

Joyce M. Klein
Arbitrator & Mediator

September 13, 2006

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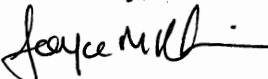
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Re: U.S. EEOC
and
AFGE, Local 3614
FMCS Case No. 03-52267A
(Overtime, Suffered and Permitted – Non-Exempt)

Gentlemen:

Enclosed please find an original and one copy of the arbitration award in the above case. I have also enclosed the invoice, and with Ms. Holt-Norwood's copy, I have enclosed copies of the relevant purchase orders.

Sincerely,


Joyce M. Klein

JMK/glb

Enclosures

- c. Diane Holt-Norwood
Contracting Officer's Technical Representative

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FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of Arbitration Between:

**AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3614**

“Union”

-and-

**U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION**

“Employer”

FMCS Case No. 03-52267A
(WFO Overtime-Non-Exempt)

OPINION AND AWARD

**Before
Arbitrator Joyce M. Klein**

Appearances:

For the Union:

Michael Snider, Esq.
Jason I. Weisbrot, Esq.
Snider & Associates, LLC

For the Agency:

James M. Sober, Esq.
U.S. Equal Employment Opportunity Commission

The AFGE, Local 3614 [the “Union”] filed a grievance against the U.S. Equal Employment Opportunity Commission [the “Agency” or “EEOC”] claiming that the Agency violated the collective bargaining agreement [the “Agreement”]

when it suffered and permitted overtime performed by non-exempt employees in its Washington Field Office ["WFO"]¹. The Agency denied the grievance in its entirety and the dispute remained unresolved. The Union submitted the dispute to arbitration pursuant to the terms of the parties' Agreement and the rules of the Federal Mediation and Conciliation Service. I was appointed to serve as Arbitrator.

I conducted hearings on November 14, 15 and 16, 2005, January 23 and 24, and March 15, 2006 in Washington, D.C. At the hearings, the parties argued orally, examined witnesses and introduced voluminous documentary evidence into the record. Testimony was received on behalf of the Union from Regina Andrew, Trial Attorney, Baltimore District Office and President of the Union, Jacques Anderson, former Mediator and ADR Supervisor, WFO, Debra Mills, ADR Program Assistant, WFO, JoAnn Holmes-Frazier, Investigator, WFO, Zafor Ullah, former Spanish-Speaking Investigator, WFO, and Theresa Kerns, former Investigator, WFO, and presently EEO Specialist, Housing and Urban Development. Testimony was received on behalf of the Agency from Dana Hutter, Director, WFO, Janet Stump, Acting Enforcement Supervisor, WFO, Selvy Leon, Investigator, Tampa Field Office, Silvio Fernandez, Policy Operations Analyst in the EEOC Office of Field Programs, Hyacinth Clarke, Investigator, WFO, Elisa Cogswell, Investigator, WFO, Tram Ngo, Acting Charge Intake Unit Supervisor, WFO, Michael Edmondson, Chief of the Desktop Support Branch and the Supervisory Information Technology Specialist, John Woods, ADR Supervisor, and Maria Salacuses, Senior Trial Attorney, Boston Area office. Post-hearing briefs were received on June 28, 2006 and reply briefs were received on July 7, 2006. Additional correspondence was received on July 10, 2006 and the record was closed on that date.

ISSUE

At the hearing, the parties agreed to frame the issue in dispute as follows:

Whether the Grievants performed suffered and permitted overtime work since January of 2000? If so, what is the appropriate remedy? (1T. 7-8).

I note that the parties disagree as to whether the end of the period in which any remedy may be due is the commencement of the hearing as argued by the Agency or the issuance of this Award as argued by the Union, and those arguments are addressed herein.

¹ The Union initially sought to include the exempt employees, but withdrew that claim during the course of the hearing. (6T. 5). References to the hearing transcripts are cited as "1T" for the November, 2005 hearing; "2T" for the November 15, 2005 hearing; "3T" for the November 16, 2005 hearing; "4T" for the January 23, 2006 hearing; "5T" for the January 24, 2006 hearing; and "6T" for the March 2, 2006 hearing. Joint exhibits are referred to as "J. Ex.". Union exhibits are referred to as "U. Ex." and Agency exhibits are referred to as "A. Ex.".

RELEVANT CONTRACT PROVISIONS

ARTICLE 30.00 HOURS OF WORK

Section 30.01 The administrative work week is a period of seven (7) calendar days within which the basic work week is included. The basic work week shall normally consist of five (5) work days, Monday through Friday.

Section 30.02 Employees shall be entitled to all holidays prescribed by current or future law, in addition to any special holidays designated by the President of the United States.

Section 30.03 The EMPLOYER will maintain a Flexible Work Schedule and Compressed Work Schedule Program for employees.

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 time.

(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 work 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 30.05

(a) One (1) Flexible Work Schedule and two (2) Compressed Work Schedule Programs shall be adopted by each Headquarters Office and District/Field Office Director in consultation with the Local Union. An Office Head of a facility with less than 20 employees must adopt one (1) of the listed Flexible Work Schedule Programs, and may adopt a Compressed Work Schedule Program if consistent with the mission of the Employer. The Flexible and Compressed Work Schedule Programs shall be available in accordance with the Local Agreement, to all employees performing at the "proficient" level or better.

(b) If a Headquarters Office or District/Field Office Director determines that an additional Flexible Work Schedule and a Compressed Work Schedule Program, as described in Section 30.04, are feasible and desirable, such Program(s) may be established and will be subject to Local negotiations.

Section 30.06 Under the Flexible Work Schedule and Compressed Work Schedule Programs, the flexible time band will be negotiated at the Office level, provided that no band shall obligate the Agency to pay a night differential.

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.

Section 30.08 Local negotiations shall address core time, flexible time bands, slide and glide provisions (i.e., grace period for arrivals and departures), off days, time and attendance accounting procedures and guidelines for resolving conflicts between coverage of the Employer's operations and an employee's requested tour of duty.

Section 30.09

- (a) Employees who chose not to participate in the Flexible Work Schedule or Compressed Work Schedule Programs shall work the basic work week, five (5) days a week, according to the official duty hours of their respective offices.
- (b) All employees shall be given the opportunity to select a Flexible Work Schedule or Compressed Work Schedule on a quarterly basis unless otherwise agreed.

Section 30.10

- (a) The Employer may exclude or terminate a Flexible Work Schedule or Compressed Work Schedule Program at any facility, or portion thereof, in accordance with 5 U.S.C. § 6122 (b), where the program causes a reduction in productivity, a diminished level of service furnished to the public or component of the Employer or an increase in the cost of the Employer's operations, other than those incidental to the start-up of the program. The Employer will bear the start-up costs of the Program.
- (b) Specific employees may be excluded from the Flexible Work Schedule and/or Compressed Work Schedule Program(s) on the basis of documented attendance and/or misconduct problems related to time and attendance or poor performance or changing workload requirements where continued inclusion will have an adverse effect on the program or workload.

Article 31.00 Overtime

Section 31.01 The assignment of overtime work is a function of the Employer. The Employer retains the right to determine the need for overtime work.

Section 31.02 When the Employer determines that overtime is required, affected employees shall be given at least one (1) day's advance notice whenever possible. The Employer shall take reasonable precautions to alleviate adverse effects on employees when dealing with overtime work assignments.

Section 31.03 Overtime shall be distributed fairly among employees based upon skills, performance, availability and the nature of the work. It is understood that an employee who is satisfactorily performing a particular job during regular working hours shall be given first consideration and the opportunity to perform any overtime work that may be required on that job. Next consideration shall be given to those employees in the work unit who volunteer, who are qualified to perform the work and who can satisfactorily perform the job.

Section 31.04 If an employee is called back to work, any overtime work he/she performs will be considered to be at least two (2) hours in duration for overtime pay purposes.

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 ½) times the rate of regular pay or within regulatory limits. In accordance with the 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 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 for forty (40) hours for the week).

Section 31.08 Compensatory time is 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 employees covered by the Fair Labor Standards Act (FLSA).

Article 32.00 Rest Periods

Section 32.01 Employees shall be granted by their supervisors a rest period not to exceed 15 minutes during each four (4) hours of duty.

Article 41.00 Negotiated Grievance Procedures

Section 41.07 Regular Grievance Procedure

Step 1.

Except as provided for in Section 41.06, an employee challenging a matter covered by the negotiated grievance procedure may first present the matter orally to his/her supervisor, or other appropriate Employer Representative, either alone or with his/her Representative designated in writing. The Employer Representative shall consider all the facts and attempt to resolve the matter. The designation of a Union Representative authorizes such Representative to speak and/or act on behalf of the grievant. If the matter is not satisfactorily resolved after the oral presentation, the grievant, either alone or with the assistance of a Union Representative, may file a grievance in writing with his/her supervisor or other appropriate Employer Representative. Written grievances must be filed within 30 calendar days after the incident giving rise to the grievance occurs. An employee who presents his/her grievance without Union representation will be allowed a reasonable amount of duty time, not to exceed two and one-half (2 ½) hours, to process his/her grievance. For good cause shown, such time limits may be extended by the Employer.

If an employee presents a grievance on his/her own behalf directly to the Employer for adjustment, the Union shall be timely notified and shall have the right to be present during the grievance proceeding.

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.

HRMS September 19, 1995 Overtime Memorandum Attachment II – Questions and Answers About Overtime

- 3. Q. Must overtime always be authorized in advance?
 - A. Overtime or compensatory time should normally be ordered or approved in advance. Supervisors should anticipate potential overtime situations so that overtime

can either be avoided or planned for ahead of time. However, overtime or compensatory time may be approved after the fact where circumstances were not foreseen e.g. a walk-in charging party's interview extends beyond the Investigator's normal working hours.

BACKGROUND

In September of 2005, EEOC's WFO was staffed by approximately 13 non-exempt employees including investigatory staff, a mediator and support staff. (Jt. Ex. No. 7). Additionally, the WFO includes ALJs, attorneys, supervisors and other exempt employees. Approximately 30 additional former non-exempt employees worked in the WFO from February 3, 2000 through the commencement of the hearing in this case in November of 2005.

On February 5, 2003, the Union filed with Silvio Fernandez, then Acting Director of the WFO, this grievance alleging that the Agency violated "the FLSA, and all other applicable Articles, laws, rules and regulation in the following manner"²:

1. Since at least 1995, EEOC has failed to properly classify bargaining unit employees as non-exempt from the overtime pay requirements mandated by the FLSA.
2. Since at least 1995, EEOC has failed to pay bargaining unit employees the proper amount of overtime, by failing to pay employees the proper overtime rate mandated by the FLSA for the overtime hours for which the employees were paid, and by failing to pay employees for all of the hours of overtime they worked ("suffered and permitted overtime").
3. Since at least 1995, EEOC has failed to offer employees their guaranteed right to choose between compensatory time or overtime. (Jt. Ex. No. 3)

The grievance was accompanied by an information request that sought a response in 30 days or prior to a grievance meeting. Andrew testified that she personally handed the grievance to then Acting Director of the WFO Silvio Fernandez. (1T. 47).

² This grievance is similar to a grievance filed by the Union concerning suffered or permitted overtime in the Agency's then Baltimore District Office. In that case, in her amended Award the Arbitrator credited the testimony of the Agency witnesses and found that the testimony of the "Union witnesses was not credible." On that basis, she dismissed the grievance. [U.S. Equal Employment Opportunity Commission and AFGE, Local 3614, Arbitrator Lucretiz Dewey Tanner, March 15, 2004, and Clarification of Award July 5, 2005: AFGE, AFL-CIO, Local 3614 and U.S. Equal Employment Opportunity Commission, 61 FLRA No. 144 (August 31, 2006)].

The Agency did not respond and on April 1, 2003, the Union filed the same grievance at Step 2. On April 28, 2003 Ruben Daniels, then Acting Director, Office of Field Programs, responded on behalf of the Agency denying generally that it violated the FLSA, the Back Pay Act, the parties' Agreement, the Federal Employees Pay Act and "any other relevant and applicable law, rule, and regulation." The Agency also sought specificity regarding "instances of employees being suffered or permitted to work overtime or compensatory time." (Jt. Ex. No. 3).

Andrew testified that the Union did not receive the information sought in the information request until the end of 2003. (1T. 49). According to Andrew, the Agency had the documents in its possession because when she asked Fernandez about them, he replied that he had given them to Jim Lee, then Acting Director of the Office of Field Programs. (1T. 51-52).

Several current and past members of the WFO staff testified as to their experiences and their understanding of policies relating to their hours of work, including overtime. A summary of their relevant testimony follows.

JacQues Anderson

JacQues Anderson was employed by the EEOC from September 1990 until August of 2005. In 2000, she was assigned to the WFO as a Mediator whose primary responsibilities were to educate the parties as to the benefits of mediation, and to convene and conduct mediations in an effort to assist the parties to settle their disputes. (1T. 99). From approximately May of 2002 until November of 2003, Anderson worked as the WFO ADR Supervisor. (1T. 100). Anderson testified that during the periods when she worked as a Mediator, she was required to sign in and sign out each day. (1T. 101). In 2000, Anderson worked an alternative work schedule known as a five-four-nine (5/4/9) in which the employee works a total of eighty (80) hours over the course of nine (9) work days out of a two-week period. (1T. 104). Anderson explained that she worked eight (8) nine-hour days and one (1) eight-hour day and had one (1) day off for each ten-day period. (1T. 105). In 2002, Anderson switched to a four-ten (4-10) work schedule in which she had every Monday off. (1T. 105-106). Anderson's alternative work schedule ended in August of 2004 when she began working a regular eight-hour day. (1T. 106).

Anderson testified that when she first became a Mediator for the WFO, there was no ADR Supervisor and no support personnel so initially, her workload was extremely high. (1T. 109-110). Anderson testified that while she worked as a Mediator she often worked over 40 hours a week and sometimes worked through lunch. (1T. 108). Anderson explained that, when she worked through lunch which the WFO was using the sign-in/sign-out sheets, she drew a line

through the box that indicated when she went to lunch and when she returned. (1T. 108-109).

Anderson recalled that Tulio Diaz circulated a memo reminding employees to work their stated hours and to sign in and sign out. (1T. 110). Anderson testified that she understood that she was "supposed to put the actual time that ... [she was] supposed to work" no matter what time she left. (1T. 111). Anderson recalled that in April of 2002, a memo was circulated indicating that employees were supposed to sign in and sign out with their assigned hours of work regardless of when they actually arrived and actually left work. (1T. 111). Anderson testified that, although she sometimes followed that instruction, there was a lot of work to get done so she "didn't consistently follow it." (1T. 112).

Anderson testified that when she first began working in the WFO in August of 2000 until John Fellin became her supervisor in April or May of 2001, she worked "probably every weekend" because she was new to the job and because for the first time the Agency had posted a nationwide contract for mediators. (1T. 181). After that period, Anderson estimated that she worked approximately six (6) hours on a Saturday each month. (1T. 131-132). According to Anderson, the sign in/sign out sheets do not reflect weekend work. (1T. 133).

The sign-in/sign-out sheets for the period between December 31, 2001 and May 2, 2002 when she began work as the ADR Supervisor reflect that although Anderson recorded her sign-in and sign-out times in excess of her tour of duty on several individual days, she did not record over 80 hours during any pay period. The sign-in/sign-out sheets for the same period reflect that on some occasions Anderson did sign-in and sign-out reflecting hours in excess of 40 in one week. For example, for the week commencing January 14, 2002, Anderson's sign-in/sign-out notations reflect a total of 41.75 hours although the box reflecting a sign-out time at the end of one day is blank.

Anderson testified that during the period from May of 2002 to October of 2003, when she was acting as ADR Coordinator, she was Debra Mills' supervisor. (1T. 139-140). Anderson testified that during that period, Mills worked overtime and was not compensated for that overtime work and she did not have an informal or off the books arrangement with Mills for compensatory time. (1T. 140). Anderson testified that she would have known if Mills was compensated for overtime hours because only work that was designated a "overtime project" was permitted to be paid overtime. (1T. 141).

Anderson testified that she observed Mills working overtime on weekends but could not remember whether that occurred when Anderson was functioning as Acting ADR Coordinator in 2002 and 2003. (1T. 169). Anderson explained that Mills did work on weekends but "as a manager, I probably did not work as many weekends." (1T. 170). Anderson denied going jogging between the time she signed in each morning and the time she signed out at the end of the day

and denied that she exercised after work when the WFO was located at 1401 L Street. (1T. 190; 6T. 228).

According to Anderson, she did not think that Richard Furcelo worked any overtime but believed that Varise Henry did³. (1T. 140-141).

Anderson testified that when she was in the office after hours, once John Woods had become the ADR Supervisor and Anderson was again working as a Mediator, Woods "would not want to see us". (1T. 213). Anderson explained,

[W]ell, I had the office that was next door to him, so he would not want to see us. So "close the door" in fact was the message that I received....If you're here, you're not supposed to be here. Close the door." (1T. 213).

Anderson testified that due to the nature of her mediation schedule she did not take lunch at a designated time each day. Rather, her lunch often depended upon when the mediation started and ended. (1T. 221). Anderson testified that Woods did come into her office on occasion while she was eating lunch, while continuing to work, at her desk but he never told her not to work during lunch. (1T. 230). Anderson testified that she often ate lunch, and sometimes dinner, at her desk. (1T. 190; 6T. 228).

Anderson testified that if she knew there was a penalty for working overtime, she would not have done so. (1T. 232). Anderson testified further that if she had not been able to work overtime it would have affected her ability to complete her work. (1T. 233).

Anderson testified that Woods has been conducting real estate transactions in addition to his EEOC employment. (6T. 220). Woods denied having a real estate business.

Anderson testified that the documents in her subfolder of the S drive all dealt with mediation cases. (6T. 224-227). Anderson testified that the "screen shots" from her computer showed that documents in her "S" drive were accessed and used at various times after hours. (1T. 149-152). Anderson denied spending evenings at work searching the internet and talking on the telephone regarding real estate deals. (6T. 223).

Debra Mills

Debra Mills has been an ADR Program Assistant since July 9, 2001. Mills initially worked from 7 a.m. until 4:30 p.m. on an AWS schedule and she was off every other Monday. On July 27, 2003, she went on a four-ten (4-10) schedule working 7 a.m. to 5:30 p.m. Effective September 4, 2005, she began working a

³ Furcelo and Henry are administrative law judges who were detailed as mediators.

regular tour of duty, Monday through Friday, 8 a.m. to 4:30 p.m. Mills testified that she receives a one-hour lunch period. (1T. 244).

Mills explained that the ADR unit is busy and she ensures that her work is up to date, sometimes by working through lunch. (1T. 245). Mills testified that when she worked through lunch, sometimes she was compensated by having the opportunity to leave work early or to come in late but she was not compensated for all the time she worked (1T. 252). Mills estimated that approximately 10% of the time when she worked through lunchtime she was allowed to leave early or to come in late. (1T. 252-253). Mills explained that these arrangements to come in late or leave early were made informally with whoever her supervisor was at the time⁴. (1T. 253). According to Mills, when the WFO used sign-in/sign-out sheets, sometimes she would write her lunch hour on the time sheets and sometimes she would not. (1T. 246-247). Mills explained that if she worked through lunch, she would leave those spaces blank. (1T. 247).

