UNITED STATES OF AMERICA

BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY

CHICAGO REGION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3614, AFL-CIO Charging Party	CASE NO. WA-CA-04-0175

General Counsel's Response to Respondent's Motion for Summary Judgment and General Counsel's Cross-Motion for Summary Judgment

Pursuant to sections 2423.27, 2429.21 and 2429.22 of the Regulations, General Counsel responds to Respondent's Motion for Summary Judgment and submits the following Cross-Motion for Summary Judgment.

The issue is this case is whether the January 2004 telephone interviews conducted by Respondent's Attorney James Sober with bargaining unit employees Regina Davis and Edwina St. Rose in preparation for a January 21, 2004 arbitration hearing on a Union grievance were formal discussions within the meaning of section 7114(a)(2)(A) of the Statute.

Respondent admits that the telephone interviews were conducted without affording the Union the opportunity to be represented. The Respondent further admits the interviews involved a discussion between a bargaining unit employee and a representative of the Commission concerning a grievance. *See F.E. Warren Air Force Base, Cheyenne, Wyo.*, 52 FLRA 149, 155 (1996) (*F.E. Warren*). Thus, the sole remaining issue to be decided is whether the interviews were formal within the meaning of section 7114(a)(2)(A) of the Statute.

Concerning the issue of formality, it appears that this can be decided based on the submissions of the parties, thereby obviating the need for the July 22, 2004 hearing. Accordingly, the General Counsel submits the following Statement of Undisputed Facts and Argument.

Statement of Undisputed Facts

1. At all times material herein, Mr. Sober has been employed as a Senior Trial Attorney in the Commission's Office of Legal Counsel. (Complaint para. 7; Resp. Answer para. 7; Sober declaration para. 1).

2. On or about January 31, 2003, the Union filed a grievance under the parties' collective bargaining agreement on behalf of all bargaining unit employees in the Baltimore District Office including the Richmond and Norfolk Area Offices. (Resp. Motion for SJ, Statement of Facts, para. 1; and GC's Ex. 1-copy attached).

3. The grievance was not resolved and was scheduled to be arbitrated on January 21, 2004. (Resp. Statement of Facts, paras. 1 and 2; and GC's Ex. 2, 3, 4, 5 and 6-copies attached).

4. Mr. Sober was assigned to represent the Commission at the January 21 arbitration hearing. (Resp. Statement of Facts, para. 5; Sober declaration para. 2).

5. At all times material herein, Ms. Davis and Ms. St. Rose were bargaining unit employees employed at the Baltimore District Office. (Complaint para. 8; Answer para. 8).

6. At all times material herein, Ms. Davis and Ms. St. Rose were covered by the Union's grievance described in paragraphs 2 and 3 above. (Complaint paras. 3, 4 and 8; Answer paras. 3, 4 and 8; GC Ex 1).

7. On or about January 20, 2004, Mr. Sober telephoned Ms. Davis and conducted an interview of her in preparation for the January 21 arbitration hearing. (Complaint para. 9; Answer para. 9; Resp. Statement of Facts, para 6, 9, 10; Motion for SJ, Sober declaration paras. 3 and 7, GC Ex 7).

8. On or about January 20, 2004, Mr. Sober telephoned Ms. St. Rose and conducted an interview of her in preparation for the January 21 arbitration hearing. (Complaint paras. 14, 15; Answer paras. 14, 15; Resp Statement of Facts paras 6, 13, 14; Sober declaration paras. 3, 9 and 10, GC Ex 8).

9. The Respondent did not notify and afford the Union the opportunity to be represented at Mr. Sober's interviews of Ms. Davis and Ms. St. Rose. (Complaint paras. 12, 17; Answer paras. 12; 17; Sober Declaration para 16; Resp. Statement of Facts para. 19; GC Ex 9).

10. Mr. Sober conducted his interviews of Ms. Davis and Ms. St. Rose to gather facts regarding their knowledge as to the matters at issue in the January 21 arbitration hearing with an eye toward using them as management witnesses at the hearing. (Resp. Statement of Facts para. 16). In this regard, Mr. Sober was

finalizing a list of the Commission's potential witnesses for the January 21 arbitration hearing. (Sober declaration para. 11).

11. Mr. Sober began each of his interviews by identifying himself as the EEOC's Attorney and informing the employee what he wished to discuss with them. (Resp. Statement of Facts paras. 9, 10, 13, 14; Sober declaration paras. 7, 9). Mr. Sober's interviews followed a question and answer format. (Resp. Statement of Facts paras. 10, 14; Sober declaration paras. 7, 10). The subject matter of each interview was the knowledge the employee might have had regarding the matters at issue in the upcoming January 21 arbitration hearing. (Sober declaration paras. 7, 9, 10; GC Ex 7, 8).

