiction for such time as may be reasonably necessary to resolve any issues arising from the settlement efforts I now direct.

With respect to any monies that may be deemed owing as a result of this accounting, I find that they are subject to an additional equal amount of liquidated damages, authorized under Section 216(b) of the FLSA. As noted by the Federal Labor Relations Authority in *National Treasury Employees Union and Federal Deposit Insurance Corporation*, 53 FLRA 1469 (1998), the standard for which an award of

liquidated damages is appropriate establishes a presumption in favor of such an award, and that it is for the Agency to rebut that presumption. The Portal-to-Portal Act, at 29 U.S.C. §260, provides that the Agency must, in such a case, demonstrate that its action was in good faith and that it had reasonable grounds for believing that its action did not violate the FLSA. Failure to carry that burden requires an award of liquidated damages.

This burden is recognized as substantial, and, as I apply it to the facts before me, I must conclude that the Agency has failed to satisfy it. These facts established that the Agency did not demonstrate that, once ascertaining what the FLSA required, it acted in accordance with it or had a reasonable basis for believing its acts complied with it. This is distinguished from the two cases cited by the Agency on the matter of liquidated damages. The first, *United States Department of Justice, Federal Bureau of Prisons, United States Penitentiary, Terre Haute, Indiana and American Federation of Government Employees, Local 720, Council of Prison Locals, Council 33*, 60 FLRA 298 (2004), had before it only the issue of willfulness, which, unlike liquidated damages, the arbitrator in that matter had failed to address. The second case, *U.S. Department of Commerce, National Oceanic and Atmospheric Administration, Office of Marine and Aviation Operations, Marine Operations Center, Norfolk, Virginia and International Brotherhood of Electrical Workers, Local 80*, 57 FLRA 559 (2001), affirmed an arbitrator's finding against liquidated damages on the basis of the agency's having sought specific advice from labor counsel concerning entitlement to standby pay. I find no similar basis in the case before me for concluding that the presumption in favor of liquidated damages was rebutted.

Thus, I find that liquidated damages are appropriate with respect to any monies deemed owing.

I now address the issue of whether the Agency's actions, for purposes of the extent of any possible remedy, were "willful" under the FLSA. Unlike the consideration of liquidated damages, the Union bears the initial burden of proof on the issue of whether a violation was "willful." In addition, the fact that the Agency was unable to overcome the presumption in favor of liquidated damages does not, by itself, establish that the violation was willful. I find below, however, that the Union has carried its burden to show a willful violation of the FLSA.

The Portal-to-Portal Act, at 29 U.S.C. §255(a), requires an action to be commenced within two years after the cause of action accrued, except in the case of a cause of action arising out of a "willful" violation, in which case it may be commenced within three years after the cause of action accrued.

5 CFR §551.104 deems a violation "willful" if "in circumstances where the agency knew that the conduct was prohibited by the Act or showed reckless disregard of the requirements of the Act. All of the facts and circumstances surrounding the violation are taken into account in determining whether a violation was willful."

5 CFR §551.104 further defines "reckless disregard of the requirements of the Act" to mean "failure to make adequate inquiry into whether conduct is in compliance with the Act."

The standard set forth by these definitions is referenced in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) and expressly endorsed in *Herman v. Palo Group Foster Home, Inc.*, 183 F.3d 468, 474 (6th Cir. 1999)("*Herman*"). One element of

"willfulness" is whether the Agency had actual notice of the requirements of the Act. That was so in this case, by reference to the explicit content and advice contained in Agency Headquarters Memoranda, as well as the direction given to employees in numerous of its offices that eliminated employees' opportunity to choose overtime pay for qualifying extra hours worked.

I acknowledge the Agency's citation to *Angelo v. United States*, 57 Fed. Cl. 100 (2003) ("*Angelo*"), in which willfulness was not found when an Immigration and Naturalization Service employee merely "negligently" failed to consider one criterion in an executive exemption determination. *Angelo* relied on *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), which required a finding that such an act was "deliberate" or "intentional" before a conclusion of "willfulness" could be reached.

The case before me, in my view, demonstrates action that went beyond mere negligence. It involved clear evidence of the Agency's actual knowledge of the requirements of the FLSA, a measure cited in *Herman*. In addition, it involved the Agency's failure to maintain adequate controls over potential overtime being worked, a standard referenced in a 2004 case involving these same parties, *United States Equal Employment Opportunity Commission, Baltimore Field Office, Baltimore, Maryland and American Federation of Government Employees, National Council of EEOC Locals No. 216*, 59 FLRA 688, 693 (2004). The Agency's failure to maintain such controls over its time records has been documented in detail herein.

Accordingly, for these reasons, I find that the three-year period under 29 U.S.C. §255(a) applies here on the basis of Agency actions I have found to be "willful."

On the Union's further request for attorney fees and costs, pursuant to Section 216(b) of the FLSA and 5 U.S.C. §5596, I defer a ruling until details concerning individual claims have been ascertained.

Steven M. Wolf, Esq.
Arbitrator

March 23, 2009