Mills described her workload, which she performed throughout the day, including while she was at lunch, as including typing multiple letters, phoning respondents or charging parties and other tasks depending on work load. (1T. 247). Mills testified that when she first came to the WFO's ADR unit in 2001, there was huge backlog and she spent time typing acknowledgement orders, calling respondents, and doing filing on weekends. (1T. 248). Mills explained that when the WFO was physically located at 1400 L Street, there was no need to sign-in and sign-out to access the building on weekends. (1T. 249). Since the WFO moved to headquarters at 1801 L Street, when Mills works weekends, she is required to sign in at the security desk in the main lobby when she arrives at work before 7 a.m. or leaves work after 7 p.m. she is required to sign out. (1T. 244-245, 251). Review of the logs kept by building security at 1801 L Street shows that Mills frequently arrived at work before 7:00 a.m. and signed in and out on weekends between September 2004 and September 2005 as follows:

October 30, 2004	11:35 – 12:55
October 30, 2004	6:00 – 7:40
January 15, 2005	10:52 – 11:20
April 23, 2005	12:30 – 4:55
June 5, 2005	1:17 – 2:00
July 16, 2005	2:15 – 12:18
July 20, 2005	10:52 – 2:50
September 11, 2005	10:10 – 4:00

Mills testified that she has not worked on federal holidays but she has worked on occasion on her AWS day for a few hours. Mills explained that, if she did not keep her work current, people would be "breathing on my back" which

⁴ Mills' first supervisor was John Fellin until May of 2002 and then Jacques Anderson until November of 2003 and currently John Woods is her supervisor.

could in turn affect her performance appraisal. (1T. 251-252). Mills testified that she was not compensated for the time she stayed after the end of her workday or for the work she performed on weekends or her day off. (1T. 254).

Mills testified that her supervisors were aware that she was working through lunch because they would come into her office and ask her questions while she was eating and after hours they would also ask questions. Mills estimated that during her years at the WFO, she sat no further away from her supervisor than a half-minute walk and currently her desk is directly outside of Woods' door. (1T. 257).

Mills testified that when the sign in/sign out sheets were used, she would sign-in/sign-out with the actual time she arrived at work and the actual time she left work. (1T. 258). According to Mills, her supervisors reviewed these time sheets because they had to certify time cards. (1T. 259). Mills testified that she was never told not to work over her tour of duty. (1T. 259). Mills recalled that two or three years ago Silvio Fernandez either had a general meeting or issued a memo stating that employees were to sign in at the time their tour of duty began and to sign out at the time the tour of duty ended. (1T. 259). However, Mills continued to sign in and sign out at the actual time she arrived and the actual time she left.

Mills explained that since the sign in/sign out sheets were eliminated, she has not kept track of how much overtime she has worked since October of 2004 except mentally. (1T. 260-261). Mills also explained that in order to be paid overtime an employee is required to complete a request for overtime form indicating the hours you intend to work and then a second form indicating the hours you actually worked. (1T. 261). Mills testified that she did not submit this form for the days when she worked through lunch because she did not believe that she would be compensated for it.

Mills testified that on occasion she would take work home and she would put documents on a disk and type up the information so that when she returned to work she would simply print it out. (1T. 271). Mills estimated that she worked approximately five (5) to ten (10) hours per month at home. (1T. 271). Mills testified further that she would advise her supervisor that she was working at home but she stopped working at home sometime in 2003 when her son asked her not to bring work home anymore. (1T. 272-273). Mills testified that when she stayed late working she would see other employees including Anderson, Theresa Kerns, JoAnn Holmes-Frazier, and Carol Allen. (1T. 275-276). Mills testified that "once in a blue moon" her supervisor would tell her not to stay late or not to work weekends but that was never enforced. Mills explained that the supervisor would simply say "go home" and she was not sure whether they were joking or were serious. (1T. 277). Mills testified that her supervisors never offered her compensation of any kind for her overtime work. (1T. 277-278). Mills explained that Woods would tell her to go home when he was going home

himself and then Woods would depart. (1T. 281). Mills testified that she believed that if she submitted an overtime form for the time she worked, the request would have been disapproved. (1T. 297-298). Mills testified further that she would have encountered hostility by simply requesting the overtime. (1T. 298). However, Mills testified that when she requested overtime for a special project it was approved. (1T. 300).

When Mills took work home prior to July of 2003, Woods was aware that she did so because he was working as a mediator at the time and he knew that she had taken acknowledgement orders home to work on them. (1T. 302). Mills testified further that for the period when Anderson was her supervisor, Anderson was aware that Mills worked overtime but never told her to "go home" or anything else to discourage her working overtime. (1T. 302). Similarly, Mills testified that when Fellin was her supervisor, he never discouraged her from working overtime. Mills testified that had she not performed overtime, she would not have been able to complete her work in an acceptable manner. (1T. 304-305). Mills testified that when she came in on her flex day, Woods asked her why she had come to work and she had replied that she was there to finish some work and Woods simply said "okay." (1T. 306). Mills testified that she frequently asked Woods, when he was her supervisor, for help from other support staff so that the work could be performed without the need for overtime. (1T. 307). Mills testified that Woods would reply "I am working on it." (1T. 307). Mills testified that on days when she took a morning break, she would take a shorter lunch. (1T. 308-309). Mills testified that since she has gone back to school and taking classes, she has used her lunch break to study but has not used work time. (1T. 310). Mills testified further that prior to returning to school, she held a part-time job from November of 2003 to April of 2004 working on Fridays from 3 p.m. to 11 p.m. and on Saturday. (1T. 311-312). Mills explained that Fridays were her day off.

Before the WFO moved to 1801 L Street, Mills frequently ate lunch in the employee lunchroom with Janice Campbell and Theresa Kerns and, on those days, Mills testified she took only her hour lunch period. (1T. 312). Mills testified that on occasion during the work day she would have non-work-related conversations with Kerns, Smalls and others, "in passing". (1T. 314-315). Mills described these conversations as stopping in the halls and saying "hi, how are you doing?" (1T. 316). Mills estimated that these conversations did not last longer than two or three minutes at most. (1T. 316).

The sign-in/sign-out sheets for the period from December 31, 2000 through December 27, 2002 reflect that Mills often did not complete the sign-in/sign-out sheets. However, the sign-in/sign-out sheets reflect that when Mills did fill them out, she did so at the time she arrived and the time she left rather than simply including the hours of her tour of duty. Additionally, the sign-in/sign-out sheets reflect that Mills frequently worked in excess of her tour of duty on any

given day, and worked a total of 87 hours and 10 minutes for the pay period from February 25, 2002 through March 8, 2002.

JoAnn Holmes-Frazier

JoAnn Holmes-Frazier has been an Investigator in the WFO since 1998. Holmes-Frazier indicated that employees were required to sign in and sign out on sign-in/sign-out sheets each day until that practice was discontinued by WFO Director Dana Hutter. Holmes-Frazier is on a slide and glide schedule where her eight hours starts when she arrives at work which may be any time between 7 a.m. and 10:30 a.m. Holmes-Frazier testified that in 2004, she was told to sign in with her starting time of duty and sign out with the ending time of duty, reflecting her core eight hours a day. (1T. 332). Holmes-Frazier testified that on the sign in sheets, she would sign when she arrived and would sign out when she left. (1T. 334, 370, 2T. 400). Until she was advised by then Deputy Director Fernandez not to do that any longer, she believed it was okay to sign in when she arrived and to sign out when she left. (1T. 334). Holmes-Frazier explained that if she worked beyond her eight hours, she was supposed to sign out at the end of her tour of duty thus reflecting eight hours and if she stayed over eight hours she would not be compensated for the additional time. (1T. 355). Holmes-Frazier testified that she did not keep track of time in excess of her regular tour of duty after the practice of marking only her regular tour of duty on the sign in/sign out sheets commenced. (1T. 335-336).

Holmes-Frazier testified that there was never enough time for her to finish her job during the allotted hours. (1T. 336). Because of staffing shortages, Holmes-Frazier explained that she often took work home at night and on weekends in order to meet deadlines or performance goals. (1T. 337). According to Holmes-Frazier, maximum staffing was 16 investigators and, at one point, the WFO had dwindled down to four investigators and since has hovered between four and eight investigators, although the workload was unchanged. (1T. 337). Holmes-Frazier explained that the limited staffing has a significant impact on the time investigators have to spend on cases. (1T. 338). According to Holmes-Frazier, "you are not able to give – to do a thorough investigation sometimes, especially when you get close to the end of the fiscal year when you are told over and over, we've got to make these goals, you know, close the cases." (1T. 338).

Holmes-Frazier testified that she has on occasion, since 2000, worked through lunch by eating lunch with one hand and typing or reading a case file. (1T. 339). Holmes-Frazier testified that her supervisor has observed her in her office eating lunch and working at the same time. (1T. 339). Holmes-Frazier testified that she typically took lunch and signed in and out for lunch unless she was out in the field conducting an investigation. (1T. 353). Holmes-Frazier testified further that she would sign out for lunch and sign back in even if she worked through lunch.

Although Holmes-Frazier has rarely come to work early, she testified that she has on occasion stayed late working on case files. Holmes-Frazier testified that she was not compensated for this time and her supervisor was able to see that she was in the office past the end of her duty time. (1T. 340). Additionally, Selvy Leon, the former Intake Supervisor, Eugene Reed, Investigative Super-Assistant (ISA), Janice Campbell, her former supervisor, and co-workers including Theresa Kerns, Samantha Canary, Cornelious Sheppard and Sharriff Thompson would observe Holmes-Frazier staying late.

Holmes-Frazier testified that she has taken work home to perform work on the weekends but has not come to the WFO to work on the weekends. (1T. 341-342). Holmes-Frazier testified that she stopped taking work home on the weekends when she was assigned to intake three days a week in September of 2005. (1T. 343). Before that, Holmes-Frazier estimated that she worked at home on average approximately six to twelve hours per month from January of 2000 to September of 2005. (1T. 342-344). Similarly, Holmes-Frazier estimated that, in 2003 and 2004, she worked anywhere from 6 to 10 hours per month at home on the weekends. (1T. 344). According to Holmes-Frazier, on occasion she would tell her former supervisor, Janice Campbell that she was taking work home and other times she would simply take the work home on her own initiative. (1T. 345). In September of 2005, her current supervisor Janet Stump told her that she could not take work home and she stopped doing so. (1T. 346, 2T. 511). According to Holmes-Frazier, she had asked Stump if she could take work home to finish a few cases before the end of the fiscal year. According to Holmes-Frazier:

We both went to Director Dana Hutter to see if I could take them home and finish closing them out. They had to consult with each other not in my presence, and the cases were never returned to me. And Janet said that you can't take them home but you can come in on the weekend if you would like and be compensated with comp time.

But due to my transportation problem and living all the way in Woodbridge, I didn't want to drive to DC so I told her that would not be feasible for me. And the cases, I assume, were reassigned to one of my coworkers. (1T. 346-347).

Holmes-Frazier testified that she was not compensated for any of the weekend work she performed for the past five years. (1T. 347). Holmes-Frazier testified that she never came to work on holidays and did not work at home on federal holidays.

Holmes-Frazier testified that she never claimed overtime because she believed it would be futile. (1T. 350). She explained that she knew the work had

to be done and stayed as long as it took to complete the work and she was told that there was no overtime. (1T. 350). Holmes-Frazier testified that the sign-in/sign-out sheets were in a public area near the supervisor's office and they were monitored frequently by then Deputy Director Silvio Fernandez. (1T. 355-356). Holmes-Frazier testified that if an employee forgot to sign in or out for lunch, Fernandez would come around and verbally remind you that you did not sign in or out for lunch. (1T. 356). According to Holmes-Frazier, he reminded her that she had not signed in or out for lunch on occasion but he never said anything to her about working beyond her tour of duty. However, Holmes-Frazier testified that in early 2004 during a WFO staff meeting, Fernandez told the staff to sign in at the start time and out at the end time of the tour of duty. (2T. 493; 511).

Holmes-Frazier testified that when the Agency began tracking employees' work time on bi-weekly electronic time sheets she would routinely list the total hours worked each day as "eight hours" whether or not she worked an additional 10 or 15 minutes completing a phone call or a late walk-in interview on intake. (2T. 385-387). According to Holmes-Frazier, on one occasion, she was specifically asked to stay past her tour of duty by the director to see a walk-in client. (2T. 388-389). In that situation, Holmes-Frazier testified that she worked out the time informally with the Director, as was done occasionally, on a case-by-case basis. (2T. 389, 396). Holmes-Frazier estimated that these informal arrangements covered 5-10% of the time when Janice Campbell was her supervisor. (2T. 495-496). However, in other instances where Holmes-Frazier did not have such an arrangement, she took annual leave, even during pay periods when she had worked approximately eight hours in excess of her duty hours. (2T. 402).

Holmes-Frazier estimated that for the period from fall of 2004 through Fall of 2005, she averaged approximately 80 hours of work per pay period. (2T. 392). However, she also testified that during the same period, there have been days when she worked in excess of eight hours, but put down eight hours on her time sheet. (2T. 509). However, Holmes-Frazier estimated that for the period from October of 2003 through October of 2004 the work sometimes took more than eight hours a day to complete. (2T. 394).

Holmes-Frazier testified that she generally takes one approximately ten minute smoke break each morning, but does not usually take an afternoon smoke break. (2T. 444, 448).

Holmes-Frazier testified that she learned that there was no money for overtime from both then Deputy Director Silvio Fernandez and her supervisor Janice Campbell. (2T. 489).

Holmes-Frazier testified that she received an e-mail from the Director indicating that comp time would be given to three investigators working on a

special project of trying to get cases closed before the end of the fiscal year. (2T. 502-503). However, neither Holmes-Frazier nor Teresa Kerns were included in the special project because they were assigned to intake. (2T. 503).

Holmes-Frazier testified that within the period from November 2004 to November 2005 there have been days when she has worked in excess of eight hours but put down eight hours on her Cost Accounting time sheet. (2T. 509).

Theresa Kerns

Theresa Kerns testified that she worked as a GS-12 investigator in the WFO from April of 2002 until September of 2005 generally working from 8:00 a.m. to 4:30 p.m. Kerns testified that when she first came to the WFO she completed the sign-in/sign-out sheets with the actual time she came to work and the actual time she left. (2T. 517). Then, according to Kerns, a few months after she began working at the WFO, she was told to complete the sign-in/sign-out sheets with her tour of duty regardless of when she arrived and when she left work. (2T. 518). Kerns indicated that when she worked intake, she frequently worked through lunch. According to Kerns, lunch hours were to be taken between 11 a.m. and 2 p.m., so when she was with an individual doing intake and it went beyond 2 p.m., she would not take lunch. (2T. 522). Kerns testified that when she did take lunch, she would put the actual time she took lunch on the sign-in/sign-out sheets. (2T. 528). Additionally, Kerns testified that she often worked through lunch or worked late to complete phone calls related to her regular caseload when intake was done. (2T. 522). Kerns testified that if she did not take lunch she would leave the lunch portions of the sign in/sign out sheets blank. (2T. 528). Kerns testified that both Janice Campbell and Janet Stump knew that she worked during her lunch hour and that she worked late. (2T. 527). Kerns recalled taking intake materials for review to Stump and Campbell during their lunch hours. Specifically, Kerns testified that Campbell would ask her several times whether she had had lunch yet and Kerns would typically reply that she was still working on intake. (4T. 371).

According to Kerns she did not receive additional compensation for working late or working through lunch. (2T. 523). Kerns testified further that she often came in early, without additional compensation, to print out work completed at home when she was telecommuting. (2T. 523). According to Kerns she occasionally worked at home after work or on a weekend to finish up a case. (2T. 526). According to Kerns, she would inform Campbell that she was taking work home from time to time. (2T. 528). Kerns did not advise Stump when she took work home. (2T. 528).

Kerns testified that when she forgot to sign in or sign out, Fernandez would remind her to do so. (2T. 529, 4T. 373). Kerns explained that she often got busy and simply forgot to complete the sign-in/sign-out sheets. (4T. 375-376). Kerns testified further that neither Fernandez nor her other supervisors told

her not to work overtime. (2T. 529). Kerns testified that when she worked intake around the lunch hour, between 11:30 a.m. and 2:00 p.m., on a typical day, three or four individuals would walk in during that period and investigators working intake would interview them through the lunch period. (4T. 237-238). According to Kerns, Janice Campbell, her supervisor was aware that she worked through lunch and that she did not receive compensation for that time. (4T. 238). According to Kerns, she did not typically sign out and in for lunch when she did not take a lunch period. (4T. 238).

Kerns testified that initially, when she began work at the WFO, she signed in and signed out for her tour of duty as well as for lunch. (4T. 239). Kerns explained that at some point she was signing out at the time she actually left for the day, but before the WFO moved to 1801 L Street she was told by both Silvio Fernandez and Janice Campbell to sign in and sign out at the time of her scheduled tour of duty. (4T. 239-240). Kerns testified that she understood this instruction to mean "no matter what time you came in or what time you left in the evening, you had to sign out your tour of duty. If you worked 7:00 to 4:30, you had to sign in 7:00 to 4:30." (4T. 240). According to Kerns, she contacted the Union regarding this issue and then returned to signing out at whatever time she left for the day. (4T. 241).

Kerns testified that she typically took lunch from either 12:30 to 1:30 or 1:00 to 2:00 and occasionally stayed in the break room for an extra five or ten minutes three or four times per month when the office was on 14th Street. (4T. 242-243).

Kerns testified that she rarely came to work early but often stayed late after work to deal with the high volume of intake and to get cases out to reduce the aged inventory. (4T. 244-245). Kerns estimated that when she stayed late, she typically left between 5:30 and 6:00 p.m. but at times worked until 7:00 p.m. (4T. 245). Kerns recalled that it was quiet after working hours and she was able to concentrate on reviewing cases and drafting investigative memos. (4T. 245).

According to Kerns, Campbell, Stump, and Hutter all saw her working late at times. (4T. 246). Kerns recalled that she was aware that Stump saw her working late because she would enter Stump's office to put folders in the office and she also always called out "goodnight" as she passed Stump's door as she left for the day. (4T. 246). Kerns testified that neither Hutter nor Stump told her she could not stay late. (4T. 247).

Kerns testified that she was not permitted to earn credit hours or comp time for working late except towards the end of the last quarter of FY 2005 when Hutter sought volunteers for comp time. (4T. 248). Kerns identified several documents that she created after hours in October through December of 2003 including documents created at 6:28 p.m. on October 28, 2003 and December 17, 2003 at 6:07 p.m. (4T. 258-261). According to the sign-in/sign-out sheets,

Kerns was telecommuting on October 28, 2003 and on December 17, 2003 she signed in at 8:15 a.m., departed for lunch at 1:00; returned from lunch at 1:55 and did not sign out at the end of the day. (U. Ex. No. 2, pp 467, 484). When Kerns worked on Saturdays in 2005, she recalled seeing Leon on one occasion and also seeing Mills.

Kerns testified that at an Enforcement meeting in approximately October of 2004, Campbell told the staff that they would be switching over to the Cost Accounting Forms and that they would be required to report their regular hours of duty and annual leave and other leave. (4T. 320-321). Kerns explained that Campbell did not specifically state that employees could not put down overtime on the Cost Accounting sheets but instead stated that the only thing to list on the Cost Accounting sheet were tour of duty hours. (4T. 321). Kerns believed that the Cost Accounting sheets were simply a replacement for the sign-in/sign-out sheets. (4T. 322).

Kerns acknowledged that she never asked anyone about getting the paperwork required to receive overtime compensation for extra work. (4T. 322-323). Kerns recalled that in an Enforcement meeting, Campbell reminded employees that Fernandez had said that they were required to put down the hours of their tour of duty when they arrived and when they left on the sign-in sheet regardless of whether or not one worked beyond one's tour of duty. (4T. 328-329). On another occasions, Kerns recalled, that Fernandez addressed the same topic in an Enforcement unit meeting back at 1400 L Street. (4T. 329-330). According to Kerns, Fernandez told employees in the Enforcement unit that they were not signing in and signing out on their lunch hours and their "exact time." (4T. 330). Kerns testified further that Fernandez also said "put down your lunch hours and make sure you sign in and out the beginning of your shift and the end of your shift, what your tour of duty is." (4T. 331-332).