12. Mr. Sober's interviews with Ms. Davis and Ms. St. Rose lasted approximately 5 to 10 minutes each. (Resp. Statement of Facts para 15; Sober declaration para 13; GC Ex 7, 8).

Argument

The interviews conducted by Respondent's Attorney Sober of bargaining unit employees Davis and St. Rose in preparation for the January 21 arbitration hearing were formal discussions within the meaning of section 7114(a)(2)(A) of the Statute.

For the Authority to conclude that a formal discussion occurred, the evidence must show that there was (1) a discussion, (2) that was "formal," (3) between one or more representatives of the agency and one or more unit employees or their representatives, (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *F.E. Warren*, 52 FLRA at 155. In making determinations under section 7114(a)(2)(A), the Authority is "guided by that section's intent and purpose--to provide the union with an opportunity to safeguard its interests and the interests of employees in the bargaining unit--viewed in the context of a union's full range of responsibilities under the Statute." *Id.* As indicated above the only issue in the subject case is whether Mr. Sober's interviews were "formal".

"Formality" under section 7114(a)(2)(A) of the Statute.

The adjective "formal" was placed in section 7114(a)(2)(A) to make it clear that the formal discussion right does not apply to highly personal, informal meetings such as a supervisor's counseling of an employee about performance. *F.E. Warren*, 52 FLRA at 156. In deciding whether a discussion is formal in nature, the Authority examines the purpose and nature of the discussion and considers the totality of circumstances presented. *Id.* The Authority has identified a number of factors that are indicative of formality: (1) the status of the individual who held the discussions; (2) whether any other management representatives attended; (3) the site of the

discussions; (4) how the meetings for the discussions were called; (5) how long the discussions lasted; (6) whether a formal agenda was established for the discussions; and (7) the manner in which the discussions were conducted. *U.S. Dep't of Energy, Rocky Flats Field Office, Golden, Colo.*, 57 FLRA 754, 755 (2002).

These factors are "merely illustrative" and other factors may be identified and applied as appropriate. *F.E. Warren*, 52 FLRA at 157. Indeed, in some cases, the Authority has found that the purpose of the discussion is sufficient in itself to establish formality citing its repeated holdings that interviews by agency representatives with bargaining unit employees in preparation for third-party proceedings, such as arbitration and MSPB hearings, are formal discussions. *Id.* at 156-157.

Attorney Sober's interviews of unit employees Davis and St. Rose in preparation for the January 21 arbitration hearing were formal in nature.

Consistent with well-settled Authority precedent, the purpose and nature of Attorney Sober's interviews is sufficient in itself to establish formality. Attorney Sober interviewed the employees to ascertain what they knew about the grievance issues and whether he should use them as management witnesses at the arbitration hearing. In addition, several other illustrative factors of formality are present. The interviews were planned, structured question and answer sessions with a set agenda. An interview of a potential witness by an attorney preparing for litigation is not an activity that could be characterized as offhand, impromptu or informal. Mr. Sober began each interview by identifying himself and advising the employees what he wanted to discuss with them. Finally, the interviews, lasting from 5 to 10 minutes, elicited information that allowed Mr. Sober to assess whether the employee could assist the Agency in defeating the Union's claim at arbitration.

Respondent's assertion that the interviews were unplanned and lacked an agenda (Resp. Motion for SJ, p. 2, para. 7) is wholly fanciful. Certainly, Attorney Sober did not pick these witnesses at random or by flipping through the EEOC phone directory. He selected these individuals and sought them out with the avowed purpose of preparing management's defense for the arbitration hearing. After interviewing both employees, Attorney Sober added them to his witness list. To claim that Attorney Sober was acting without any plan, agenda, schedule or strategy is preposterous.[1]

Accordingly, based on the totality of circumstances presented herein and noting the purpose and nature of Mr. Sober's interviews was to discover if the unit employees

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1 Respondent's claim that the interviews were non-coercive is misplaced. The issue here is whether the interviews were formal discussions not whether Attorney Sober conducted a coercive interrogation in violation of section 7116(a)(1) of the Statute. *Department of the Air Force, F.E. Warren Air Force Base*, 31 FLRA 541,545-546 (1988).

would be helpful witnesses for management at the upcoming arbitration hearing, the interviews of unit employees Davis and St. Rose were formal discussions within the meaning of section 7114(a)(2)(A) of the Statute. *F.E. Warren,* 52 FLRA 156-157; *Dep't of Veterans Affairs, Med. Ctr., Denver, Colo.*, 44 FLRA 768 (1992) (attorney conducted 15 minute interviews of unit employees to determine if employees had relevant testimony to support management's position at an upcoming arbitration hearing); *Veterans Admin. Med. Ctr., Long Beach, Cal.*, 41 FLRA 1370 (1991) (*VA Long Beach*) (attorney conducted telephone interviews with unit employees in preparation for an upcoming MSPB hearing, interviews last between 5 minutes and one hour), *enforced,* 16 F. 3d 1526, 1532 (9th Cir.1994) (attorney preparation for an MSPB hearing is not an informal goal, and assessing the testimony of potentially adverse witnesses is not an informal undertaking); *Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan Air Base, Cal.,* 38 FLRA 732 (1990) (attorney interview of unit employee in preparation for an arbitration hearing) *Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan Air Base, Cal.*, 35 FLRA 594 (1990) (attorney conducted telephone interview with a unit employee in preparation for an arbitration hearing).[2]

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2 In *Social Security Admin., Office of Hearing and Appeals, Boston Regional Office, Boston, Mass.*, 59 FLRA 875 (2004) (*SSA OHA Boston*), the Authority determined, *inter alia*, that a brief, unscheduled telephone interview of an unit employee by an agency investigator concerning a formal EEO complaint that had been filed under the EEO process was not formal in nature. (the Rosanne Moore meeting). While at first glance *SSA Boston OHA* appears somewhat similar to the situation presented herein, the two cases are materially different and readily distinguishable. The *SSA OHA Boston* case involved the investigation of a complaint filed under the statutory EEO appeals process, a forum where the exclusive representative has a limited role. *See U.S. Government Printing Office*, 23 FLRA 35 (1986). Here, the interviews concerned the arbitration of a Union grievance under the parties' section 7121 negotiated grievance-arbitration procedures, an arena where the exclusive representative wields exclusive power. Considering that the intent and purpose of the formal discussion right is to provide the Union with an opportunity to safeguard its interests and the interests of employees in the bargaining unit, it is readily apparent that the Union has a compelling and significant interest in being present when management conducts discussions with unit employees about a grievance-arbitration matter. Indeed, the Statute recognizes the heightened interest that the exclusive representative has concerning grievances pursued under the negotiated procedure by mandating union presence at grievance proceedings even when the grievant is pursuing the grievance on his or her own behalf. *See Social Security Admin., OHA*, 25 FLRA 571 (1987). This is why the Authority has repeatedly held that interviews of unit employees by management representatives in preparation for arbitration proceedings trigger the exclusive representative's formal discussion right under the Statute.

As Respondent concedes that all the other elements have been met, General Counsel submits that Respondent violated section 7114(a)(2)(A) of the Statute by not affording the Union the opportunity to be represented at Attorney Sober's interviews and that by such conduct violated section 7116(a)(1) and (8) of the Statute. To remedy these unfair labor practices, it is respectfully requested the Chief Administrative Law Judge adopt the proposed remedial order attached hereto. The proposed remedial order is appropriate for the violation herein and is consistent with the relief ordered by the Authority in a formal discussion case. *See U.S. Dep't of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Del.*, 57 FLRA 304, 310-311 (2001), *enforced*, 316 F.3d 280 (D.C. Cir. 2003); *VA Long Beach*, 41 FLRA 1385-1387.

Respectfully submitted,

Sandra LeBold

Sandra LeBold
Counsel for the General Counsel
Federal Labor Relations Authority
Chicago Region
55 W. Monroe, Suite 1150
Chicago, Illinois 60603-9729

Dated: July 16, 2004

GENERAL COUNSEL'S PROPOSED ORDER

Pursuant to section 2423.41 of the Authority's Rules and Regulations and section 7118 of the Statute, the Equal Employment Opportunity Commission shall:

1. Cease and desist from:

(a) Failing or refusing to provide the National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO, Local 3614 (the Union), advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning grievances or any personnel policies or practices or other general conditions of employment, including interviews in preparation for arbitration hearings.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Provide the Union advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning interviews in preparation for arbitration hearings.

(b) Post at its facilities where bargaining unit employees represented by the National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO, Local 3614 are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Chair of the EEOC and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply.

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Equal Employment Opportunity Commission violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide the employees' exclusive representative, the National Council of EEOC Locals, No. 216, American Federation of Government Employees, AFL-CIO, Local 3614 (the Union), advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning grievances or any personnel policies or practices or other general conditions of employment, including interviews in preparation for arbitration hearings.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL provide the Union advance notice and the opportunity to be represented at formal discussions with bargaining unit employees concerning interviews in preparation for arbitration hearings.

(Agency)

DATED: _____ By:
Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, of the Federal Labor Relations Authority, Chicago Regional Office, whose address is: 55 West Monroe, Suite 1150, Chicago, IL 60603-9729, and whose telephone number is: (312) 353-6306.