Kerns recalled that on one occasion, she asked Campbell about overtime and Campbell told her no, the WFO "doesn't have any money" so she never asked for it again. (4T. 333, 367). Kerns testified that on one occasion, she returned approximately one half-hour late from doing an onsite investigation. According to Kerns, she did not have an arrangement with Campbell that permitted her to take the time off the next day or at some other time. (4T. 346). Kerns does not recall either Hutter or Stump indicating that when she worked late, she could take comp time or credit hours the next day. (4T. 347-348).

Kerns testified that she did not know that she could not work overtime and was not told to go home at the end of the day. (4T. 367). She explained that she was not told that she could not work overtime but she was told to get her cases done and to work on aged inventory. (4T. 367).

Kerns recalled seeing Cogswell work after hours and, on at least two occasions, observed Cogswell eating a microwave dinner in Hutter's office. (4T. 294).

Dana Hutter

Dana Hutter has been Director of the WFO since May of 2005, and held that position in an acting capacity since December of 2003. Hutter testified that in September of 2004 he consulted with the supervisors who reported to him regarding discontinuing the use of the sign-in/sign-out sheets. According to Hutter, then Intake Supervisor Selvy Leon expressed some concern because she used the sign-in/sign-out sheets as a "tool for keeping track of some of her staff." (2T. 546). After considering Leon's concerns, as well as other factors, including the conversion to Cost Accounting sheets, and that the sign-in/sign-out sheets were "inaccurate and unreliable" because they did not reflect actual times when employees arrived and departed, Hutter decided to eliminate the form. (2T. 548-549). Hutter explained his reasons for discontinuing the sign-in/sign-out sheets as follows:

There are a couple of reasons. I think that for one thing we were, I think, around this time going -- converting to this -- I forget what -- cost accounting sheets is what they're called. So in that regard, it made the sign-in sheets redundant in terms of -- in some respects. ... I did not discontinue the sign-in sheets solely because we were going to this new cost accounting system.

That was one thing. There was going to be another form that staff had to fill out saying when they worked, when they were on leave, so on and so forth.

I didn't want to -- a good amount of the staff is very good about coming and going, working their shifts and all of that. It seemed to me to be silly to make everybody in the office use sign-in and out sheets if what we were really concerned about was, you know, a handful of staff. I don't like the management approach to let's, you know, punish everybody for the sins of a few.

So that's another reason. I wanted to -- instead of dealing with the problems and so trying to deal with attendance and time problems on a -- in this global way, I wanted to make sure the supervisors did it individually.

I think the sign-in sheets were -- I found them to be inaccurate and unreliable. In other words, they did not frequently reflect the accurate -- actual times that people came and went. In particular, I'm talking about people who I was concerned were

coming to work late and/or, you know, leaving early or taking long lunches things like that.

And so I think people -- what I found was people were signing in at a time that maybe they should have been signing in rather than when they in fact signed in. (2T. 547-549).

Hutter cited the example of Tanya Stanfield, who was chronically late and was not available when she was scheduled to be working intake. (2T. 554-555). According to Hutter, from his discussions with Leon, he became aware that some employees would sign in at 8:30 a.m. but would not actually arrive for work until 9:30 a.m. (2T. 559). Hutter testified he also became aware that other employees including Holmes-Frazier, Chandler, Winters and Anderson were skimping on time. (2T. 563-567, 656). Hutter added that Stanfield's pay was docked and she received discipline. (2T. 659-660).

On October 4, 2004, Hutter issued the following memo discontinuing the use of the sign-in/sign-out sheets:

As we begin the new fiscal year, I want to let you know of a few changes that are effective as of October 1, 2004:

...

Time Sheets: Staff will no longer be required to sign in and out using time sheets. This move is not made because issues related to work hours are unimportant, or for any reason related to new time and attendance procedures. I just don't see using sign-in sheets as particularly useful. In the event that time or attendance issues arise, they can be dealt with by the supervisor on an individual basis, rather than burdening everyone with an extra administrative task. What this does mean, I am told by timekeepers, is that staff should be sure to submit leave slips to their supervisors for signature, as leave indicated on time sheets will no longer be recorded. (U. Ex. No. 1).

Hutter testified that the new time sheet, titled the "Cost Accounting Using the FPPS Time and Attendance System" is the timesheet currently used throughout the EEOC. (3T. 750). Hutter explained that each employee reports his or her hours on the form and submits the form to the supervisor, who in turn certifies electronically that the information is accurate, and then the employee is paid. (3T. 753). Hutter explained the difference between the Cost Accounting sheets and the old sign-in/sign-out sheet is that the Cost Accounting sheet does not reflect the employee's time of arrival and departure, but only the total number of hours. (3T. 755). According to Hutter, the sheet is accurate with respect to bargaining unit members.

Hutter explained the new timesheets to employees telling them that what is recorded on the sheet is entered into the system and determines how they are paid. (3T. 726; A. Ex. No. 9). Hutter explained that he sought to create "an atmosphere of professionalism in the office" and thought the sign-in sheets symbolized general mistrust between management and the staff. (2T. 572-573). Hutter described the Cost Accounting Sheets as requiring employees to certify their accuracy and to report any discrepancies between their pay and leave statement and what they believe to be an accurate accounting of their time. (2T. 582-583). Hutter testified that in the summer of 2005, Regina Andrew brought the issue of overtime in the WFO to his attention. At that time, he testified, management was cognizant of the rule that "overtime is not allowed absent advanced approval" and that management had the responsibility to enforce that rule. (3T. 730).

Hutter testified that since he has been at the WFO in December of 2003, he has attended all staff meetings and does not recall any announcement by Fernandez directing employees to sign-in and sign-out with the hours of their scheduled tour of duty. (2T. 575-577).

Hutter testified that when he became director of the WFO, he determined that walk-ins who came in to meet with intake personnel would be seen until 4:30 or 5 p.m. rather than being asked to come back the next day as was the previous practice. (2T. 592-593). Hutter explained that when an individual comes in at 4:30, they are encouraged to complete the intake form and return the next day but there are some circumstances where an investigator may be required to stay after 5 p.m. (2T. 593). In those circumstances, the employee should let their supervisor know and the credit hour concept allows both the supervisor and the employee flexibility to address work duties that may need to be completed outside the regular tour of duty. (2T. 594).

Hutter acknowledged that when investigators are interviewing individuals while doing intake, they will occasionally work "through the lunch hour". (2T. 595). Hutter continued indicating that employees occasionally work "to the point where they did not take time out for lunch." (2T. 595). Hutter continued explaining that employees try to work it out with their supervisors with this occurs so that they would either leave early that day or take a credit hour for the next day. (2T. 596, 3T. 705).

Hutter testified that at times investigators are required to call a witness early in the morning or in the evening and, when investigators are conducting an onsite investigation, witness interviews may go beyond the scheduled time. Hutter also testified that outreach events may go beyond an employee's tour of duty. (2T. 591-592).

Hutter testified that in management meetings, he made sure to communicate to supervisors that they were to tell staff that they were not permitted to work overtime beyond their tour of duty. (2T. 601-601).

Hutter testified that at the time of hearing the WFO was in the process of hiring two investigators and he would prefer to hire even more because the office has enough work for it. (3T. 675). However, Hutter testified that nonetheless, the work is being completed. (3T. 675).

Hutter testified that approval to work overtime must be given in advance. (3T. 707.) Hutter testified that there is no written WFO office policy on whether credit hours must be requested in advance. (3T. 708). Hutter testified further that comp time must be approved in advance. (3T. 708). Hutter described the situation where an employee works an extra hour at the last minute during the conduct of an interview as follows:

... if there were a circumstance where something might not have been foreseeable to the employee – they were in the middle of an interview, the interview went an hour longer than expected past the end of the scheduled workday, the employee would not necessarily stop the interview at the moment when they are technically off the clock, contact the supervisor, ask for approval to continue the interview for some additional period of time.

In that situation, what I imagine would happen is the employee would continue the interview. If it takes an extra hour, when they – the next day or the next time they saw their supervisor, they would say – they would inform the supervisor “I worked an extra hour yesterday doing this interview. Do you mind if I come in an hour late? Do you mind if I take that hour some other time?” (3T. 710).

Hutter explained how credit hours are used to allow flexible schedule employees to use that facility when a task runs into their lunch hour or late in the day.

Credit hours are different because they're – they allow for the situation for a flexible work schedule employee who is working, you know, and may have to work an extra half hour or hour on a given day, and it allows that employee to have that -- take that time a different day. They are expected to get approval of their supervisor. They don't have to get it in advance. They likely will get it afterwards by simply informing their supervisor.

But I think in many or most instances there is sort of a tacit understanding between the employee and the supervisor that on those occasions when an employee works a half hour over

because an interview takes a half hour longer that the employee is allowed to take an extra half hour at lunch the next day or whenever. And conversely, if an employee, for whatever reason, comes in a half hour late one day, they're – they are – the understanding between them and the supervisor is that they will make up that half hour either that day or later in the week.

And again, this is – it's supervisor by supervisor because there are some situations where, you know, it may be all right, you know, for an administrative judge, for example, who goes a half hour or an hour over at a hearing or is – comes in late one morning a half hour or an hour, it may not be a big deal in terms of operationally whether that employee works that – flexible. (3T. 780-782).

Hutter testified that within the last two years, he and/or individual supervisors advised bargaining unit employees, perhaps by writing in an e-mail, on a regular basis that overtime should not be worked without advance approval. (3T. 731). To the extent that goals, in terms of case processing, are used, "the goals are expressed in terms of average per available staff," Hutter explained. (3T. 746). Hutter testified that there is no independent obligation for any EEOC office to maintain sign-in and sign-out sheets for its staff, bargaining unit or otherwise. (3T. 748).

Hutter acknowledged that he has observed Cogswell working at times that might possibly have been outside of her tour of duty. (3T. 757). Hutter does not remember exactly when he observed Cogswell working beyond her tour of duty but believed that it was earlier in fiscal year 2005. (3T. 759). According to Hutter, when he observed Cogswell, he "informed her that under no circumstances is she allowed to work beyond the 40-hour week." (3T. 759). Hutter testified that Cogswell acknowledged to him that, "she has been told from the beginning by her supervisor that she is not permitted to work more than a 40-hour week," and that she knew she was not permitted to work in excess of 40 hours per week. (3T. 759-760). Hutter testified that he may also have told Hyacinth Clarke not to work in excess of her 40 hours during the spring of 2005. Hutter testified that he told Cogswell approximately a dozen times that she is not permitted to work in excess of her 40-hour week without the approval of her supervisor. Hutter testified that Cogswell's supervisor had given her approval to work some comp time. (3T. 763). However, Hutter testified that to the best of his knowledge, he has "absolutely won the argument" and she has not worked overtime. (3T. 763). Hutter testified that he did not find it necessary to discipline Cogswell for working overtime. (3T. 764).

Maria Salacuses

Maria Salacuses, currently a senior trial attorney in the Boston area office, worked as an investigator in the WFO from January of 1994 until sometime in 1998 when she became an enforcement supervisor. Salacuses testified that based upon her experience as an investigator and as a supervisor she believed that investigators could complete their job within 40 hours. (3T. 832). She acknowledged that on occasion an investigator was required to interview a witness during the evening or on the weekend, and when that occurred she had an arrangement with her investigatory staff to allow them to take the time off as comp time. (3T. 832). Salacuses testified that her Support Assistant, Cathy Ballard told her that she had worked through lunch and Salacuses advised her that she should not. (3T. 835). Salacuses testified that to the best of her knowledge, the investigators that reported to her in 2000, including Sharriff Thompson, Cynthia Darden, Janice Campbell and Nicole Swan, did not work in excess of 40 hours in the average week. Salacuses testified that in 2000, employees signed in and signed out on the sign-in/sign-out sheets that were used to monitor when employees arrived and when they left. (3T. 841). Tulio Diaz who was then Director of the WFO, advised Salacuses that it was permissible to have an arrangement with the investigators to allow them to work late and take the time on another day without receiving overtime. (3T. 846).

Janet Stump

Janet Stump has been Acting Enforcement Supervisor in the WFO since approximately March 15, 2005, and for a short period, Stump was also Acting Supervisor for CRTIU. At present, Stump supervises Cogswell, Clarke, Holmes-Frazier and Stanika Smith, an ISA. Stump testified that since March of 2005, Cogswell is the only investigator who has worked over 40 hours a week on average. (3T. 862). Stump testified that Cogswell comes in on her days off and stays late in the evening and Stump has observed her working late. (3T. 862). Stump testified further that Cogswell has also worked through lunch. (3T. 868). According to Stump, she has told Cogswell to take lunch and walk-ins will have to wait. (3T. 868). Stump testified that she has advised Cogswell not to work in excess of 40 hours per week. (3T. 863). Recently, Cogswell has been not working over her scheduled shift, according to Stump. (3T. 864-865).

Stump testified that Holmes-Frazier has never complained that she could not complete her work within an average of 40 hours per week and has never told her that she works in excess of 40 hours per week. (3T. 865-866). Stump testified that during the six-month period when Kerns reported to her, she did not work in excess of 40 hours per week. (3T. 867). Stump testified that Ullah worked as an investigator in the WFO for approximately one year and, to the best of her knowledge, while he was at the WFO, did not work more than 40-hours per week. (3T. 890-891).

Stump testified that when investigators go onsite, travel time may result in a longer day and on occasion, investigators working on intake sometimes run over and work an extra half-hour. (3T. 870). According to Stump, the Agency tries to complete intake at 5 p.m. because that is when the front office closes. (3T. 870). However, if an investigator tells her that they worked intake conducting an interview the prior evening for an extra hour, she allows that employee to keep track of the time and to leave early another day. (3T. 870).

According to Stump, Tram Ngo who worked as an investigator until becoming Acting CRTIU Supervisor in November of 2005, did not work more than an average of 40 hours per week. Stump testified that in order to meet unit case processing goals, the Enforcement unit had a special project where certain investigators were taken off of intake and others were assigned to work intake based upon individuals case management skills and their ability to process cases. (3T. 876-877). According to Stump, the WFO had an inventory of approximately 800 cases in November of 2005 and the WFO was looking to hire additional investigators or to send cases to another EEOC office to decrease the backlog. (3T. 880-882).

According to Stump, several individuals including Campbell, Kerns, Mills and Smalls ate lunch together at 1400 L Street and often took a lunch period that extended over one hour. (3T. 887).

According to Stump, since the Agency has used the new bi-weekly Cost Accounting sheets, employees have put down over 80 hours on their bi-weekly sheet when there was a special project at the end of the fiscal year and the Agency offered comp time to those who volunteered to work on aged cases. (3T. 900). Stump recalled that Cogswell, Clarke, Ngo, and Kerns all volunteered for the comp time project. (3T. 901). Stump sent the following September 1, 2005 memo to investigators when she sought volunteers for compensatory time to work on aged cases:

In order to complete the aged inventory project, **compensatory time** is available for the investigators. This is on a **volunteer basis**. In order to receive the compensatory time, you must fill out a form (from me) and get my approval (via signature).

On the form you must list what cases you will be working on and the **estimated** time needed per pay period. Then submit the form to me for approval (my signature). After you work the compensatory time, you enter the **actual** time worked on the same form and submit the form to me for signature. Of course you also need to turn in the cases you listed on your form. Keep in mind that you cannot work compensatory time during a week in which you have leave scheduled. (A. Ex. 12).

Stump recalled that in November of 2005, Cogswell stated that she planned to stop in to the office and work for a short period of time on Veterans Day holiday before meeting friends for lunch. (3T. 913). Stump testified that she reminded Cogswell that she did not need to work on the holiday and sent her an e-mail confirming that she should not work on the holiday. (3T. 913-914). Stump testified that she also discussed the issue with Hutter who also advised Cogswell not to work overtime. Stump recalled an incident when Cogswell approached her and indicated that she would like to take an hour off in exchange for an additional hour that she had previously worked "off the books." (3T. 920). Stump recalled that she had "put a sticky on [her] computer" as a reminder that Cogswell needed to take the extra hour or two off. (3T. 920-921). Stump testified that review of Cogswell's bi-weekly timesheets show that this additional work was not recorded on her timesheets. (3T. 922-923).

Stump testified that when the sign-in/sign-out sheets were in use, she would write down her actual arrival and departure times. (3T. 898). Stump acknowledged that she signed a document on October 29, 2003 reflecting that she was told to sign out at the end of her shift even if she stayed late to work. (3T. 931, U. Ex. No. 8).

Stump testified that in order for an individual to receive compensatory time, the supervisor's prior written approval is necessary. (3T. 963-964). Stump testified that, at some point, she received overtime pay for coming in and working on a holiday, but she had put in for compensatory time and later learned that the rules require that she be paid instead of earning compensatory time for holiday work. (3T. 964-965).

David Gonzalez

David Gonzalez is currently the State and Local Coordinator in the WFO, and has reported to Hutter for approximately one year. Previously Gonzalez worked as an Investigator reporting to several different supervisors, most recently Campbell. Gonzalez has worked on a slide and glide schedule for the past two and one-half years. According to Gonzalez, on occasion when he is facing a deadline, he sometimes works in excess of 40 hours per week. (3T. 976). Gonzalez testified that when this occurs he seeks and receives comp time in advance. (3T. 977). Except for deadline situations and an occasional request from Headquarters, Gonzalez testified he is able to complete his job within 40 hours per week. According to Gonzalez, the only time he can recall working in excess of 40 hours per week and not receiving comp time was in early 2001 when he attended a week-long training session in Reston, Virginia and did not receive compensation for the additional three hours daily that were added to his commute. (3T. 979). Gonzalez testified that on a few occasions he worked through lunch and when this occurred, he generally left early with the permission of his supervisor. (3T. 981).

Gonzalez does not recall attending a meeting with Fernandez in early 2004 where Fernandez asked all employees to sign in and sign out with the times of their tour of duty even if they were different from when they arrived and when they left. (3T. 983). Gonzalez testified that when he worked as an Investigator, he spoke with a charging party over the weekend on perhaps two occasions of approximately 20 minutes each and was not compensated for those calls. (3T. 1002). Gonzalez testified that when he worked as an investigator and he needed to have a brief phone call with a charging party after hours, he would do so and did not receive compensation for those calls. (3T. 1004-1005). Gonzalez testified that his supervisors were not necessarily aware of those night or weekend calls. (3T. 1004-1005).

Zafor Ullah

Zafor Ullah began working for the WFO in August of 2004 when he was hired as a term employee for a two-year term working as an investigator. Ullah testified that he frequently stayed late after 4:30 p.m. on Fridays because he was assigned a lot of foreign-speaking telephone interviews and he was told to complete them before Monday when he was typically assigned to work intake. (4T. 12, 120-121). As a result, Ullah testified that he often worked until between 6 and 8 p.m. completing telephone interviews. (4T. 12-13). Since Ullah was not provided with a telephone card or a credit card, he did not attempt to complete the interviews from home over the weekend. Ullah testified that during the period when employees completed sign-in/sign-out sheets, employees were told to sign out even though they continued to work. Ullah stated that he "was still there, but I was told to sign out." (4T. 15).