Received by Glace on 1-31-03 at 4:38pm

LOCAL 3614

National Council of EEOC Locals No. 216, AFGE, AFL-CIO
C/O EEOC Baltimore District Office, 10 S. Howard Street, 3rd Floor, Baltimore, MD 21201

January ~~13~~ 31, 2003 (R)

BY HAND DELIVERY

Mr. Gerald S. Kiel, Esquire
District Director (Acting)
Baltimore District Office
10 S. Howard Street, Suite 3000
Baltimore, MD 21201

Re: Step 1 Grievance – FLSA and Comp Time Violations

Dear Mr. Kiel,

This Step 1 Grievance is filed by the Union on behalf of all bargaining unit employees in the Baltimore District Office, including the Richmond and Norfolk Area Offices.

The Union alleges that the Agency violated the Fair Labor Standards Act, the Back Pay Act, the Collective Bargaining Agreement, and all other relevant and applicable law, rule, and regulation when it:

1. Failed to properly classify bargaining unit employees as FLSA non-exempt;
2. Failed to pay proper compensation for overtime worked to bargaining unit employees;
3. Improperly offered bargaining unit employees compensatory time in lieu of overtime;
4. Failed to pay suffered and permitted overtime to employees

GC Ex 1

The facts supporting this Step 1 Grievance are extremely detailed and will be presented at the Article 41, Section 41.07 oral presentation hereby requested.

As relief, the Union requests the following:

A. Reclassify all improperly classified bargaining unit employees, retirees, and past employees as FLSA non-exempt, retroactive three (3) years from the date of the filing of this Step 1 Grievance, or three (3) years prior to the date when the Agency knew or should have known that these employees were improperly classified;

B. Backpay under the Collective Bargaining Agreement, Back Pay Act, and FLSA for the difference in pay for any overtime paid for overtime worked by wrongfully classified bargaining unit employees under Title 5 or other pay schedule, and the true time and one-half to which the employee(s) were entitled;

C. Pay for suffered and permitted overtime retroactive at least three (3) years;

D. Liquidated damages or interest, whichever is greater;

E. Payment for overtime (minus the employee-s hourly rate of pay) for any compensatory time worked since six (6) years prior to the filing of this Step 1 Grievance and the employee's overtime rate of pay, for comp time wrongfully given in lieu of overtime;

F. Reasonable attorney fees, costs, and expenses.

The Union request to meet at a mutually convenient time to present this matter orally in order that you have an opportunity to give full consideration to all available facts and issues before a written decision is rendered. However, should you decline to meet, in accordance with the CBA, the Union requests that you give full consideration to the facts contained herein and notify the Union in writing of the disposition of this grievance within thirty (30) calendar days of the filing of this grievance.

Sincerely,

Regina Andrew

Regina Andrew, L3614 President

cc: Mr. Michael Snider, Counsel, Local 3614 AFGE

LOCAL 3614

NATIONAL COUNCIL OF EEOC LOCALS NO. 216

AFGE, AFL-CIO

c/o Baltimore District Office, EEOC, 10 Howard Street, Suite 3000, Baltimore, MD 21201, (410) 962-4220

July 19, 2003

BY CERTIFIED MAIL No. 7003 0500 0004 1559 0036
RETURN RECEIPT REQUESTED

Ms. Joann Riggs, Assistant Director
Labor-Management Relations Division
Equal Employment Opportunity Commission
1801 L Street, N.W.
Washington, D.C. 20507

Re: Washington Field Office Overtime Grievance
Baltimore District Office Overtime Grievance

Dear Ms. Riggs,

This serves as the Union's written request to arbitrate the above-referenced overtime grievances.

The issue is whether the Agency violated the Fair Labor Standards Act, the Back Pay Act, the Collective Bargaining Agreement, and all other relevant and applicable law, rule, and regulation when it: (1) failed to properly classify bargaining unit employees as FLSA non-exempt; (2) failed to pay proper compensation for overtime worked to bargaining unit employees; (3) improperly offered bargaining unit employees compensatory time in lieu of overtime; and (4) failed to pay suffered and permitted overtime to employees.

The Union Attorney in this case is Michael J. Snider. Please direct all communications to him at Snider & Fischer, LLC,104 Church Lane, Suite 201 in Baltimore, Maryland 21208. Mr. Snider's office number is 410-653-9060.

On Behalf of Local 3614,

Regina M. Andrew

Regina M. Andrew, President

cc: Michael J. Snider, Esq

GC Ex 2

In the Matter of the Arbitration Between

AFGE LOCAL 3614, Union, v. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Agency.	FMCS CASE NO. 02-12164 FLSA Overtime/Comp Time Title V Overtime/Comp Time FEPA Overtime/Comp Time

UNION'S ARTICLE 42 §42.04(c) SUBMISSION

A. Union's Statement of Facts

On June 6, 1995, AFGE Council 216 and the Equal Employment Opportunity Commission ("EEOC" or "Agency") entered into a Settlement Agreement regarding a Fair Labor Standards Act (FLSA) Grievance. Subsequent to this Agreement (in the late 1990's to present), the Agency has downsized through attrition and other methods, while maintaining an increasing workload. The net result of these two factors is that bargaining unit employees have been expected, allowed, induced and/or encouraged to work in excess of forty (40) hours per workweek and/or in excess of eight (8) hours per workday without compensation.