Ullah testified that he resigned from the EEOC in August of 2005 because he felt uncomfortable closing out cases where he felt the individual did not receive a "fair shake." (4T. 18-19). According to Ullah, when he complained about this, Stump told him "just do what you're told. Remember you're here term." (4T. 19). According to Ullah, both Stump and Hutter placed great emphasis on closing cases to "meet the quota for the EEOC." (4T. 20). Ullah reviewed the lobby sign-in and sign-out sheets for August 26, 2004 which reflects that he signed in at 6:27 a.m. and signed out at 6:34 p.m. (4T. 25-26). Similarly, on August 25, 2004, the lobby arrival and departure records show that Ullah arrived at 6:48 a.m. (4T. 27). The building arrival and departure records also reflect that on September 7, 2004, Ullah arrived at 5:56 a.m. and left at 7:16 p.m. (4T. 38).

Ullah testified that Stump saw that he was working late because her office was physically next to his office and she too was there after hours. (4T. 49). Ullah testified that Janice Campbell would tell him to go home at 4:30 p.m. (4T. 52). Ullah testified that he never received informal compensatory time for work in excess of his tour of duty and was not paid overtime for work in excess of his tour of duty.

Ullah testified that his bi-weekly timesheets did not reflect overtime, because he believed that he was not supposed to show any overtime. (4T. 63). Ullah testified that on one occasion he gave a cost-accounting sheet to his supervisor that reflected overtime worked and it was returned to him because he was not supposed to show overtime. (4T. 65). Ullah testified that on May 24, 2005, the building records for early arrival or late departure to the building at the loading dock show that he signed in at 6:25 a.m. and signed out at 7:25 p.m. (4T. 75). Ullah testified that he did not get paid or receive comp time for work in excess of eight hours for that day. (4T. 75-76).

Ullah acknowledged sending an e-mail in December of 2005 to Cogswell indicating that when he was asked about overtime he would "tell the truth." (4T. 78). Ullah testified that Cogswell did not respond. (4T. 122).

Ullah denied staying late on Fridays to wait for a friend. (4T. 90). Ullah testified that he never told either Stump or Campbell that he came in to work before 7 a.m. or left after 7 p.m. or told them that he worked more than 40 hours that week. (4T. 93). Ullah testified that he never complained to either Hutter or Stump that Smalls told him he could not include extra hours that reflected overtime on sign-out sheets. (4T. 97). According to Ullah, only Smalls told him that he was not allowed to indicate overtime on the sign-in/sign-out sheets. (4T. 101, 105). Ullah testified that Leon told him he could not put time on his sign-in/sign-out sheet that reflected the overtime he had performed. (4T. 102). Ullah testified further that Leon did not tell him that if he had to work late he should not put the time down on the sign-in/sign-out sheet. (4T. 103). Ullah acknowledged that he never asked Leon whether he could earn informal comp time or credit hours when he worked late.

Ullah testified that Stump never discussed with him how to make sure that he worked only 40 hours per week, or 80 hours per pay period, but only discussed the number of cases to be completed. (4T. 105). Ullah testified that he never told either Stump or Hutter that Leon required him to work beyond his tour of duty. (4T. 114).

Ullah testified that if Stump was not satisfied with the cost accounting sheet he submitted, she would make corrections before signing it. (4T. 117). Ullah testified that he asked Stump why he could not be paid overtime, and Stump specifically told him that "we cannot show overtime." (4T. 118).

Ullah acknowledged that when Hutter saw him in the office between 6 and 7 p.m., Hutter would not necessarily know that Ullah had been at work more than eight hours. (4T. 119). Ullah testified that when Hutter saw him at work after hours, typically on a Friday evening, he did not tell him to go home. (4T. 120-121).

Ullah acknowledged that he had an initial one-year probationary period at the EEOC and he was told that the Agency planned to terminate his employment at the end of the year, so he resigned. (4T. 83-84). Ullah clarified however, "they never gave me any reason, on paper or anything. I decided to resign from my position because I didn't want to go through fighting this because I know how long these cases take." Ullah testified that Janet Stump brought him into her office and he preempted the performance-related discussion that she began stating, "... I'm just going to resign because I don't want to go through any of this, or my record being blemished for something I didn't do" (4T. 87).

Ullah testified that from his observations, he believed Cogswell and Hutter had a personal relationship. (4T. 123-125).

Selvy Leon

Selvy Leon was the CRTIU Supervisor with responsibility for the intake process in the WFO from June of 2002 until March of 2005. (4T. 138). As CRTIU Supervisor, Leon supervised ISAs Reed and Winters and Martinez, the receptionist. (4T. 141). In October of 2003, Stanfield also moved to the CRTIU. (4T. 140). While Leon supervised the CRTIU, ISAs, as well as Investigators from the Enforcement Unit worked on intake by screening and counseling individuals who walked into the office with complaints and drafted charges for those walk-ins who wished to file a charge, but do not conduct investigations. (4T. 142). According to Leon, if an issue arose with the Investigators while they were working intake, she would call the Investigator's supervisor, either Campbell or Stump. (4T. 144-145). According to Leon, she was not responsible for the hours that Investigators worked performing intake. (4T. 145).

To the best of Leon's knowledge, there was an office-wide policy that employees were to complete their lunch break by 2:00 p.m. (4T. 146-147). However, after Hutter became the Director, he advised Leon that she need not follow the 2:00 p.m. policy. (4T. 147).

Leon recalled that Martinez worked overtime only when the office was moving from 1400 L Street to its current headquarters location and employees were paid overtime to assist with the packing. (4T. 152-153). On a few other occasions since the move, Martinez has stayed an extra half hour to unpack boxes of files sent to the WFO from the EEOC's Philadelphia office. (4T. 153). On each of those occasions, Leon permitted him to leave early on another day in an informal arrangement. (4T. 153-154). Leon recalled that Mills, Smalls, Stanfield and Allen also worked overtime and received overtime compensation during the move. (4T. 155).

Leon testified that she was not aware that Reed worked any uncompensated overtime. (4T. 156). Leon recalled that each year when Reed plans his annual vacation, he often stayed late in the office to complete his

vacation planning and would tell Leon that he was doing so. (4T. 156-157). To the best of her knowledge, Leon was unaware that Winters worked any uncompensated overtime. (4T. 157). Similarly, Leon testified that to the best of her knowledge Allen did not work any uncompensated overtime between June and August of 2004, the period during which she worked in the CRTIU Unit as an ISA. (4T. 159-160).

Leon testified that Stanfield had an attendance problem and would either come in late and not sign in, or leave early without submitting leave slips, or come in late and then a few days later record that she came in early, or ask to submit leave slips but then not do so until the timekeeper brought it to either her or Leon's attention. (4T. 161). Leon sent Stanfield a memo on June 22, 2004 indicating she needed to correct her problems with leave or she would be charged AWOL. (4T. 163; A. Ex. No. 11). Leon testified that Stanfield would claim that she stayed later than she was supposed to without authorization after she came in late. (4T. 188). Leon testified that she made it clear to Stanfield that she should not stay late without Leon's permission. (4T. 188-189).

Leon testified that the employees she supervised could perform the work they were assigned within 40 hours per week. (4T. 165). Leon does not remember any employee telling her that they could not complete their work within 40 hours per week. (4T. 165). Leon testified that to her knowledge, no member of her staff either worked through or skipped lunch. (4T. 167).

Leon recalled that individuals who phoned were told to try not to come into the EEOC after 3:00 p.m. because interviews may take an hour or more. (4T. 169). This policy was in existence long before Leon came to the CRTIU. (4T. 170). Leon testified that as CRTIU Supervisor, the last walk-in interview should begin between 3:00 and 3:30 p.m., unless they were close to the end of the statute of limitations. Since Hutter became Director, the door remains unlocked until 5:00 p.m. and individuals who walked in who were nearing the 300 day statute of limitations would be seen for intake but other individuals who walked in late in the day would be asked to return the next day. (4T. 223-224).

Leon testified that she never told Ullah to conduct an interview in either Spanish or Arabic commencing at 4:55 p.m. (4T. 176). Leon testified further she never asked any employee to conduct an interview commencing just before 5 p.m. Leon noted that Cogswell, Gonzalez and herself were also available to handle intake in Spanish. (4T. 177). Leon testified that Ullah never complained to her that she required him to work overtime conducting interviews of individuals who spoke only Spanish or Arabic. (4T. 178).

Leon testified that the only overtime worked by members of the CRTIU was that which they volunteered for as either special projects or during the office move. (4T. 179). Leon testified that to her knowledge, employees are not supposed to work overtime without approval from their supervisor. (4T. 184).

Silvio Fernandez

Fernandez was Deputy Director of the WFO beginning in 1998 and served as Acting Director for six months in 2000 and then briefly in 2002 and again from February to August of 2003. From August of 2003 to August of 2005 Fernandez returned to work as Deputy Director of the WFO. Fernandez explained that the policy that overtime in the WFO should be approved in advance, was posted in memos and employees were verbally reminded. (5T. 419). The first such memo from then WFO Director Tulio Diaz was issued on July 20, 1999 and included the following guidance on time and attendance to WFO employees:

This memorandum is to reiterate the importance of each staff member recording their attendance promptly and accurately. Your daily arrival should be recorded at the time of your arrival. Likewise, your departure and return from lunch time should be recorded at the time of occurrence. This is in accordance with the Supplemental Agreement to the Local Agreement of the Collective Bargaining Agreement. A copy of this agreement is posted on the bulletin board in the copy machine area. I encourage each of you to familiarize yourself with the provisions of this agreement regarding the arrival and departure times and the appropriate times for lunch.

Employees must have a signed leave statement when absent and if onsite should have an approved notice. In addition, employees are expected to designate on the Time and Attendance Sheets the times when they are out of the office for onsites and note the days they are on leave.

All schedule changes must be approved by me.

Another example was a July 28, 2000 email to the WFO from Fernandez including the following guidance and instructions regarding time and attendance:

In anticipation of the upcoming technical assistance review (audit) of our office by HQ, I reviewed the sign-in/sign-out sheets for employees on flexible work schedules of Team I and III. My review found:

1. Some employees fail to sign in and/or out, and/or for lunch.
2. Some sheets do not reflect if an absent employee is on leave or if he or she is absent without leave.

3. Some employees slide and glide even though they are not authorized to keep a gliding schedule as defined by Section 30.04 [C] (2) of the CBA: a "flexible schedule in which an employee has a basic work requirement of eight 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."
4. Some employees sign for more hours than their authorized daily schedule. Remind your employees that the only person who can authorize overtime or comp time in this office is the Director and that there is an established procedure to request overtime or comp.

Supervisors are responsible to monitor the use of sign-in/sign-out sheets and these sheets are one of the controls reported to HQ as in place in our latest Federal Managers Financial Integrity Act (FMIFIA) submission. Direct your employees to make the necessary changes to the time sheets to correct the above-mentioned deficiencies. I will review the corrected time sheets on August 2, 2000 COB.

Pls. remind your employees of the proper sign-in and out procedures and distribute a hard copy of this E-mail to each employee in your respective Teams. Tx. (Tab 4, page 6 of Agency Pre-Arbitration Statement).

Fernandez explained his July 28, 2000 email as explaining that employees were signing in for more than their tour of duty without advanced authorization and they would not be paid for the additional work. (5T. 474-475). Fernandez explained that he advised the staff in that email to only sign in for their authorized daily schedule but that the employees were not working overtime. (5T. 476). Fernandez testified that if an employee is not authorized to work overtime then they are not working overtime. (5T. 476).

Also a March 3, 2003 memo from the Office of Human Resources provided the following advice and guidance regarding overtime to several EEOC offices, including the WFO:

Consistent with the memorandum issued on December 23, 2002 and HRMS Memorandum No. 550-006 dated September 19, 1995, 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:

* * *

- 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.

Fernandez testified that Diaz who was the Director when these memos were issued, was very strict regarding signing in and signing out at the time of the occurrence. (5T. 420). Fernandez noted that these memos were in compliance with the Supplemental Agreements to the Local Agreement of the National Collective Bargaining Agreement. (5T. 420, J. Ex. No. 6). Specifically, Fernandez pointed to Article 11 of the Supplemental Agreement dated June 13, 1996 which provides "all employees shall sign in and out on arrival and departure and sign in and out for lunch in a location designated by Management." (5T. 423, J. Ex. No. 6).

Fernandez testified that he never "suffered and permitted" any work by any WFO non-exempt employee since February of 2000 and that WFO investigators could complete their job within 40 hours per week for 80 hours per pay period. (5T. 430).

Fernandez acknowledged that the staffing level of the WFO has changed dramatically since 2000. In 2000, the WFO had 16 investigators and in 2005, the WFO had six investigators, and at one point had only four investigators. (5T. 431). Fernandez explained that the WFO was able to use interns from Cornell and Berkeley to take up the slack. (5T. 431). Fernandez explained that when he worked in the WFO, investigators were assigned a reasonable workload and cases were maintained in a file cabinet in his office to be distributed and when the summer interns were working some were distributed to the interns. (5T. 432).

Fernandez testified that the sign-in/sign-out sheets are not a reliable indicator of actual attendance in the office because some people did not sign-in and sign-out and did not reflect the times on the sign-in/sign-out sheets. (5T. 435). Fernandez testified further that he made notations on the sign-in/sign-out sheets such as failure to sign-in and arrived late contemporaneously with his observations. (5T. 435).

Fernandez denied ever telling the staff either individually or in a unit or staff meeting that they should not record any actual overtime they believed they had performed. (5T. 438). Fernandez noted that he reissued the 1999 Diaz memorandum when he was Acting Director in 2000 and again when he was Acting Director in 2003. (5T. 439). Fernandez testified that he does not recall ever hearing another supervisor advise employees to only put their tour of duty on the sign-in sheets. (5T. 440).

Fernandez testified that to his knowledge, neither Samantha Canary nor Monique Daniel worked uncompensated overtime from February 2000 to August of 2005. (5T. 442-444). Fernandez testified that he had no knowledge of whether Mills worked overtime because she was physically located in the ADR unit. (5T. 446). However, Fernandez testified that to his knowledge, Mills never requested overtime. (5T. 446). Fernandez testified that he had no personal knowledge as to whether or not Anderson worked any uncompensated overtime. (5T. 448).

Fernandez testified that the building sign-in sheets at 1801 L Street are maintained by a private security company and are not within the EEOC's control. (5T. 452). Fernandez testified further that it never occurred to him to review those sign-in/sign-out sheets. Fernandez testified that Shirley Johnson and Eugene Reed were both always very punctual and signed in on time and signed out on time. (5T. 454-456). Fernandez acknowledged that on the occasions when Reed signed out of the building after 7:00 p.m., he was probably working late. (5T. 510). Fernandez testified that he does not have any knowledge as to whether Easter Winters worked any uncompensated overtime, but commented that her attendance was not good due to health problems that caused her to leave the Agency. (5T. 457). Fernandez also noted that Winters took at least four smoke breaks each day in addition to a one hour lunch. (5T. 457-458). Fernandez testified that to his knowledge Tim Mullins did not work any uncompensated overtime. (5T. 458-459). Fernandez testified that, to his knowledge, Pedro Pladavila and Lynn Smith did not work any uncompensated overtime. (5T. 460-461). Fernandez testified that Kerns worked five doors away from his office and to his knowledge, did not work any uncompensated overtime from 2000 through 2003. (5T. 462-463). Fernandez recalled the Kerns was a good worker and had excellent time and attendance but that her supervisor, Campbell never told him that Kerns worked extra hours or uncompensated overtime. (5T. 464).

Fernandez acknowledged that it is possible that some employees did not sign and out for lunch because they were working through lunch. (5T. 473-474). Fernandez testified that although he did not issue a written statement, he advised employees verbally on several occasions that they must take lunch. (5T. 474).

When Fernandez supervised the intake process, the mandatory tour of duty for all persons assigned to intake was 8:30 a.m. to 5:00 p.m. (5T. 499).

Before Hutter changed the policy to allow walk-ins until 5 p.m., the WFO has a policy that if a charging party entered the office after 3:00 or 3:30 p.m., he would be given a form to complete and then an appointment was set for a later date. (5T. 501-502). Fernandez testified that he never instructed employees in writing not to take work home with them because he didn't know anyone other than those who were telecommuting took work home. (5T. 510).

Hyacinth Clarke

Hyacinth Clarke has been an investigator in the WFO since August 23, 2004 where she is currently working in her second term as a term employee. (5T. 598). Clarke worked an eight hour tour of duty until Spring of 2005 when she began working a 5/4/9 scheduling coming in from 9:00 a.m. to 6:30 p.m. with alternating Fridays off. Clarke testified that in September of 2005, she worked on a special project to complete and close aged cases was paid overtime for that work. (5T. 555-556). Clarke testified that when she worked on the special project closing aged cases, she accrued approximately 20 hours of comp time and when she used that comp time, she entered it in the "other leave used" category on the Time and Leave statements. (5T. 627-628).

In December of 2004 or January of 2005, Clarke learned that the WFO was behind its office goals for the end of the first quarter and so she worked extra to try and keep up. (5T. 558). Clarke explained that she would take position statements home and read them on the train ride. (5T. 559). Clarke testified that her supervisor did not know that she was taking position statements home. (5T. 559). Once she learned that she was not supposed to bring things home and work on the train, she stopped doing so except when she was telecommuting as an accommodation. (5T. 560, 562). Clarke testified that in addition to learning that she should not work at home from the Union, Hutter and Stump both told her she should not bring things home to work on without prior approval. (5T. 560-561). Since that time, Clarke has not done Agency work other than the special project, outside of her tour of duty except when she worked on a Saturday doing an outreach program for the Agency in September of 2005 speaking to a Sikh organization. (5T. 562-563). Clarke testified that she received comp time equal to the amount of hours she worked performing the outreach. (5T. 563-564).

Clarke testified that she believed it is possible to complete her assigned work within 80 hours a pay period. (5T. 564). Clarke testified further that she has not been pressured by any supervisors to work any overtime and has been specifically told not to work after her tour of duty. (5T. 564-565). Clarke testified that on occasion, when she is late as a result of delays in public transportation, she discusses it with Stump and she will either work through lunch or make up the time at the end of the day. (5T. 565-566).

Clarke testified that she used to eat lunch with Nicole Chandler and Ullah and, after an hour, she would get up and return to work and Chandler and Ullah would remain seated in the break room once or twice a week. (5T. 566-567). Clarke estimated that Chandler and Ullah would remain in the break room for an additional half-hour because their cubicles are right beside each other and she would observe when Chandler and Ullah returned to their cubicle. (5T. 567-568).

Clarke testified that three or four times a week, she and Cogswell would stay in the office late and talk about non-work-related issues until after 7:00 p.m. (5T. 607). Clarke testified that she frequently saw Reed staying after his tour of duty but he does not sit near her so she has "no idea what Mr. Reed does." (5T. 623). Clarke added that Reed often travels to New York directly from the office. (5T. 624).

Elisa Cogswell

Cogswell testified that when she came to the Agency on July 12, 2004, she had never before worked with Title VII of the Civil Rights Act and stayed late doing a variety of things including reading manuals and on one occasion, to accommodate a charging party. (5T. 654-655). Cogswell testified that she initially worked on a slide and glide schedule and if she worked an extra half-hour, Janice Campbell would let her take the time another day. (5T. 709). At some point, Stump, before she became a supervisor, told Cogswell that she did not have to stay late. Cogswell testified that she explained that she was just learning the job and enjoyed the work. (5T. 655). Later, after Stump became a supervisor, she and Hutter both told Cogswell that she was doing fine and she should go home. (5T. 656). Cogswell testified that Stump told her not to stay late over a dozen times and Hutter made similar comments approximately a dozen times. (5T. 657). Cogswell testified that as her tenure as an investigator increased and her comfort level with the issues increased, she worked less on the weekends. (5T. 658). However, Cogswell testified that she did on occasion continue to work beyond her tour of duty and on weekends. Cogswell testified further that she does not believe that either Stump or Hutter were aware of the amount of time she worked on weekends. (5T. 659). Specifically, she testified that usually she worked overtime but did not alert either Stump or Hutter to the fact that she was doing so. (5T. 659-660).

Cogswell testified that at present it was not possible to perform her job within 80 hours per pay period since there were only two individuals investigating, taking charges over the phone, answering mail charges and handling onsite investigations. (5T. 660).

Stump and Hutter have both advised Cogswell that she need not work so hard and Stump has told her "just remember, you're only one person." (5T. 661). Cogswell testified that Nicole Chandler left the office frequently at 2 p.m. to go to Baltimore for class and she would be asked to handle walk-in charges in

Chandler's absence. (5T. 662). Cogswell was not sure of Chandler's hours but believed that she had every other Monday off. (5T. 663).

Cogswell testified that she frequently observed Ullah sitting at his desk sleeping. (5T. 665). Cogswell testified that Ullah arrived at work very early from Stafford County and Cogswell believed that as a result, he was tired and fell asleep.

On July 13, 2004, Cogswell signed in at 8 a.m. and signed out at 6:45 p.m. (5T. 712: U. Ex. No. 2 at p. 542). Cogswell acknowledged that she worked at least two hours and fifteen minutes in excess of eight and one-half hours on July 13 and that Campbell would have been aware that she was performing work outside her normal tour of duty. Cogswell acknowledged that on July 14, 2004, based upon the sign-in/sign-out sheets, she worked 41 minutes in excess of eight and one-half hours, from 8:19 a.m. to 5:30 p.m. (5T. 715: U. Ex. No. 2). On July 16, 2004, Cogswell also worked from 8:19 a.m. until 5:30 p.m. with one half hour for lunch. (5T. 723-724: U. Ex. No. 2, p. 543). Cogswell testified that this was a pretty typical week and that she worked between 43 and 45 hours. (5T. 725). Cogswell testified that she did not receive compensation for the additional time. (5T. 725).

Hutter and Stump have both told Cogswell that she needs to eat but neither have specifically told her that she needs to take a half-hour lunch break each day. Cogswell testified that while she spent virtually all of her time at work on weekends performing work, some portion of the time she spent at work after hours she spent in personal conversation with Clarke. (5T. 731-733). Cogswell testified that she typically ate two frozen meals each day at the office, one for lunch and one for dinner. (5T. 742). Cogswell testified that when, she came in on the weekends, she did not advise her supervisors that she would be doing so. (5T. 744). However, Cogswell acknowledged that it was likely that her supervisors were aware through her work product that she was working on the weekends. (5T. 745-746). Cogswell testified that Hutter and Stump repeatedly told her not to work overtime and she stopped working overtime after she had worked for the WFO for approximately a year and a half. (5T. 759). Cogswell testified that she has taken a charge on intake very late in the day at 4:50 or 5 p.m. (5T. 760). Cogswell testified that if a charging party comes in near the 300th day (the statute of limitations), their charge will be taken no matter how late in the day. (5T. 763).

During the summer of 2005, Cogswell worked on a project to close aged cases and was pre-approved to work beyond her tour of duty and received comp time. (5T. 651-652). In January of 2006, Cogswell again worked on a special project and kept track of her hours to submit for comp time. (5T. 653).

The lobby security sign-in and sign-out sheets for 1801 L Street reflect that Cogswell signed out after 7:00 p.m. on a regular basis between September

2004 and September 2005. Those sign-in and sign-out sheets reflect that Cogswell entered the building on weekend afternoons between September 2004 and September 2005 as follows:

November 6, 2004	5:37 – 6:14
November 14, 2004	3:43 – 5:09
November 21, 2004	1:25 – 6:10
December 11, 2004	11:11 – 11:44
December 12, 2004	2:50 – 4:24
January 15, 2005	2:30 – 6:26
February 6, 2005	1:38 – 6:55
February 13, 2005	1:51 – 5:20
March 6, 2005	1:34 – 6:11
March 13, 2005	2:12 – 6:41
March 19, 2005	2:23 – 5:45
March 27, 2005	3:05 – 4:05
March 27, 2005	4:10 – 6:18
May 29, 2005	4:40 – 6:11
June 5, 2005	4:06 – 6:52
August 6, 2005	5:25 – 5:27
September 25, 2005	5:18 – 5:24

Review of the building security logs at 1801 L Street shows that in several instances, the sign-in or sign-out by Cogswell was incorrectly redacted and therefore illegible.

Tram Ngo

Tram Ngo has been Acting Charge Intake Supervisor in the WFO since November 7, 2005. Before that, Ngo worked as an investigator on a 5/4/9 schedule in the WFO beginning in 1999. (6T. 7-8). According to Ngo, from 2000 through November of 2005, she was able to complete her work within 80 hours per pay period. (6T. 20). Ngo estimated that, in a typical year, she conducted five to seven onsite investigations, and of those one or two per year caused her to work beyond her tour of duty for an hour to an hour and a half. (6T. 9). On those occasions, she would tell her supervisor that she worked outside of her tour of duty and they would work it out informally by either leaving early the next day or on the day of her choosing. (6T. 9-10). This practice was in line with Ngo's understanding that, if one works beyond one's tour of duty, one can take the time off the next day or in the future with the supervisor's knowledge. (6T. 10). Although typically Ngo would fill out a form when she took comp time, she did not always fill out a form when she was taking off an extra hour after having worked extra time. Specifically, Ngo testified that if she worked in excess of an hour more than her tour of duty, she would fill out a comp time form, but if it was a half-hour she would simply advise the supervisor informally. (6T. 12).

Ngo testified that she never worked through lunch except when working intake. (6T. 13). When she worked in excess of her tour of duty while on intake, Ngo either came in late the next day or left early after discussing it with her supervisor, either Salacuses or Campbell. Ngo recalled that at various times investigators working on intake were required to take lunch between 11:30 a.m. and 2 p.m. but if there was sufficient staff, investigators working on intake could take lunch whenever they wanted. (6T. 16). Ngo estimated that in 2000, there were approximately 10 to 12 investigators in the WFO. (6T. 19). Ngo estimated that when she was hired in 1999, there were approximately 16 investigators. In the intervening period until November of 2005, there were between 7 and 10 investigators in the WFO. (6T. 19-20).

Ngo recalled that if an employee did not complete the sign-in/sign-out sheets, Fernandez would highlight that name. (6T. 21). Ngo thought that the purpose of the sign-in/sign-out sheets in the WFO was to ascertain who was at work and who was not in the event that a supervisor needed to find a replacement to do intake. (6T. 22).

Since Ngo was promoted to Acting CRTIU Supervisor in November of 2005, Allen, Reed and Martinez have reported to her. (6T. 24). Ngo testified that on one occasion, Allen turned in an overtime request to her. Ngo testified as to her understanding that when an employee is required by their job responsibilities to work past their tour of duty, the only option was comp time. (6T. 33). Ngo testified that she was not aware that she could receive overtime pay instead of comp time. (6T. 34). Ngo testified that when she worked as an investigator, she sometimes had to speak with charging parties in the evenings but never arranged to speak to charging parties on the weekend. (6T. 37). Ngo estimated that she spoke to one or two charging parties after hours each year for approximately one-half hour each. (6T. 38). Ngo testified that when she did work extra by having contacts with charging parties after hours, she would either leave early or come in late and, if it was a small amount of time, such as fifteen minutes, then she would just let it go. (6T. 39).

Ngo testified that she made every effort to complete the sign-in/sign-out sheets accurately and tried to take a full hour lunch each day. (6T. 41-42). Ngo testified that when she did work in excess of her tour of duty, she kept track of it on her calendar and on the sign-in/sign-out sheets. Ngo acknowledged that when individuals came in to file charges near the end of the work day, they were often required to return or to complete a phone interview the next day unless they were nearing the 300 day deadline. (6T. 45). Ngo acknowledged that on occasion, an employee would be required to stay late to take such a charge, but it never happened to her. (6T. 46).

John Woods

John Woods worked as an investigator at the WFO from 1997 until 2001, when he became a CRTIU Supervisor. In 2002, Woods became a mediator until he was promoted to ADR Supervisor in 2003. Since December of 2003, Mills, Anderson and Mel Thomas Ally report to Woods. As CRTIU Supervisor, Woods supervised Johnson, Reed and Winters.

Woods testified that, based on his experience, he believes that the mediation work of an EEOC Staff Mediator can be completed within an 80 hour work period. (6T. 85-86). Woods testified that Anderson could complete her work as a mediator within 80 hours per pay period. (6T. 90). Woods explained that mediations take on average from two to five hours. (6T. 91).

Woods related that after Anderson was removed from an AWS schedule and worked a straight eight-hour schedule, he believed that she intentionally scheduled mediations late in the day so they would go beyond her tour of duty. (6T. 92). Woods testified that when Anderson worked the 4/10 schedule, she scheduled her mediations in the morning. However, when she worked a straight eight schedule, she began scheduling mediations starting at 2 o'clock and since she was off at 4 o'clock, the mediations would go beyond her tour of duty and she would receive credit hours and take time off later in the pay period. (6T. 94-95). Woods indicated that, when Anderson sought comp time for these extra hours, it was provided. (6T. 92). Anderson received 1.5 hours of comp time for the pay period ending October 30, 2004 and 3.5 credit hours for the pay period ending November 27, 2004. (6T. 97-98; U. Ex. No. 7H).

Woods testified that he found the sign-in/sign-out sheets to be unreliable because he frequently forgot to sign in or sign out and would complete the sheets based upon his recollection. (6T. 100-101). According to Woods, from December of 2003, until the middle of 2005 when Anderson left the EEOC, she never certified a claim for overtime. (6T. 104). According to Woods, when the WFO was at 1400 L Street, Anderson stayed at the office late every evening and used her office for personal use and the gym located in the building. (6T. 108-109). Once the WFO moved into the headquarters building at 1801 L Street and she worked a straight eight-hour schedule, Anderson left pretty much on time, according to Woods. (6T. 108). Woods also overheard Anderson on the phone and observed faxes from real estate brokers and believed that Anderson was purchasing or attempting to purchase investment property. (6T. 112). Woods testified that to his knowledge, Anderson did not work on weekends, and when she was in the office on weekends, it was for personal business. (6T. 118). Woods testified that he believed that Anderson did not work during lunch and indicated that she would inform him that she was taking lunch early when she had a 12 o'clock mediation. (6T. 117). Woods testified that when Anderson performed mediation outreach, she was not required to work beyond her tour of duty. (6T. 119-120).

In August of 2004, Anderson told Woods that she needed an hour to follow-up on a telephone mediation and, according to Woods, she was compensated with comp time. (6T. 173). Woods testified that Anderson was not given the option to elect overtime or comp time but was only given the option of comp time. (6T. 174). Woods testified further that Anderson was also told that if she needed to work beyond her tour of duty, she should communicate that to Woods beforehand. (6T. 174) (See A. Ex. No. 16). Woods acknowledged that if Anderson needed to continue a mediation, he did not expect her to stop the mediation in mid-stream in order to seek permission, but to come see him afterwards for credit hours or comp time. (6T. 177).

Computer entries on December 10, 2003 reflect that Anderson was working on documents at 10:54 p.m. and 11:01 p.m. respectively. When questioned about the likelihood that Anderson was working on mediation documents at that time of night, Woods testified:

As I stated before, Ms. Anderson, in essence, lived in her office, so it doesn't shock me that she was here at 11 o'clock or even at 6 o'clock but under no circumstances did she have permission or should have been working on any documents past her normal tour of duty.

Woods explained that when he entered Anderson's office when she was eating with the door closed, she would be eating and reading the newspaper. (6T. 204).

Woods recalled a conversation with Anderson regarding good places to invest in real estate. Woods recalled that he indicated that Baltimore is a good investment. (6T.232). Woods testified that he had engaged in real estate transactions in 1997 and 1998 and was not investing in real estate at the time in 2002, but still paid attention to the real estate market. (6T. 232).

Woods testified that he believes that Mills has been paid overtime for special projects. (6T. 121). Woods testified that he does not believe that Mills worked more than 80 hours a pay period since 2003 but has not reviewed either her sign-in/sign-out sheets or any sign-in/sign-out sheets that she may have completed at the guards desk in the lobby. (6T. 122). Woods testified that the only time he can remember seeing Mills in the office on the weekend was in November and December of 2005 was when she was working on the special project with the administrative judges. (6T. 124-125). Woods recalled that Mills also worked overtime on another special project in addition to the special hearings project, and was paid for it. (6T. 129). Woods testified that Mills had no need for overtime because the way her "employment is structured, it definitely can be done within the time frame that's allotted..." (6T. 126).

Woods testified initially that he believed that there was "absolutely no work" that Mills could do at home because her primary duties are filing, data input and telephone calls. (6T. 130). Woods testified that Mills' work sending out scheduling letters is work that can be done at home but it is work that should be done at the EEOC and that he would prefer that it not be done at home. (6T. 206). Woods testified that to his knowledge, Mills made one phone call outside of work, that was shortly before she was scheduled to have surgery, and she had forgotten to inform an attorney of another party's participation in mediation, so she called that attorney from the hospital. (6T. 130). Woods testified that he was surprised that Mills had called the attorney from the hospital, but he did not provide compensation for that call. (6T. 131). Woods testified that to the best of his knowledge, Mills never worked through lunch. (6T. 133). According to Woods, Mills eats lunch at her desk and lets everyone know that she is at lunch and is not to be disturbed. (6T. 133). Woods testified that he has never seen or been aware of whether Mills arrived and began working before 7 a.m. (6T. 135). However, Mills had a part-time job that begins after her EEOC job, so she often stayed until it was time for her to go to her part-time job. (6T. 135). Woods testified that during that period, Mills typically turned her computer off and made personal calls that were "louder" and included "a lot of laughter." (6T. 136). Woods explained that he learned about Mills' part-time job when he used to tell her to go home at the end of her workday and she informed him that she had a part-time job. (6T. 137).

Woods testified that the ADR Unit often discussed overtime during staff meetings and emphasized that overtime, compressed schedules and credit hours could not occur without prior notice. (6T. 131). Woods testified that he did not issue any directives but constantly reiterated that overtime had to be approved in advance. (6T. 209).

Michael Edmondson

Michael Edmondson has been the Chief of the Desktop Support Branch and the Supervisory Information Technology Specialist since June of 2001. Edmondson explained that there are software programs that allow the user to modify the date modified information on a network drive. (6T. 54-57). Edmondson testified that for someone who is "computer savvy," using such software would be easy and a novice "could probably figure out how" to use the software. (6T. 58). Edmondson testified that the date modified could also be changed by an employee with administrative rights who was logged into the PC or when an individual gets a new computer, the migration to a new PC could result in changing the date that the document was modified. (6T. 61-63).

Edmondson also testified that the date modified shown on a document in the network drive would, 99 times out of 100, show the actual date when a file is created. (6T. 64). However, Edmondson testified that there is a Novel network quirk that results in changing the date and time to reflect when the file was

accessed by the network virus scanner if the machine was left on overnight. (6T. 65). Finally, if a file is copied from one machine to another, it could have a creation date that was later than the modified date, which would remain the date when someone last opened the file and made a change. (6T. 67).

DISCUSSION

I have carefully reviewed and considered the arguments and evidence presented by the Agency and the Union in support of their positions. The Union has the burden to prove that the Grievants performed "suffered and permitted" overtime work since January of 2000.

The Union argues that the Agency willfully violated the Fair Labor Standards Act (FLSA) because it directed employees to sign in and sign out with the hours of their normal tour of duty regardless of the hours they actually worked. The Union contends that the Agency was aware, through its supervisors and management that employees were working uncompensated overtime and it failed to either compensate them or to halt the overtime. Additionally, the Union claims that the Agency violated the FLSA when it failed to keep accurate records of arrival and departure times in violation of both Department of Labor and Office of Personnel Management (OPM) record-keeping requirements.

The Union maintains that its burden of proof is limited to showing evidence sufficient to prove that overtime was worked as a matter of just and reasonable inference. First, the Union maintains that the Agency's records are unreliable and inaccurate in violation of §11(c) of the FLSA which requires employers to "make, keep and preserve records" of employees and "their wages, hours, and other conditions and practices of employment." 29 U.S.C. §211(c); 29 C.F.R. 516.1. Citing 29 C.F.R. §516, the Union contends that employers are required to maintain records for non-exempt employees of "the hours worked each day and the total hours worked each workweek." However, the Union argues that the sign-in and sign-out sheets maintained by the Agency were not accurate because many employees record the hours of their regular tour of duty rather than the times they actually arrive and depart. Additionally, the Union points out that between 2002 and 2003, the Agency instructed employees to sign-in and sign-out at their scheduled tour of duty rather than at their actual arrival and departure times.

The Union emphasizes that current WFO Director Hutter issued a memo to WFO employees eliminating the use of the sign-in/sign-out sheets. The Union notes that when the sign-in/sign-out sheets were eliminated, Local Union President Andrew discussed the policy change with Hutter. Addressing the Agency's claim that Andrew agreed to the changed policy, the Union maintains that it and the Agency cannot agree to a procedure that violates the law. The Union claims that the Agency's determination to eliminate the sign-in/sign-out sheets, particularly during the period when there is an ongoing overtime

grievance, was an attempt to thwart the Union's efforts to find facts regarding the grievance and to destroy documentary evidence going forward. Additionally, the Union emphasizes Hutter's testimony that the sign-in/sign-out sheets were unreliable and inaccurate because employees failed to sign-in and sign-out accurately.

The Union contends that employees should not be required to maintain records and prove overtime worked, particularly in light of the Agency's statements that there would be no compensation for excess work. The Union also points out that the Agency was in the best position to accurately and properly record actual time worked.

The Union emphasizes that OPM provisions provide that employees should not be penalized for the failure of the Agency to maintain proper records. Rather, the Union contends, that in order to show that an employer has violated the FLSA, an employee must "show the amount and extent of overtime work as a matter of just and reasonable inference." Davis v. Food Lion, 792 F.2d 1274, 1276 (4th Cir. 1986), Anderson v. Mt. Clements Pottery Co., 328 U.S. 680, 687, 66 S. Ct. 1187, 90 L.Ed. 1515 (1946). The Union maintains that testimony regarding overtime worked was corroborated by the sign-in/sign-out sheets required to be completed to access the building at 1801 L Street before and after work hours and on weekends as well as screenshots from employee's computers and testimony from supervisors.

The Union maintains that the employer had actual and/or constructive knowledge that overtime work was being performed by WFO employees. The Union maintains that instructing employees not to report overtime hours worked is evidence supporting an inference of knowledge of the overtime worked. In support, the Union points to the Agency's effort to advise employees to sign-in and sign-out at the hours of their regular tour of duty rather than the actual hours worked. The Union maintains that both documentary evidence and testimony shows that the Agency knew that employees were working overtime.

The Union argues that employees should not be punished for the Agency's failure to comply with the law and partial compensation for overtime hours worked does not preclude recovery of overtime pay or damages. The Union argues that the employer's failure to maintain accurate and complete records should not preclude the Grievants' recovery of overtime pay.

The Union contends that the testimony shows that employees worked overtime without receiving proper compensation. The Union maintains that each of the employees who testified credibly that they worked during their lunch hour, stayed late or took work home without receiving full or proper compensation. The Union explains that the WFO has been understaffed while workload has increased exponentially over the past several years and these factors have put pressure on the Agency. The Union maintains that the Agency was aware that

the work got done but did not question how fewer employees performed work in the same amount of time. The Union maintains that these employees were in fact working overtime without compensation.