There are two groups of employees encompassed by the instant Grievance. The first group includes those employees at the Agency's Baltimore District Office ("BDO")(which includes those at its Richmond, VA and Norfolk, VA offices) who are "non-exempt" from the FLSA. This group includes Equal Employment Specialists, Paralegal Specialists, Investigators, Computer Specialists, etc. These employees are entitled to payment for any work in excess of forty (40) hours per workweek and/or in excess of eight (8) hours per workday that is "suffered and permitted" by the Agency. This term (and the legal test) will be addressed herein.

GC Ex 3

The second group includes those employees at the Agency's Baltimore District Office ("BDO")(which includes those at its Richmond, VA and Norfolk, VA offices) who are "exempt" from the FLSA. This group includes Attorneys and Administrative Judges. These employees are entitled to payment under the FEPA and Title V for any work in excess of forty (40) hours per workweek and/or in excess of eight (8) hours per workday that is "ordered and approved" by the Agency. This term (and the legal test) will be addressed herein.

The Union filed a Grievance alleging that certain Investigators in the BDO worked "suffered and permitted" overtime, by performing Agency work before the start of their workday, during lunch, after the workday ended, by taking work home on weekday evenings, and by performing Agency work over the weekends and on holidays. The Union prevailed in the Grievance, and request that this Arbitrator take judicial notice of the Arbitration Decision and Award.

In this Grievance, the Union claims that 1) FLSA "non-exempt" employees performed "suffered and permitted" overtime, without proper compensation; 2) FLSA "exempt" employees performed constructively "ordered and approved" overtime without compensation; 3) the Agency did not make a good faith effort to comply with the FLSA; 4) the Agency's violations of the FLSA were "willful;" and 5) the Agency's violations of Title V and the FEPA were an unwarranted or unjustified personnel action that resulted in the loss of pay or differentials to the employees.

In support of its claim that the Agency's actions were willful, the Union will introduce evidence that employees were told by the Agency that they were to sign in and out at the times prescribed by their tour of duty, regardless of the actual time that they arrived and/or

left. Further, the "exempt" employees performed their overtime work with the knowledge and expectation, encouragement, inducement or approval of supervisory officials.

B. Legal and Factual Arguments, Applicable Contractual Provisions and Requested Remedy

The Union herein incorporates by reference all **Grievances** filed herein. We note that the Agency has failed to produce the information requested in the Grievance, and **ask for an ORDER** from the Arbitrator directing the Agency to produce the requested information forthwith.

Furthermore, the Agency Representative in this case has professed his (and his office's) intention to violate clear and unambiguous FLRA precedent prohibiting direct contact with Grievants (and this Attorney's clients), by interviewing said employees, and by interviewing said employees without prior notice to the Union and an opportunity to be present. The Union **requests a PROTECTIVE ORDER** from this Arbitrator directing the Agency to **not** contact any of its bargaining unit witnesses.

Suffered and Permitted Overtime

A principle difference between FLSA overtime as compared to Title 5 overtime is that under the FLSA an Agency must pay for all Agency work that it either ordered or that it "suffered or permitted" employees to work. Thus, if employees come into the office early, work late, work weekends, or work through lunch, the Agency is obligated to pay for this time, providing all of the worktime adds up to more than 40 hours in a week or over 8 hours in a workday. Advance authorization to work overtime is not required. The only requirement is that the Agency had knowledge that the overtime was being worked and that the work is being done for the benefit of the Agency.

1. WHAT IS "WORK", DEFINITION OF "EMPLOY"

To "employ" means to suffer or permit to work. 29 U.S.C. §203(g). Work may be suffered or permitted even if it is not requested in advance. 29 C.F.R. §785.11. Work may be suffered or permitted even if it is performed away from the employer's premises, even at home. 29 C.F.R. §785.12."Work" for purposes of the FLSA is physical or mental exertion, whether burdensome or not, controlled or required by the employer, is necessarily and primarily for the benefit of the employer, and is an integral and indispensable part of the job. Holzapfel v. Town of Newburgh, NY, 145 F.3d 516 (2nd Cir. 1998); Anderson v., Pilgrim's Pride Corp., 147 F.Supp.2d 556 (E.D. TX 2001). The employee has the initial burden of showing that he/she performed work for which the employee was improperly compensated for by the employer.