The Union emphasizes that under the FLSA the term "employ" includes "work not requested but suffered or permitted." 29 C.F.R. §785.11. The Union acknowledges that unless the employer is aware of or has reason to believe that an individual is performing work on its behalf, the work is not covered by the FLSA but the employer has an affirmative duty of reasonable inquiry under the prevailing business conditions to determine whether work is performed on its behalf. The Union points out that the overtime work at issue always exceeds the minimum seven minutes provided in the parties' collective bargaining agreement. The Union cites OPM regulations providing that preparatory and concluding activities that are closely related to an employee's principal responsibilities are compensable as overtime. 5 C.F.R. §551.412(a)(1).

The Union argues that the testimony supports its contention that employees worked suffered or permitted overtime without proper compensation for the additional hours of work. Turning first to the testimony of Anderson, the Union points to her testimony that she worked in excess of 40 hours per week as a mediator in the WFO as exemplified by sign-in/sign-out sheets at the guard station in the building's lobby and by WFO sign-in/sign-out sheets. The Union emphasizes Anderson's testimony that she worked through lunch three to four times per week and came to work on weekends and her AWS day. The Union highlights Anderson's testimony that when she began working at the WFO she worked every weekend for approximately 10 to 12 hours in order to maintain the ADR office and then later, she worked one weekend day per month for approximately six hours. The Union points to the evidence confirming that Anderson worked overtime on evenings and weekends by providing screen shots of the work on her computer.

The Union points out that Anderson testified that she was unaware that employees were not to perform overtime work without prior approval and that she did not tell any of her employees, including Mills that they could not work overtime. The Union asserts that the Agency took no affirmative actions to prevent overtime work from being performed and that Anderson was never told by her supervisors that she needed to go home or that she could not perform Agency work after hours.

Turning to Mills' testimony, the Union points out that she regularly came to work before 7 a.m., worked through lunch and stayed late but received comp time for only a small percentage of those hours and received no overtime pay.

The Union claims that the Agency's assertion that it told an employee to go home does not prevent liability for overtime work performed. The Union points out that only Woods told Mills to "go home", a statement she believed to

be a joke. The Union also points out that there is no evidence that Woods told Mills to "go home" because he believed that she was doing overtime work. Based on Mills compressed work schedule, she could have arrived at any time between 7:30 and 10:30 a.m. and thus, according to the Union, Woods had no way of knowing whether Mills had worked a full day at 5 p.m. when he told her to go home.

The Union points to Holmes-Frazier's testimony that she believed the WFO policy to be that employees were to sign-in and sign-out with the hours of their tour of duty rather than the actual times of their arrival and departure. The Union points out that Holmes-Frazier followed that policy and testified that there was not enough time to finish the work. Citing Holmes-Frazier's testimony, the Union claims that employee performance was based on closing a certain number of cases, generally 80 to 90 each year, and the production standard resulted in many employees working overtime because they understood that there would be adverse consequences if the work was not completed. Specifically, the Union points to Holmes-Frazier's testimony that she was removed from her telecommute alternative work schedule when she received a memorandum citing production standards and failure to close enough cases.

Like Holmes-Frazier, Kerns testified that initially when she completed the sign-in/sign-out sheets, she recorded her actual times of arrival and departure, but was then told to list only the hours of her tour of duty on the sheets. The Union cites Kerns' testimony that she worked through lunch while working in the intake unit and cites Hutter's corroborating testimony that employees often must work through lunch or skip lunch while working in the intake unit. The Union also cites Kerns' testimony that she would arrive at work early and take work home.

The Union also cites Hutter's testimony that Cogswell regularly worked at times outside of her tour of duty. Specifically, the Union points out that Cogswell reported eight hours of work per day each day on the bi-weekly Cost Accounting time sheets between October 2004 and January 2005, the same period during which Hutter testified that he spoke with Cogswell about not working beyond her tour of duty. The Union suggests that the only reason for Hutter to remind Cogswell not to work beyond her tour of duty would be because she was working overtime. Additionally, the Union points out that for this same period, the sign-in sheets in the building's lobby show that Cogswell was working beyond her tour of duty and that she regularly left the office after 8 p.m.

The Union claims that the WFO sign-in/sign-out sheets as well as the sign-in and sign-out sheets at the building's guard station support the testimony that employees regularly performed Agency work after hours. The Union points out that the lobby sign-out sheets show that both Cogswell and Stanfield regularly left the office after 7 p.m. Similarly, the Union points out that Anderson frequently signed out between 7 p.m. and 8 p.m. and on other occasions signed out well after 8 p.m. The Union also notes that employees, including Ullah,

Kerns and Reed, frequently left between 6:30 and 7 p.m. and Ullah often arrived before 7 a.m. The Union notes that the building's sign-in sheets reflect that Cogswell, Stanfield, Mills and Kerns all came into the office on weekends.

The Union maintains that testimony of Agency witnesses including Stump and Gonzalez corroborate that employees did perform overtime work without proper compensation. The Union cites Stump's testimony that she frequently told Cogswell not to take work home, not to stay late and not to worry about it and was unaware of whether Cogswell was compensated for all of the hours of work that she performed particularly on Saturdays and Sundays. The Union also points out that Gonzalez testified that he regularly signed out for lunch and then often ate lunch in his office, sometimes performing work, including phone calls or reading documents without additional compensation. The Union also points out that Gonzalez occasionally called charging parties on evenings and weekends without proper compensation and, according to the Union, Gonzalez testified that his supervisors were aware of this. The Union in particular highlights Gonzalez' testimony that there is currently a shortage of investigators and that "perhaps" an investigator could perform the job within 40 hours per week.

The Union argues that the Agency's claim that breaks of fewer than seven minutes in duration should negate an employee's overtime claim is inaccurate. Specifically, the Union addresses the Agency's contention that Holmes-Frazier took daily smoke breaks asserting that such breaks were de minimus because they lasted fewer than ten minutes and there is no Agency policy requiring employees to sign in and sign out for smoke breaks. The Union claims that the Agency's arguments regarding employee's personal use of the computer is an attempt to punish employees for such de minimus use.

The Union argues that Hutter's allegations that Anderson was not performing Agency related work during the workday are unsupported. The Union maintains that Hutter's only evidence in support of this contention was that he observed Anderson wearing a "gym suit" on a few occasions.

The Union challenges Stump's credibility citing her testimony regarding the extent to which Stanfield engaged in non-work related activities during the workday. Specifically, the Union points out that Stump claimed that Stanfield and other employees were taking long lunch breaks but was unable to testify as to whether these incidents were more than de minimus in nature and had no notes or records of these incidents. Additionally, the Union points to Stump's testimony that she did not recall hearing Fernandez tell employees to sign in and out based on the hours of their tour of duty, and subsequently admitted that she had told the Union that she heard Fernandez direct employees to record their tour of duty hours rather than the actual time of their arrival and departure on the sign-in/sign-out sheets. The Union also points to Stump's testimony that she performed work at home on weekends and during lunch without additional compensation.

The Union argues strenuously that the Agency knew, or should have known, that overtime work was being performed because the Agency was short-staffed and continued to expect the same output from employees. The Union points out that at times the Agency was working at one-quarter of its ideal staffing level. The Union cites Hutter's testimony that he had requested additional investigators and was in the process of hiring two new investigators. Additionally, the Union points out that Hutter acknowledged that the work was getting done by only three to four investigators. The Union contends that the Agency was well aware that it was short-staffed but that the work was still getting done and thus, should have known that its employees had to work additional hours in order to complete the work. The Union maintains that employees have a choice to work extra hours and receive successful performance evaluations or leave the work unfinished, thus receiving poor performance appraisals and possible termination.

The Union points out that Mills and Kerns both testified that their supervisors never told them not to work in excess of their tour of duty. The Union notes that with respect to Mills, Anderson corroborated this testimony and indicated that there was simply too much work to complete in an eight-hour day.

The Union argues that supervisors observed employees performing overtime work. Relying upon the testimony of Anderson, the Union cites her testimony that her supervisor knew she worked overtime and during lunch and pointed out that her supervisor regularly checked the sign-in/sign-out sheets. The Union also points to Anderson's testimony both that she knew that Debra Mills worked overtime without compensation and that no informal "off the books" arrangement for comp time was available. Citing Mills' testimony that her office has always been near her supervisor's office, the Union points out that her supervisors have been aware of her good work ethic and that she was regularly observed working in her office over lunch hours.

As corroboration, the Union cites Woods' testimony that he saw Mills in the office on a flex day and his acknowledgement that she made at least one phone call from home. The Union also points to Woods' testimony that he has worked on his AWS day without compensation and has worked through lunch when he was an investigator in 2000 and 2001. The Union cites Holmes-Frazier's testimony that she has worked through lunch and that her supervisor has observed her eating and working at her desk as well as working late after her tour of duty ended. The Union points out that Holmes-Frazier testified that she saw other employees, including Kerns and Anderson, working late.

The Union argues that the Agency did not fulfill its duty to ensure that overtime work was not being performed and it did not refuse to accept the benefits of this overtime work. Addressing the Agency's argument that, due to employees on alternative work schedules, a supervisor would not know whether an employee had completed his or her tour of duty by 5 or 6 p.m., the Union

contends that the sign-in/sign-out sheets were regularly monitored and certified by supervisors and they could easily check to see when an employee had arrived if they were concerned with overtime. The Union maintains that the standard to gauge an employer's awareness is "whether the circumstances ... were such that the employer either had knowledge of overtime hours being worked or else had the opportunity through reasonable diligence to acquire knowledge." The Union argues that the Agency should be required to take every necessary step to ensure that no overtime work is being performed and if the employer seeks to prevent such work, it must make every effort to do so.

Addressing the Agency's argument that it ordered employees to go home and therefore is not liable for work suffered and permitted, the Union asserts that the employer is liable for compensating an employee for time worked on behalf of the employer if the work is accepted and the employer does not stop performance of the work. Citing Reich vs. Stewart, 121 F.3d (8th Cir. 1997), the Union asserts that work performed by an employee before or after scheduled working hours, even if not requested, must be compensated if the employer "knows or has reason to believe" that the employee is working and the duties are an "integral and indispensable part" of the employee's job.

Turning to the issue of a remedy, the Union argues that employees are entitled to overtime compensation for all hours worked in excess of 40 per week and/or eight per day whether the Agency provided compensatory time or credit hours. For those hours in which employees received no compensation, the Union claims that damages should be calculated at an overtime rate of time and one-half plus the greater of liquidated damages or interest under the Back Pay Act. The Union maintains that for hours in which employees received compensatory time without being given the choice of overtime pay, damages should be calculated using an overtime rate of .5 of the hourly rate plus the greater of liquidated damages or interest. The Union maintains that employees on flexible work schedules are entitled to overtime compensation as well and the Agreement's provisions regarding flexible work schedules at Section 30.07 should not affect the ability of those employees to elect overtime. The Union maintains that there is no legal authority for the Agency to require non-exempt employees to take comp time in lieu of overtime pay under the FLSA. The Union emphasizes that in this case employees were specifically and repeatedly advised that there was no money available for overtime compensation and were only permitted to accept involuntary comp time. Accordingly, the Union maintains that those employees should be compensated to the overtime for which they were entitled. Due to the difficulty in calculating damages in this case, the Union seeks an interim decision regarding the Agency's liability.

Initially, the Agency asserts that the Union's grievance does not meet the minimum requirements of the parties' grievance procedure. Specifically, Section 41.07, Step 1, requires that the written grievance both identify the employee and office and the incident and date on which it occurred. The Agency maintains that

the Union's grievance cites unidentified time and attendance sign-in/sign-out sheets but does not cite the date, specific violation, or any specific non-exempt employee. Additionally, at Step 2, the Union continued to make general allegations that Agency supervisors were aware of the alleged overtime and that employees could not complete their work in the allotted time. The Agency points out that also at Step 2, no names, incidents or specific details were included. The Agency emphasizes that Section 41.07, Step 2 of the parties' Agreement specifically provides that "any issues not raised in the grievance by Step 2 are waived." For these reasons, the Agency seeks dismissal of the grievance for failure to provide the required specifics by Step 2 that would allow the Agency to respond to the grievance. The Agency notes that the Union's expansion of the detail of its claims during the arbitration does not cure the Step 2 contractual deficiency.

Turning to the merits, the Agency argues that WFO Grievants are not entitled to overtime pay under the FLSA for all hours worked in excess of eight in a single workday. According to the Agency, the FLSA and the Federal Employees Pay Act (FEPA) both provide frameworks for calculating overtime pay for federal employees. The Agency points out that FEPA, together with implementing OPM regulations, require that overtime be ordered or approved in writing. The Agency asserts that a claim under either FEPA or the FLSA for overtime for hours worked in excess of eight in one day, is available only when the overtime has been ordered or approved in writing. The Agency argues that in this instance, there is no evidence that overtime over eight hours in any one workday was ever ordered or approved in writing for any WFO employee. Rather, according to the Agency, only claims for hours worked in excess of 40 in a single workweek may be considered under the suffered or permitted standard. Because this standard applies to both flexible and compressed work schedule employees, compressed schedule employees must show overtime hours worked in excess of 80 in a single pay period in order to prove suffered and permitted overtime, according to the Agency. The Agency maintains that in order to show overtime for more than 40 hours of work in an administrative workweek, the Agency asserts that an employee must show that he or she worked more than 40 hours, specifically excluding times set aside for eating. The Agency emphasizes that, for the most part, Grievants routinely took a daily one-hour lunch break. The Agency points out that the sign-in/sign-out sheets generally reflect an 8 ½ hour workday with a one-hour lunch period.

The Agency explains that under the parties' "old" Agreement, effective in 1995, employees were permitted a one-half hour lunch period that was extended to one hour by virtue of adding two paid 15 minute rest breaks to their one-half hour lunch period. However, according to the Agency, this provision was omitted from the current collective bargaining agreement, effective September 2, 2002 after the FLRA determined that it was not permissible to compensate employees for time set aside for eating. However, the Agency points out it is undisputed that it continues to permit one-hour lunch breaks and continues to pay employees for

"rest periods." The Agency argues that its "kindness" in continuing to pay employees for part of their lunch period, for the two rest periods, should not be used to support a claim that the rest period portion of the daily lunch hour is part of the workweek under the FLSA. The Agency maintains that the Union must demonstrate that Agency work was performed during any lunch or rest periods that the Union seeks to count as part of any overtime claim to prove work for the Agency was performed in excess of a 40 hour workweek or 80 hour pay period. The Agency argues that time set aside for eating cannot be counted as hours of work as it is expressly prohibited by law. The Agency argues that in order to prevail in this case, the Union must show that each and every Grievant worked over four or five hours of uncompensated overtime per pay period in excess of their tour of duty.

The Agency argues that hours worked by flexible schedule employees in excess of eight hours per day, or 40 hours per week, are "credit hours" to be applied before annual leave and are not considered overtime under the FLSA. The Agency notes that three investigators who testified, Holmes-Frazier, Ullah, and Kerns all were flexible schedule employees for some or all of the period at issue.⁵ Pointing out that flexible schedule employees may earn credit hours, the Agency distinguishes credit hours from overtime hours explaining that OPM regulations define overtime hours for employees working under flexible schedules as "all hours of work in excess of eight in a day or 40 in a workweek" except that employees "shall not receive overtime compensation" ... "for hours of work that are not 'overtime hours' ... for employees under flexible or compressed schedules." In other words, the Agency maintains that absent an official advance directive, flexible schedule employees who work hours in excess of 40 in a workweek automatically convert those hours to "credit hours" which the employee may use to shorten a subsequent workday or workweek. The Agency emphasizes that no employees working on a flexible schedule have offered evidence that they were officially ordered in advance by a supervisor to work any overtime hours. The Agency points out that the claim that these employees were "suffered or permitted" to work, by definition suggests that there was no official direction to work overtime. The Agency also points out that the sign-in/sign-out sheets, whose accuracy the Agency disputes, show that each week when employees on flexible schedules worked over 40 hours, in subsequent weeks, the employee worked less than 40 hours, thus showing that employees took advantage of the credit hour provision.

The Agency points out that the current Agreement permits a limit of eight credit hours per pay period and restricts carryover to eight hours, while the

⁵ Under the Federal Employees Flexible and Compressed Work Schedule Act, 5 U.S.C. §§6120-33 (WSA), employees may arrive and depart from work at varying times within a 3-hour period and may earn "credit hours" when the employee chooses to work more than 8 hours per day and these credit hours may be used to shorten a subsequent workday or workweek. Under the WSA, "overtime hours" for flexible schedule programs means "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." 5 U.S.C. §6121(6).

previous Agreement imposed a limit of four credit hours per pay period with a four hour carryover as well. The Agency notes that under both Agreements, flexible schedule employees must use accrued credit hours before accrued compensatory time or annual leave. The Agency points out that Section 30.07 of the Agreement provides that credit hours may be earned with supervisory approval, but does not define the nature of that approval. The Agency cites the informal arrangements Stump had with investigators to take time off equal to extra time worked when necessary. The Agency maintains that this was an acceptable form of supervisory approval and that no specific requirement exists for labeling this process as credit hours and credit hours need not be approved in writing or in advance. The Agency maintains that the flexible schedule employees do not average over 40 hours per week and that the Grievants, with one exception, failed to demonstrate that they worked uncompensated overtime.⁶

Addressing Holmes-Frazier's sign-in/sign-out sheets, the Agency asserts that her tour of duty requires 37 ½ hours of work each week and review of the sign-in/sign-out sheets does not reveal any pay period from 2002 and 2003 during which she worked over 40 hours per week. Additionally, the Agency calculates that for both 2002 and 2003, Holmes-Frazier averaged under 40 hours per week in each year. The Agency points out that as a flexible schedule employee, those weeks in which she worked over 40 hours per week, she accrued credit hours rather than overtime hours and used those credit hours during weeks in which she worked under 40 hours per week. Based upon the sign-in/sign-out sheets, the Agency calculates that for 2002 and 2003, Holmes-Frazier worked a total of 435 minutes less than her tour of duty required. Additionally, under Section 30.07 of the parties' Agreement, Holmes-Frazier should have used accrued credit hours in early 2002 before using accrued annual leave, according to the Agency. The Agency maintains the fact that Holmes-Frazier did not know this process does not excuse the technical violation of Section 30.07. Additionally, the Agency maintains that testimony reflects that Holmes-Frazier took frequent unreported smoke breaks and occasionally used her computer at work for personal business including accessing news and weather.

The Agency points out that Holmes-Frazier's testimony regarding overtime worked beyond that reflected on the sign-in/sign-out sheets was vague. The Agency argues that Holmes-Frazier's mere assertion that her supervisors knew she was working through lunch because they saw her eating lunch in her office is insufficient to prove supervisory knowledge. Similarly, Holmes-Frazier's testimony that she "sometimes" worked late and that her supervisors observed her working late is insufficient in light of her flexible slide and glide schedule. The Agency also points to Holmes-Frazier's testimony that she took work home on

⁶ The Agency objects strenuously to consideration of Union Exhibit 4, a demonstrative exhibit purporting to summarize the hours worked by some WFO employees, particularly those who did not testify in this proceeding. I do not consider Union Exhibit 4 in reaching any conclusions in this hearing.

unspecified weekends but did not keep track of the time. The Agency points out that Holmes-Frazier never claimed overtime or brought such a claim to her supervisor's attention. Additionally, the Agency points out that Holmes-Frazier acknowledged in an informal agreement with her supervisors, that when she worked late, she would take the same amount of time off at a later date. The Agency also points to Holmes-Frazier's testimony that on one occasion where Hutter asked her to finish interviewing a walk-in at intake, she took an unofficial credit hour off in return. The Agency also cites Hutter's and Stump's testimony that Holmes-Frazier did not work over 40 hours per week. Additionally, the Agency points out that Stump testified that Holmes-Frazier never complained to her that she could not complete her work in 40 hours per week.

The Agency initially addresses Kerns' testimony that until Fernandez directed her to mark only her tour of duty on the sign-in/sign-out sheets, she put down her actual time of arrival and departure on the sign-in/sign-out sheets. The Agency claims this testimony cannot be reasonably interpreted as a direction to misrepresent actual time worked on the sign-in/sign-out sheets and a reasonable employee would have asked Fernandez if the employee had a question about his instruction. However, the Agency points out that no employee ever asked Fernandez for a clarification of his remark. Accordingly, the Agency maintains that it is only reasonable to consider the Union's interpretation of Fernandez' comments as litigation-driven.

The Agency notes that Kerns' sign-in/sign-out sheets include many days where she did not sign out at the end of the day. Additionally, the Agency points out that the screen-shots of Kerns' computer reflect that rather than working after hours, that she worked on February 1, 2005, the first day she was out on a two-month medical leave, and Kerns also worked on her computer on Saturday, April 2, 2005 and Saturday, April 9, 2005, which the Agency conjectures resulted from having excess work assigned in March while she worked at home. The Agency suggests that Kerns found it more convenient to use her home computer on Saturday rather than another day of the week and there is no evidence that this Saturday work was pre-approved. The Agency points out that the remainder of the screen-shots supplied by Kerns reflect work performed between 4:30 p.m. and 6 p.m. during the workweek which does not necessarily reflect overtime work for a flexible schedule employee on a slide and glide schedule.⁷ The Agency asserts that Kerns' testimony regarding whether she recorded the correct times on her sign-in/sign-out sheets was inconsistent and emphasizes Stump's testimony that Kerns spent a lot of time in conversation with Mills during the workday. For these reasons, the Agency maintains that Kerns did not demonstrate overtime in excess of even 37 ½ hours per week much less 40.

⁷ Because the Agency believed that these screen-shots are immaterial, it does not emphasize the issue of whether Kerns used software to modify the dates of her screen-shots but notes that IT witness Edmondson testified that such modifications would not be difficult to complete.

Turning to Ullah, the Agency maintains that Ullah provided no evidence of working any overtime but simply provided vague assertions that supervisors saw him working late. The Agency points out that Ullah never told supervisors that he worked before 7 a.m. or after 7 p.m. or that he worked over 40 hours per week. The Agency emphasizes that Ullah never asked to be paid overtime. Also, the Agency emphasizes Stump's testimony that Ullah did not work overtime. Similarly, Clarke, whose desk was near Ullah, testified that he took one and one-half hour lunch breaks twice each week and surfed the internet for non-work activities on a regular basis. The Agency also notes that Cogswell observed Ullah reading the newspaper and sleeping at his desk during his tour. The Agency also notes the testimony of Leon that she never told Ullah that he needed to work late on intake rotation. Finally, the Agency notes that Ullah initially testified that he left the EEOC because he was required to do "unethical work" and later testified that he left after being told that he would be terminated for poor performance.

Addressing Gonzalez, Clarke and Ngo, all WFO investigators at some point, the Agency suggests that these witnesses be considered representative of those in the unit and should be given greater weight than that of investigators Holmes-Frazier and Kerns. The Agency points out that Gonzalez and Ngo both testified that on occasion they worked more than 40 hours in a given week and received the same amount of time off at a later date on an informal basis. The Agency points out that shortly after she was hired, Clarke read Agency manuals and other materials on her way home but after both the Union and her supervisors advised her not to do so without prior approval, she did not work outside her tour of duty. The Agency maintains that these investigators were able to complete the assigned work within 40 hours per week and to eat lunch without pressure to work overtime. The Agency acknowledges Gonzalez' testimony that he made calls of a few minutes in duration after work and acknowledged instances where his sign-in/sign-out sheets reflect 10 to 25 minutes work beyond his tour of duty. The Agency points to Ngo's testimony that when her work doing intake extended beyond her tour of duty by 35 to 40 minutes, she would simply take that time off the next day. The Agency notes that Stump's informal arrangements provided that opportunity to all investigators. The Agency also highlights Gonzalez' testimony that he never heard Fernandez give a direction to put the time of his tour of duty on the sign-in/sign-out sheets even if that time was different from the actual arrival and departure times.

Turning to Anderson and Mills, both compressed schedule employees for the most part, the Agency initially argues that Mills' claim of overtime worked based upon arrival and departure times does not reflect any time over 80 hours in any given pay period when the Agency's policy of paying for one-half of the one-hour lunch is considered. The Agency asserts that Anderson's claim for overtime even if fully credited from sign-in/sign-out sheets reflects minimal overtime. To the extent that any overtime claim for these individuals is credited, the Agency maintains that those claims are not suffered and permitted.

Turning to the other Grievants who did not testify but who worked at the WFO during the period from February 2000 through February 2005, the Agency points out that the Union called only five of these individuals to testify, despite listing 13 additional non-exempt witnesses in its pre-arbitration submission. Since these individuals did not testify about "suffered and permitted overtime" even on rebuttal, the Agency maintains that the "specific testimony addressing the hours of work of each of the non-testifying witnesses must be given greater weight" than general testimony by other Grievants about their circumstances.

Acknowledging that the FLSA permits a representative employee to bring a claim on behalf of himself and other "similarly situated" employees, the Agency argues that such collective action is not appropriate here. 29 U.S.C. §216(b). The Agency argues that because WFO employees work under different supervisors in different units, and are subject to varying managerial rules and policies and work on a variety of different work schedules, then employees are not similarly situated and one cannot impute the experiences of a few to the entire group.

The Agency contends that the record shows that in this case no general conclusions may be drawn about the treatment of the group as a whole. In support, the Agency points out that while five employees called by the Union testified that they worked, suffered or permitted overtime, three other employees, Gonzalez, Clarke and Ngo, testified that they never worked, suffered or permitted overtime, that they were not expected to do so and that their job responsibilities did not require it. The Agency maintains that this shows that any incidents of alleged overtime were random rather than the product of a policy or practice. The Agency contends that the testimony of the Union witnesses shows that whether or not an employee allegedly worked overtime centers on individual circumstances rather than a general rule, policy or practice of the employer. In support of this, the Agency cites Cogswell's testimony that she worked beyond her tour of duty in secret.

The Agency also points to Hutter's testimony that Stanfield and Chandler were observed to be not available during intake assignments despite their having signed-in. The Agency also points out that Hutter also testified that Winters was often not available during her tour of duty. The Agency cites the testimony of Salacuses that she told ISA Ballard not to work through lunch and that Ballard did not do so. The Agency also notes that Salacuses testified that none of the non-exempt staff that she supervised in 2000 worked uncompensated overtime or through lunch. The Agency cites Stump's testimony that when she was Acting CRTIU Supervisor for about two months in 2005, she observed that Martinez, Allen, Reed and Chandler did not perform any suffered or permitted overtime. Similarly, the Agency points to Fernandez' testimony that Canary, Daniel, Johnson, Reed, Winters, Mullins, Pladliva and Smith worked no uncompensated overtime. The Agency cites Leon's testimony that she was unaware of any

uncompensated overtime performed by her staff from June of 2002 to March of 2005, including Martinez, Winters, Reed, Stanfield and Allen. The Agency notes that Leon testified that overtime was paid to Martinez, Stanfield and Allen for special work projects. The Agency cites Cogswell's testimony that she worked uncompensated overtime and acknowledged that such activity was confirmed by both Hutter and Stump. The Agency, however, asserts that this overtime was neither suffered nor permitted.

The Agency argues strenuously that no Grievant was permitted or suffered overtime because the WFO management had no reason to know of or suspect any overtime work. Citing 5 C.F.R. §551.104, the Agency asserts that the burden to show that employees were performing suffered or permitted overtime which the employee's supervisor knew or had reason to believe the work was being performed, lies with the Union to show that compensable work was being performed and the employer had knowledge or constructive knowledge of that work as well as the opportunity to prevent it. The Agency maintains that Grievants did not show they actually worked overtime hours, but even if they did, they did not establish that a supervisor actively or constructively knew about such overtime work. The Agency emphasizes that its long-standing policy that overtime must be pre-approved by the Office Director and similarly, suffered or permitted overtime work has been precluded by long-standing policy. The Agency argues that even if Grievants can show that they actually worked overtime hours, they are not able to prove that any supervisor actually or constructively was aware of such work. The Agency cites its long-standing policy precluding suffered or permitted overtime that has been included in several Agency publications and memos. Citing the July 20, 1999 Diaz memo, which states that its purpose is to "reiterate the importance of each staff member recording their attendance promptly and accurately," the Agency contends that the Union bears the high burden of showing that managers knew or should have known of any unauthorized overtime.

The Agency cites the testimony of supervisors including Hutter, Fernandez and Stump that they were unaware of overtime being performed by Grievants. Specifically, Hutter testified that he was unaware of any intake staff working beyond 5 p.m. The Agency also points to Fernandez' testimony that he never observed any investigator working beyond their tour of duty and Woods' testimony that mediation work can be completed within 80 hours per pay period. The Agency asserts that the supervisors' testimony is supported by testimony of investigators that they never worked overtime and that their duties and responsibilities did not require them to work overtime. The Agency also points out that both Woods and Stump would benefit financially if the grievance were sustained and thus, their testimony cannot be viewed as self-serving.

Addressing the Union's argument that the size of the investigative staff has shrunk significantly over the past six years, the Agency cites Stump's testimony that she does not assign all of the cases currently in her inventory

because there are not a sufficient number of investigators currently on staff to complete investigation of all of these cases within their tour of duty. The Agency points out that Stump testified that her office has a huge backlog and, due to this backlog, in 2004, the WFO sent cases to EEOC offices in Pittsburgh and Philadelphia for processing. Additionally, the Agency points to Hutter's testimony that the office goals change depending upon available resources and staff. The Agency also cites Fernandez' testimony that when the number of investigators decreased, he used interns to help make up the difference.

The Agency maintains that the WFO sign-in/sign-out sheets are not reliable indicators of time worked. Additionally, the Agency asserts that there is no evidence in the record to show that any supervisor reviewed the lobby sign-in/sign-out sheets and most supervisors did not review the sign-in/sign-out sheets used in the WFO. The Agency cites Stump's testimony that she did not review the WFO sign-in/sign-out sheets and Woods' testimony that he found the WFO sign-in/sign-out sheets to be unreliable and noted that when he was a staff investigator, he made frequent errors on his sign-in/sign-out sheets. The Agency contends that simple access to information that, if studied, would result in an awareness of overtime being worked is not sufficient to show actual or constructive knowledge of overtime. The Agency also asserts that the WFO sign-in/sign-out sheets are ambiguous in that they do not record time spent on breaks, other than lunch, or time accrued by flexible schedule employees to bank as credit hours. Additionally, the WFO sign-in/sign-out sheets did not require employees to record time spent on work completed at home under the tele-work program. The Agency cites Fernandez' testimony that he found the sign-in/sign-out sheets to be reliable because some employees signed in but were not present and others regularly forgot to complete the sheets. The Agency also contends that the sign-in/sign-out sheets do not reflect when an employee stayed late after work for non-work reasons or ate breakfast after signing in or ate dinner before signing out. The Agency contends that employees knew that the sign-in/sign-out sheets were not used to either record attendance or compute pay and thus, had no reason to ensure their accuracy. The Agency contends that in contrast with the sign-in/sign-out sheets, the current Cost Accounting Time and Attendance system which was put into place in October of 2004, accurately reflects the hours of work of employees. The Agency points to the Certification of Accuracy signed by employees each pay period. The Agency points out that there is no claim of overtime hours based upon the FPPS System.

The Agency argues that Woods had no reason to know or suspect that Anderson worked through lunch. The Agency points out that Anderson never told Woods that she worked through lunch and her claim that she worked through lunch was a line on the sign-in/sign-out sheet indicating that she worked through lunch although she later testified that she would leave the box blank if she did not take lunch. The Agency cites Anderson's testimony that Woods would not be aware that a blank in the box for lunch on the sign-in/sign-out sheets meant that she would not take lunch. The Agency notes that Woods had no reason to know

that Anderson may have worked weekends and he never authorized overtime for Anderson either orally or in writing. To the contrary, the Agency cites Woods' memo to Anderson reminding her that overtime is not given without prior approval and that she needed to manage her time efficiently. The Agency notes that Anderson did not certify overtime on the Cost Accounting Sheets during the period when Woods supervised her and Woods viewed the sign-in/sign-out sheets only as a mechanism to see who was in the office.

The Agency cites Woods' testimony that before August of 2004, when the WFO was located at 1400 L Street, he frequently stayed until 8 or 9 p.m. and observed Anderson on a regular basis using her office for personal activities, including using the phone and fax for personal real estate matters and the gym in the evening. The Agency points out that after the WFO was relocated to 1801 L Street, Anderson was removed from her 4/10 compressed work schedule and left on time. The Agency points out that the screen-shots Anderson supplied that showed modifications to her work outside of the regular workday were all dated before August of 2004. The Agency poses the question of why if Anderson's workload required so much overtime, did that need vanish after August of 2004 when the office moved to 1801 L Street.

Similarly, Woods had no reason to know or suspect that Mills worked more than 80 hours in any pay period. The Agency points out that Mills never told Woods that she worked uncompensated overtime and never claimed any overtime and never requested any overtime for working through lunch. The Agency also points to Mills' testimony that no supervisor or manager ever discouraged her from submitting an overtime claim. The Agency cites Woods' testimony that he believed Mills' work could be completed within the time allotted. The Agency discounts Mills' testimony that her supervisors knew she worked overtime because she frequently failed to use the sign-in/sign-out sheets at the end of the day or at lunch, thus negating any use they may have. The Agency also points out that Woods did not review the sign-in/sign-out sheets before certifying timesheets and Mills never told him that she could not complete her work within her tour of duty. The Agency responds to Mills' testimony that she worked on the ADR backlog citing Woods' testimony that there was no backlog. The Agency responds to Mills' testimony that she worked on acknowledgement orders when she was away from the office by citing Woods' testimony that the ADR unit did not issue acknowledgement orders after December 2003. The Agency also cites Woods' testimony that the only weekend when he saw Mills in the office was when she was working on a special project for which she received overtime pay. Addressing Mills' testimony that she worked on her flex or AWS day and that Woods saw her in the office, the Agency cites Woods' explanation that Mills frequently switched her flex day. The Agency also cites Woods' testimony that Mills does not do any work that could be taken home as her responsibilities include office filing, data input and telephone contact during the workday. The Agency also points to Woods' testimony that Mills was protective of her lunch hour and thus Woods was careful not to interrupt her even to ask a

question during that period. The Agency also points to Mills' testimony that her lunch hour varied between 1:15 and 2:45 p.m., thus it was more difficult to know whether she was working through lunch by virtue of seeing her at work at any given time. The Agency addresses Mills' testimony and the corroborating lobby sign-in sheets showing that she occasionally arrived at work before 7 a.m. pointing to Woods' testimony that he was unaware that she got to work at that time and Mills never told him. For these reasons, the Agency maintains that Woods has no reason to know or suspect that Mills was performing overtime work and thus Woods did not suffer or permit any FLSA overtime even if Mills did work over 80 hours in any pay period.

The Agency argues that Cogswell, Clarke and Mills were told not to work overtime and thus any overtime was not suffered or permitted. The Agency argues that when managers learn an employee worked overtime and told the employee not to do so, when the employee continues to work such overtime, that work is neither suffered nor permitted. The Agency cites Hutter's testimony that he was initially aware that Cogswell worked unauthorized overtime and told her as many as a dozen times not to work overtime. The Agency points to Hutter's belief that Cogswell stopped working overtime. The Agency also cites Stump's testimony that she was aware that Cogswell worked overtime and that she told Cogswell to take lunch and to go home repeatedly. The Agency also cites Cogswell's testimony that she initially worked overtime without approval by management and without informing her supervisors and that both Hutter and Stump told her repeatedly not to work late and thereafter, she stopped working unauthorized overtime. The Agency cites Clarke's testimony that she initially read work-related materials on her commute home but stopped after she was told not to do so by the Union, Stump and Hutter. The Agency cites both Mills' and Woods' testimony that Woods' repeatedly told Mills to "go home" at the end of the workday and suggests that Mills' interpretation of Woods' instruction as a joke was inaccurate. Finally, the Agency cites an e-mail distributed to staff from Fernandez that advised employees not to work overtime unless pre-approved. The Agency contends that Hutter, Stump, Woods and Fernandez were either unaware that unauthorized overtime was performed or that they had reason to suspect that unauthorized overtime was being performed, they directed that the overtime cease and did not suffer or permit any overtime under the FLSA.

I first address the arbitrability issue raised by the Agency that the grievance does not meet the minimum requirements of Section 41.07 of the parties' Agreement. The Agency claims that the grievance must be dismissed because it does not specifically identify the employee, office, incident and date on which it occurred at either Step 1 or Step 2 of the grievance procedure. I note that the grievance is filed on behalf of "all bargaining unit employees", and alleges three specific types of violations of the FLSA and includes a request for information. The Agency did not respond to the Step 1 Grievance, and thus the Union proceeded to file the same grievance at Step 2.

Section 41.07 requires that a written grievance minimally include:

- (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.

In this instance, the grievance addressed to Fernandez, who was then Acting Director of the WFO, identified the employees as "all bargaining unit employees." Although the number of employees covered may be many, the class is clearly identified as "all bargaining unit employees" and the grievance was filed with the WFO. Since the grievance involves all bargaining unit employees in the WFO, it by definition, identified the office as the WFO, and identified the incidents as "suffered and permitted overtime" and "failure to offer employees their guaranteed right to choose between compensatory time or overtime" under the FLSA "since at least 1995."

Although the Agency would charge the Union with the requirement of greater specificity, the grievance meets the minimum requirements of Section 41.07 in that it identifies the employee(s), office, incident (FLSA violations) and the beginning date of "since at least 1995." The grievance addresses a class of employees over a long period of time and required information included in the information request in order to provide greater specificity. The Agency did not respond to the information request until the end of 2003 long after the filing deadlines included in Step 2 had expired. I find the grievance meets the minimum requirements of Section 41.07 and is arbitrable.

Turning to the merits of the Union's grievance, the Union claims both that the Agency has suffered and permitted overtime and has "failed to offer employees their guaranteed right to choose between compensatory time and overtime."⁸

I first address the framework for consideration of a claim that the Agency has suffered and permitted overtime work by non-exempt employees of the

⁸ The Union also claims that the Agency has violated §11(c) of the FLSA by maintaining unreliable and inaccurate records of employees' hours. That claim is beyond the scope of this grievance and is not addressed.

WFO. Section 31.05 of the parties' Agreement provides that "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". Under the FLSA, work that is not requested, but is "suffered or permitted" is defined as work time. 29 C.F.R. §785.11. "Work time" is defined further by OPM regulations as excluding "time during which an employee performs no work" including meal periods and paid leave. 5 C.F.R. §551.205.

OPM regulations define "hours of work" as "all time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency." 5 C.F.R. §551.205. "Hours of work" includes time during which the employee is "suffered or permitted" to work. 5 C.F.R. § 551.401(a)(2). Under Section 31.09 of the parties' Agreement, work is "suffered or permitted" when it is "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." 5 C.F.R. § 551.102(e).

The Agency would limit overtime work to that performed with advanced authorization, in excess of 40 hours per week plus time allotted for meals. When considering flexible schedule employees, the Agency would base overtime on 80 hours per week, arguing that employees earn credit hours on an informal basis and then use them within the pay period to work less on another day within the pay period.

The Union would calculate overtime based upon any hours worked in excess of eight in any day, including time worked during lunch, work completed at home, except for when telecommuting, and work performed on weekends and AWS days.