2. NEED FOR EMPLOYER KNOWLEDGE OF WORK

In order to show that they were suffered or permitted to work, employees must show that the defendant had either **actual or constructive knowledge** of the overtime work. Reich v. Stewart, 121 F.3d 400 (8th Cir. 1997); Pforr v. Food Lion, Inc., 851 F.2d 106 (4th Cir. 1988). An employer who knows or **should have known** through the exercise of reasonable diligence that an employee is working overtime must comply with the FLSA requirements. See, Holzapfel v. Town of Newburgh, NY, 145 F.3d 516 (2nd Cir. 1998); Forrester v. Roth's I.G.A. Foodliner, Inc., 646 F.2d 413 (9th Cir. 1981); Brennan v. General Motors Acceptance Corp., 482 F.2d 825 (5th Cir. 1973) (constructive knowledge found due to knowledge and acts of employees' immediate supervisors). Constructive knowledge may also be established through proof of a pattern or practice of overtime work. Pforr, 851 F.2d at 109. An employer who is armed with the knowledge that an employee is or was working overtime cannot stand idly by and allow the employee to perform overtime work without proper compensation, even if the employee does not make a claim for overtime.

Jerzak v. City of South Bend, 996 F.Supp. 840 (ND IN 1998). FLSA overtime may not be denied solely on the grounds that the employee could have completed his or her tasks during scheduled hours thereby avoiding the need for overtime altogether. Holzapfel v. Town of Newburgh, NY, 145 F.3d 516 (2nd Cir. 1998).

3. NON-DEFENSE OF "NO OVERTIME WORK" DIRECTIVES

An employer cannot take shelter in an "instruction to employees" not to work more than forty hours per week knowing the employee actually works more. Reich v. Stewart, 121 F.3d 400 (8th Cir. 1997); Wirtz v. Bledsoe, 365 F.3d 277 (10th Cir. 1966). Even where an employer has not specifically ordered an employee to work, an employee must be compensated for time spend working on the employer's behalf if the employer accepts the benefits of such work and does not act to stop performance of the work it does not want performed, regardless of whether the employee demands overtime compensation. Mumbower v. Callicott, 526 F.2d 1183 (8th Cir. 1975). An employer must pay for work suffered or permitted notwithstanding an agreement to obtain authorization to work beyond a specified work period. Burry v. National Trailer Convoy, Inc., 338 F.2d 422 (6th Cir. 1964); Majchrzak v. Chrysler Credit Corp., 537 F.Supp. 33 (E.D. Mich. 1981). The mere promulgation of a policy or instructions not to work overtime, standing alone, does not establish that the employer did not suffer or permit the work where the nature of the work required overtime or the employer pressured the employees to work overtime. Reich v. Dept of Conservation & Nat. Resources, 28 F.3d 1076 (11th Cir. 1994); Lindow v. United States, 738 F.2d 1057 (9th Cir. 1984). In a "duty free lunch".scenario the issue is whether employees are required to "work" during their "free" lunch period. This is a question of fact revolving around the duties the employees are required to perform. See, 29 C.F.R. §785.19; Reich v. Southern New England Telecommunications Corp., 121 F.3d 58 (2nd Cir. 1997).

Under 29 C.F.R. §785.13 there is an **affirmative duty of the management** to exercise its control and see that the work is not performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

Liquidated Damages - Doubling the Overtime Award

29 U.S.C. §216 provides:

> (b) Any employer who violates the provisions of section 206 or section 207 of this title [hours of work over 40 per week] 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 an additional equal amount as liquidated damages. *(Emphasis added.)*

The trier of fact (such as an arbitrator) must award liquidated damages unless the Agency meets its substantial burden of proof to avoid liquidated damages. See, Reich v. Southern New England Telecommunications Corp., 121 F.3d 58 (2nd Cir. 1997); See also, Jarrett v. ERC Properties, Inc., 211 F.3d 1078 (8th Cir. 2000).

Thus, the trier of fact's decision whether to award liquidated damages does not become discretionary until the employer carries its burden of proving good faith. In other words, liquidated damages are mandatory absent a showing of good faith. Greene v. Safeway Stores, 210 F.3d 1237 (10th Cir. 2000); Nero v Industrial Molding Corp., 167 F.3d 921 (5th Cir. 1999); Bernard v. IBI Inc. of Nebraska, 154 F.3d 259 (5th Cir. 1998); EEOC v. First Citizens Bank of Billings, 758 F.2d 397, 403 (9th Cir.), cert. denied, 474 U.S. 907, 106 S.Ct. 228, 88 L.Ed.2d 228 (1985).

Before a trier of fact may exercise its discretion to award less than the full amount of

liquidated damages, it must explicitly find that the employer acted in good faith. Williams v. Tri-County Growers, Inc., 747 F.2d 121, 129 (3rd Cir. 1984); Joiner v. City of Macon, 814 F.2d 1537, 1539 (11th Cir. 1987); see also, L-246 Utility Workers v. Southern Cal. Edison Co., 83 F.3d 292 (9th Cir. 1996). The employer bears the burden of showing good faith and there is strong presumption in doubling the award. Herman v. RSR Sec. Services Ltd., 172 F.3d 132 (2nd Cir. 1999); Shea v. Galaxie Lumber & Construction Co. Ltd, 152 F.3d 729 (7th Cir. 1998); Herman v. Hector I. Nieves Transp. Inc., 91 F.Supp.3d 435 (D. Puerto Rico 2000)

The liquidated damages provision of 29 U.S.C. §216(b) was specifically applied to federal employees in 29 U.S.C. §204(f):

> Notwithstanding any other provision of this chapter [the FLSA], or any other law, the Civil Service Commission [now Office of Personnel Management] is authorized to administer the provisions of this chapter with respect to any individual employed by the United States .... Nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation and liquidated damages under section 216(b) of this Act." (Emphasis added.)

Liquidated damages are not meant to be punitive; rather, they are compensatory in nature to provide adequate recompense to employees whose proper wages were illegally withheld.

Under the [FLSA] Act, liquidated damages are compensatory, not punitive in nature. Herman v. RSR Sec. Services Ltd., 172 F.3d 132 (2nd Cir. 1999). Congress provided for liquidated damages to compensate employees for losses they might suffer by reason of not receiving their lawful wage at the time it was due. Reich v. Southern New England Telecommunications Corp., 121 F.3d 58 (2nd Cir. 1997); Marshall v. Brunner, 668 F.2d 748, 753 (3rd Cir. 1982); Martin v. Cooper Electric Supply Co., 940 F.2d 893, 907 (3rd Cir. 1991). See also, L-246 Utility Workers v. Southern Cal. Edison Co., supra; Cox v.

Brookshire Grocery Co., 919 F.2d 354, 357 (5th Cir. 1990); Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094 (11th Cir. 1987); The FLRA has confirmed that arbitrators have the authority to award liquidated damages against the federal government in FLSA situations. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, 49 FLRA No. 40, 49 FLRA 483, 489-90 (March 10, 1994), citing, U.S. Department of the Treasury, Internal Revenue Service, Washington, D.C. and National Treasury Employees Union, 46 FLRA No. 97, 46 FLRA 1063, 1073 (1992) (finding a waiver of sovereign immunity under the Back Pay Act (5 U.S.C. §5596)).

Under 29 U.S.C. §260, an Agency may be relieved from payment of liquidated damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation" of the FLSA.[1] However, an award of liquidated damages is discretionary **even where** the employer shows that he acted in good faith. Heidtman v. County of El Paso, 171 F.3d 1038 (5th Cir. 1999); McClanahan v. Mathews, 440 F.2d 320 (6th Cir. 1971); Herman v. Hector I. Nieves Transp. Inc., 91 F.Supp.3d 435 (D. Puerto Rico 2000).

Ordered and Approved Overtime

The FLSA "exempt" Grievants in this case, including Attorneys and Administrative Judges, despite not being eligible for FLSA "suffered and permitted" overtime, are eligible for overtime compensation under the Federal Employees Pay Act ("FEPA"). 5 U.S.C. §§5541-5550a.

[1] §260 is no defense to the Agency's obligation to pay wrongfully withheld FLSA overtime. It is a defense solely to the liquidated damages portion of the recovery.

Under FEPA, overtime compensation must be paid for all hours of work in excess of 8 per day or 40 per week that have been "officially ordered or approved." 5 U.S.C. § 5542. The Agency is likely to base its defense on this language, arguing that in most circumstances overtime must be expressly ordered or approved by a supervisor to be compensable. The Courts, however, have long held that overtime is "ordered or approved" within the meaning of the statute as long as it is performed with the knowledge and expectation, encouragement, inducement or approval of supervisory officials. Hannon v. United States, 29 Fed. Cl. 142, 149 (1993) ("Overtime work performed with the knowledge and inducement of supervisory personnel is deemed to be officially ordered or approved."); DeCosta v. United States, 22 Cl. Ct. 165, 176 (1990) (same); Anderson v. United States, 201 Ct. Cl. 660, 682 (1973) (supervisor knew and "tacitly approved" of overtime); Byrnes v. United States, 163 Ct. Cl. 167, 174 (1963) (overtime was worked with "full knowledge, encouragement and inducement" of officials). To hold otherwise would render the statute a nullity. As several courts have held, "[t]he law will treat as issued those orders that ought to have been issued." Manning v. United States, 10 Cl. Ct. 651, 661 (1986); Bennett v. United States, 4 Cl. Ct. 330, 337 (1984); Fox v. United States, 416 F. Supp. 593, 596-97 (E.D.Va. 1976).

C. Prospective Witnesses

Attached are a list of all prospective witnesses, who work in the EEOC-Baltimore District Office, at 10 S. Howard Street, S 3000, Baltimore, MD 21201 and/or in the Richmond/Norfolk sub-offices.

Regina Andrew, Union President and Grievant (attorney)
(410) 962-4220
will testify about ordered and approved overtime, history of the Grievance, suffered and permitted overtime, performance quotas, reductions in staff, etc.

Attorneys and Administrative Judges
will testify about ordered and approved overtime, performance quotas, reductions in staff, etc.

Investigators and other "Non-exempt" Staff
will testify about suffered and permitted overtime, performance quotas, reductions in staff,

etc.

D. Exhibit List (documents to be provided)

Grievance and Response(s), Invocation

Decision and Award by Arbitrator in prior FLSA case between AFGE 3614 and EEOC

Emails and other documents supporting Union's claim to suffered and permitted / ordered and approved overtime

Time Records and sign in/out sheets for April 2000 - present

Record of Time of Arrival and Departure From City Crescent Building

Reservation of Rights

The Union reserves the right, in accordance with the past practice between the parties and in the interest of justice, to add to, subtract from and otherwise modify its factual and/or legal arguments, the witness list and Exhibit list.

Respectfully submitted,

Michael J. Snider, Esq.
Attorney for Union

AFGE Local 3614
104 Church Lane, Suite 201
Baltimore, Maryland 21208
Tel.: (410) 812-6399

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2003, the Union's Article 42, §42.04(c) Submission was sent to:

James Sober, Esquire
EEOC – OLC
1801 L Street, N.W.
Washington, D.C. 20507

Arbitrator Lucretia Tanner
14300 Baden Westwood Road
Brandywine, MD 20613

Michael J. Snider

Pertinent portion of the email from Michael Snider to James Sober
Date: January 1, 2004
Subject: Re: EEOC FLSA Arbitration

"Regarding narrowing down our witness list, please note we will likely call the following witnesses, although we
Reserve the right to expand, narrow or modify this list. We are also directing you to NOT contact ANY bargaining
Unit employee (current or retired or transferred), as they are all clients of mine and the attorney-client privilege
Has attached, in addition to the current FLRA law.

I. Regina Andrew. AFGE President. EEO Trial Attorney, Baltimore
II. Bernadette Harding, Legal Technician, Baltimore
III. Regina McPhie, Investigator (IRS?), Richmond
IV. Wanda Cathcart, Investigator (Ret.), Richmond
V. David Norkin, Administrative Judge, Baltimore
VI. Eula Kelly, Mediator (ret. 6-27-03), GS-13, Richmond
VII. Nicole Chandler, Assistant Investigator, Baltimore
VIII. Gary Gilbert, Former Chief Administrative Judge, Baltimore
IX. Nancy Bosque, Investigator, Baltimore
X. Marietta Blueford, Mediator, GS-13, Richmond
XI. Victor Lawrence, Attorney, Baltimore
XII. Cecile Quinlan, Attorney, Baltimore
XIII. Charles Shubow, Administrative Judge, Baltimore
XIV. Tammy Lawrence, Investigator (Ret?), Baltimore"

GC Ex 4

From: "Michael Snider" <sniderlaw@hotmail.com>
To: "'JAMES SOBER'" <James.Sober@EEOC.GOV>
Date: 1/18/04 5:14:40 PM
Subject: Amended Witness List

Mr. Sober:

Here is the Union's second Amended witness list.
Please make sure that present EEO employees are present at 9:30 a.m. on Wednesday.

I. Regina Andrew. AFGE President. EEO Trial Attorney, Baltimore 9:30 a.m.
II. Bernadette Harding, Legal Technician, Baltimore 10:30 a.m.
III. Regina McPhie, Investigator (IRS?), Richmond 10:00 a.m.
IV. Wanda Cathcart, Investigator (Ret.), Richmond (tel?) 11:00 a.m.
V. David Norkin, Administrative Judge, Baltimore 1 p.m.
VI. Nicole Chandler, Assistant Investigator, Baltimore 12:30 p.m.
VII. Gary Gilbert, Former Chief Administrative Judge, Baltimore (tel) ~2:00 p.m.
VIII. Nancy Bosque, Investigator, Baltimore 1:30 p.m.
IX. Pam Pisik, Former investigator, Norfolk (tel) 2:45 p.m.
Stacey Caldwell, Attorney, Richmond 11:30 a.m.

We are assuming lunch is from 12 to 12:30 and will try to stick to this schedule.
Without extensive cross-examination, our witnesses should be about ½ hour each.

Mike Snider

CC: "'REGINA ANDREW'" <REGINA.ANDREW@EEOC.GOV>, "'Regina Andrew'" <randrew@comcast.net>

GC Ex 5