When the FLSA is read together with FEPA, and its implementing rules issued by OPM, in order to claim overtime for hours in excess of eight in one day, the overtime must be directed and approved in writing. Christofferson v. United States, 64 Fed. Cl. 316 (2005). Since by definition, work that is suffered and permitted is not directed and approved in writing, only claims for work in excess of 40 hours in any week can be considered.

With respect to flexible schedule employees who may earn up to eight credit hours per pay period pursuant to Section 30.05 of the parties' Agreement, the earning and use of credit hours does not mean that flexible schedule employees may not earn overtime for work in excess of 40 in any week. Rather, any suffered and permitted overtime worked by flexible schedule employees must be considered in light of the provision of Section 30.05 that "any hours authorized to be worked in excess of the eight (8) hours shall be treated as overtime." Reading Section 30.05 together with the regulatory framework

regarding suffered and permitted overtime, flexible schedule employees may be found to have worked suffered and permitted overtime after they have worked eight credit hours in any pay period. Since flexible schedule employees may not carryover more than eight credit hours per pay period, repeated suffered and permitted overtime may lead to overtime by flexible schedule employees for hours worked in excess of 40 in any week.

Compressed work schedule employees may not earn credit hours under Section 30.07. Under Section 30.04(d), compressed work schedule employees fulfill "an 80-hour biweekly work week in less than 10 work days" by working either a 5/4/9, 4/10 or 4/9/4 work schedule, and suffered and permitted overtime must be considered as hours in excess of the employee's tour of duty as either in excess of 40 hours per week (4/10) or 80 hours per pay period.

The Agency argues strenuously that its employees continue to receive a one hour lunch break even though the parties' September 2, 2002 Agreement was amended to provide a one half hour lunch period. The Agency explains that under the parties' "old" Agreement, employees were permitted a one-half hour lunch period that was extended to one hour by virtue of adding two paid 15 minute rest breaks. (J. Ex. No. 1). This provision was omitted from the current collective bargaining agreement because the FLRA determined that it was not permissible to compensate employees for time set aside for eating. It is undisputed that the Agency continues to permit one-hour lunch breaks and continues to pay employees for "rest periods." The Agency argues that its "kindness" in continuing to pay employees for part of their lunch period, for the two rest periods, should not be used to support a claim that the rest period portion of the daily lunch hour is part of the workweek. However, Section 32.01 of the parties' current Agreement provides that "employees shall be granted by their supervisors a rest period not to exceed 15 minutes during each four (4) hours of duty." That the Agency continues to permit employees to take those contractual breaks before and after the lunch period so as to extend their lunch break does not automatically convert break time into meal time or time spent eating. Accordingly, only the half hour lunch period during each day is considered the meal period or time set aside for eating, and work that is suffered and permitted is work in excess of 40 hours per week or 80 hours per pay period for compressed schedule employees.

Also within that parameter, I must consider that under Section 30.07 of the parties' Agreement, flexible schedule employees such as those working a fixed eight hour schedule or a "slide and glide" schedule may earn up to eight credit hours per pay period, and may carry over up to eight credit hours. I note that Section 30.07 specifically prohibits employees working a compressed work schedule, such as a 5/4/9 or a 4/10 schedule, from earning credit hours.

Addressing the issue of whether the Agency violated the parties' Agreement the FLSA and FEPA by suffering and permitting overtime work, I

begin with the issue of whether employees generally performed work in excess of their tours of duties. Making a determination as to whether employees worked in excess of their tour of duty is effected by factors including the accuracy and reliability of the sign-in/sign out sheets and the instructions and directions given to employees regarding the completion of the sign-in/sign out sheets, and conflicting testimony as to whether employees worked beyond their tour of duty, before and after work, through lunch and on weekends.

Until October 1, 2004, employees completed daily sign-in/sign-out sheets where they recorded their time of arrival and departure, as well as the time they left for and returned from lunch. The Union and the Agency, both rely upon and also dispute the accuracy of the sign-in/sign-out sheets. The Union would rely upon the sign-in/sign-out sheets to show that employees worked in excess of their tour of duty on given dates. Likewise, the Agency would rely upon the sign-in/sign-out sheets to show that certain employees never worked over 40 hours per week or 80 hours per pay period for the period during which the sign-in/sign-out sheets are included in the record. However, the Agency also disputes the accuracy of the sign-in/sign-out sheets because employees did not always complete them fully and accurately. Likewise, the Union disputes the accuracy of the sign-in/sign-out sheets to the extent that employees followed the directive to sign-in and sign-out with the hours of their daily tour of duty rather than the actual hours worked.

Each of the employees who testified described varying practices for completing the sign-in/sign-out sheets. For example, Woods testified that when he was responsible for completing the sign-in/sign-out sheets, he would often forget to do so, then complete several entries at the same time from his recollection. (6T. 100-101). Mills testified that she completed the sign-in/sign-out sheets with the actual time that she arrived at work and the actual time of her departure, yet review of her sign-in/sign-out sheets shows many days on which she neglected to sign-out. (1T. 259; U. Ex. No. 2). Holmes-Frazier testified that initially she signed-in and sign-out with the hours of her arrival and departure, but followed Fernandez' direction after he told her to record her regular tour of duty on the sign-in/sign out sheets. (1T. 334-336).

Fernandez testified that employees frequently forgot to complete the time sheets and that he would make notes on the time sheets or would highlight them. (5T. 435). Hutter testified that he believed that employees were not completing the sign-in/sign out sheets accurately, either skimping or mis-representing their arrival and departure times. (2T. 547-549).

After reviewing this testimony, as well as the testimony of the remaining employee witnesses as to their practices with respect to completing the sign-in/sign-out sheets, I find that I can not rely solely upon the sign-in/sign-out sheets either to prove or disprove that any employee worked in excess of their tour of duty. However, there are situations where individual employees fully completed

the sign-in/sign-out sheets for a given pay period, that may be used to corroborate their testimony and/or other documentary evidence.

The Union alleges that when Fernandez was Assistant Director and/or Acting Director, he instructed employees to sign in and sign out with the times of their tour of duty rather than with the times they actually arrived and departed both orally and in his July 28, 2000 e-mail disseminated through supervisors to WFO staff. The Agency asserts that Fernandez never made such a statement and relies upon the written instructions to employees limiting compensatory time and overtime to hours "requested and approved in advance".

In the July 28, 2000 e-mail Fernandez advised WFO supervisors and employees of deficiencies in time keeping, including that "some employees sign in for more hours than their authorized daily schedule" (Tab 4, page 6 of the Agency's Pre-Hearing Statement). Fernandez directed to supervisors to "remind" employees that only the office of the Director can authorize overtime or comp time through the established procedure. Fernandez also instructed supervisors to "[d]irect your employees to amend the necessary changes to the time sheets to correct the above-mentioned deficiencies." Fernandez acknowledged that his e-mail directed employees to only sign in for their authorized daily schedule, adding that employees were not working overtime because they were not authorized to do so. (5T. 476).

Holmes-Frazier and Kerns both testified credibly that Fernandez told them to sign in and sign out at the time of their tour of duty. (1T 334; 4T 239-240). Kerns testified that Campbell also told her to sign in and sign out at the times of her tour of duty. (4T 239-240). That testimony is consistent with Fernandez' written instructions to supervisors to "[d]irect your employees to ...correct the above-mentioned deficiencies." Gonzalez' testimony that he never heard Fernandez direct that the sign-in/sign out sheets be completed with the tour of duty rather than times of actual arrival and departure, though credible, does not contradict the credible testimony of Holmes-Frazier and Kerns, or the plain language of Fernandez' e-mail. Hutter's testimony that he never heard Fernandez issue such an instruction must be considered in light of the fact that he did not begin working at the WFO until December of 2003 and the e-mail containing the instruction was issued in July of 2000.

In particular, Fernandez' e-mail, specifically advises supervisors to correct deficiencies in the sign-in/sign-out sheets. Those deficiencies included that employees were signing in for hours in excess of their daily schedule. While that instruction does not explicitly advise employees to fill out the sign-in/sign out sheets with the hours of their tour of duty, regardless of the hours they work, it is a reasonable conclusion from the plain language of the e-mail. When this instruction is consider together with the testimony of Fernandez, Holmes-Frazier, Kerns and Gonzalez, I find that Fernandez did instruct employees to complete the sign-in/sign out sheets with the times of their daily tour of duty rather than the

times of their actual arrival and departure from the office. I find further that until Hutter became Acting Director of the WFO in December of 2003, employees had a reasonable belief that if they worked in excess of their tour of duty they were not to report that time on their sign-in/sign-out sheets.

Fernandez' testimony that employees were to sign-in and sign-out for their authorized tour of duty, together with the July 28, 2000 e-mail explaining that employees "sign in for more hours than their authorized daily schedule" coupled with the instructions to supervisors to remind employees of the overtime authorization procedures amounts to tacit acknowledgement that employees were working overtime with Fernandez' knowledge. Fernandez attempted to curtail overtime by directing employees to complete their time sheets with only their authorized tour of duty and to remind them of procedures for the authorization of overtime and comp time. However, Fernandez did not instruct employees to stop working in excess of their authorized tour of duty, although he had the opportunity to do so when he issued the July 28, 2000 e-mail. Nor is there evidence that Fernandez took any other action to ensure that non-exempt WFO employees did not work beyond their authorized tour of duty.

The testimony from Hutter, Stump and Woods regarding their efforts to ensure that employees did not work overtime commenced after Hutter came to the WFO in December of 2003. Woods became ADR Supervisor in December of 2003 and Stump became the Acting Enforcement Supervisor in March of 2005. Their testimony as supervisors concerns practices and situations beginning no earlier than December of 2003, and in Stump's case, in March of 2005. In addition to Fernandez, only Salacuses and Leon were WFO supervisors before December of 2003. Salacuses, who was Enforcement Supervisor until 2000, did not testify regarding efforts policies surrounding overtime, other than that Diaz had advised her that it was permissible to have an arrangement with the investigators to allow them to work late and take the time on another day without receiving overtime. (3T. 846). Leon, the CRTIU Supervisor until March of 2005, testified that she believed that her staff did not work hours in excess of their authorized tour of duty, except in certain circumstances, such as the office mover or when they volunteered for special projects. (4T. 184). This testimony is not contradicted, although the building security logs show that Reed stayed at work until after 7 p.m. with regular frequency from September 2004 through September 2005.

For these reasons, I find that from January of 2000 at least through December of 2003, some employees were working in excess of their authorized tour of duty, WFO management was aware that employees were doing so, and did not take action to prevent employees from working in excess of their tour of duty. In other words, I find that the WFO suffered and permitted overtime by some WFO employees until at least December of 2003.

From December of 2003 to the present, Hutter, first as Acting Director of the WFO, and later as Director, took some action designed to prevent employees from working unauthorized overtime. Specifically, he and other supervisors began a verbal campaign to discourage employees from working in excess of their authorized tour of duty by telling employees to "go home" or by reiterating the policy that employees are not permitted to work overtime or comp time without advanced approval. However, at the same time, the WFO became increasingly short-staffed, with the number of investigators shrinking to approximately 25% of its 2000 complement. As a result, the WFO has a significant backlog of cases and is unable to assign all of its cases to investigators. Stump testified that she maintains a file of cases waiting to be assigned to an investigator when one is available. Hutter testified that he was in the process of hiring two additional investigators and would like to be able to hire more investigators. Hutter also testified that each office, including the WFO had performance goals that were dependent upon staffing levels.

I evaluate both Hutter's verbal campaign to discourage employees from working in excess of their authorized tour of duty and the WFO's staffing issues in light of the provision of Section 31.05 of the Agreement that states that it "is the Employer's responsibility to ensure that the employee's workload can reasonable be accomplished within the employee's regularly scheduled work day or work week." Additionally, I consider the employee's responsibility under Section 31.05 to "inform the Employer whenever the assigned workload is requiring more time than normally scheduled."

With this framework in mind, I evaluate the work, and the extent, if any, to which each group of non-exempt employees worked suffered or permitted overtime for the period before December 2003 as well as for the period beginning in December 2003. Because their supervisors, work schedules and units are so varied, the Agency asserts that only those WFO employees who provided affirmative testimony on an individual basis may prove that they worked suffered and permitted overtime. The FLSA permits an employee to bring a claim on behalf of himself and other similarly situated employees. 29 U.S.C. §216(b). In this case, there are certain facts common to all non-exempt WFO employees, and others that are job specific. For this reason, I address the claim of suffered and permitted overtime based upon the job categories of mediator, ISA, investigator, and support staff. Unless otherwise noted, my findings apply to all non-exempt WFO employees within each grouping.

Turning first to the mediators, I find insufficient evidence that mediators worked in excess of their tour of duty. The mediators at issue are Anderson, Woods, and the two administrative judges who were detailed briefly to the WFO ADR unit to work as mediators. Woods testified that a mediator could complete his or her work within 80 hours per pay period and there is no evidence that he worked in excess of his tour of duty when he was a mediator. (6T. 85-86).

Anderson testified initially regarding her work as a mediator from 2000 through May of 2002, when she was began working as the ADR Supervisor. Anderson testified that when she worked through lunch she would put a line through the lunch departure and lunch return boxes on the sign-in/sign-out sheets. (1T. 108-109). Review of the sign-in/sign out sheets shows only three dates (January 9⁹ and 11 and 25, 2002) on which Anderson marked a line through the lunch departure and return boxes. (U. Ex. 6). On January 9, 2002, Anderson worked from 7:40 a.m. to 5:20 p.m. for a total of 9 hours and 40 minutes. On January 11, 2002, Anderson worked from 9:10 a.m. to 6:30 p.m. for a total of 9 hours and 20 minutes. For the pay period from December 31, 2001 through January 11, 2002, Anderson's sign-in/sign-out sheets reflect a total of 73 hours and 40 minutes, with a holiday on January 1, 2002 and a flex day off on January 7, 2002. On January 25, 2002, Anderson's sign-in/sign-out sheet reflects that she arrived at 10:40 a.m. and departed at 6:20 p.m. for a total of 7 hours and 40 minutes. The sign-in/sign-out sheet also reflects that Anderson used two hours of sick leave on January 25, 2002. For the pay period ending on January 25, 2002, Anderson's sign-in/sign-out sheets reflect that she worked a total of 62 hours and 5 minutes, and was off for a holiday on January 21, 2002 and for a flex day on January 22, 2002. While Anderson may have worked through lunch on the dates identified on the sign-in/sign-out sheets, there is no evidence either that she recorded only her tour of duty on the sign-in/sign-out sheets for those pay periods or that she worked in excess of 80 hours in either pay period based upon her 5/4/9 work schedule at the time.

Anderson testified further that when she became a mediator again after Woods became ADR Supervisor, she continued to work overtime in order to complete her work, but that Woods made an effort to avoid being aware that she was working in excess of her tour of duty by sending the message "close the door". (1T. 213, 233). However, Woods testified and provided an e-mail showing that Anderson made a concerted effort to work beyond her tour of duty by scheduling mediations to start at 2:00 p.m. instead of earlier in the day. Specifically, Woods testified that Anderson scheduled mediations so as to work in excess of her tour of duty is supported by at least one e-mail from Anderson to Woods where she notes in an email sent at 7:45 p.m. on January 6, 2005 that a mediation that commenced at 2:00 p.m. was completed successfully at 7:15 p.m. that day and that she would be coming to work late the next morning, and that she needed the file for a mediation scheduled for 2:00 p.m. the next afternoon. (U. Ex. 12).

Anderson's flat denial that she ever worked out in the gym in the building at 1400 L Street must be considered in light of her acknowledgement that she is a runner and has completed three marathons. Woods testified further that Anderson frequently stayed late at 1400 L Street to work on real estate transactions and to use the gym in the building. (6T. 108-109, 220, 232).

⁹ The sign-in/sign-out sheet for the week of January 7-11, 2002 includes a note that Anderson reversed the 8th and 9th.

Anderson denied working on real estate transactions and using the gym at 1400 L Street after hours. The security logs for 1801 L Street show that she frequently entered and left the building at odd hours after 7:00 p.m. for five or 10 minutes at a time. This reflects a pattern of conducting personal business after work and returning briefly, probably for personal reasons before going home at the end of the day. After consideration of this evidence, I credit Woods' testimony regarding Anderson's activities at work after hours.

Anderson testified that the screen shots from the "S" drive on her computer support her claims that she worked after hours. The screen shots show numerous instances of Anderson's documents in the "S" drive being accessed before and after hours. However, attempts to corroborate that Anderson was in fact, at work when those documents were accessed was unsuccessful. For example, the screen shots show that a document named "Sette516" was accessed at 6:06 a.m. on September 14, 2004, but there is no record on the security logs for that date of Anderson entering the building at 1801 L Street before 7:00 a.m. Edmondson, the Agency's IT expert, explained a number of technological reasons why a document might be shown as accessed, such as access by anti-virus software, when Anderson was not in the office.

Anderson testified to suggest that when she created work product at 10:50 p.m., that she had been working until that time. However, building security logs for 1801 L Street are replete with instances when Anderson signed into the building after hours and signed out again several minutes later. (1T. 235; U. Ex. 6). Based upon this evaluation, I find that Anderson cast her work so as to appear as though she has worked more hours than the record reflects. Under these circumstances, I credit Woods' testimony regarding Anderson's hours of work when he was her supervisor. Anderson's testimony that when she initially became a mediator in the WFO in August of 2000, she worked most weekends because she was new to the job and the Agency had posted a nationwide contract for mediators is neither directly contradicted nor supported. (1T. 181). Since, as described above, I do not find her testimony generally to be consistent with supporting documentation, I find insufficient evidence that Anderson worked in excess of her authorized tour of duty and thus did not work suffered or permitted overtime.

The evidence concerning whether ISA's worked in excess of their tour of duty without compensation shows insufficient evidence that some ISAs worked in excess of their tour of duty without compensation.

The only direct testimony regarding the hours worked by ISAs is that of Leon who testified that except in isolated circumstances, ISAs have no reason to work overtime and did not do so to the best of her knowledge. Unlike Investigators, ISAs do not work on investigations or perform outreach, both functions that can cause an employee to work in excess of their tour of duty. However, ISAs do participate in the intake process and may be required to work

through lunch or to stay late on the rare occasion when an intake interview continues after 5:00 p.m. either because the individual is nearing a statutory deadline or because the interview is simply not concluded by 5:00 p.m. However, there is insufficient evidence that any ISA has done so.

Review of the security logs kept by the building security staff at 1801 L Street shows that Eugene Reed signed out after 7:00 p.m. frequently, and on one occasion, as late as 8:20 p.m. Reviewing the period from September through December of 2004, Reed signed out after 7:00 p.m. four times in August of 2004, 12 times in September, 11 times in October 6 times in November and 7 times in December of 2004. Stump testified that Reed "would just do his 40" to her knowledge. Leon testified that Reed sometimes stayed late to use the internet for vacation planning. Fernandez testified that he thought that if Reed was in the office, he was working but to his knowledge Reed worked no overtime. (3T. 889; 5T. 510).

Review of the evidence regarding ISAs shows only limited circumstantial evidence that ISAs worked uncompensated overtime. There is significant evidence that Stanfield had a time and attendance problem, and while she may have stayed late, she often came to work late and did not work beyond her authorized tour of duty. The only evidence that any ISA may have worked uncompensated overtime in excess of his tour of duty is the building security logs for 1801 L Street which shows that Reed frequently signed out after 7:00 p.m. However, evidence regarding whether Reed was working after his tour of duty, and based upon the credible testimony of his direct supervisors Leon and Stump, I find insufficient evidence that Reed or any other ISA worked suffered and permitted overtime.

The weight of the testimony and supporting documentary evidence leads to the conclusion that most investigators worked uncompensated suffered and permitted overtime in excess of their authorized tour of duty since January of 2000. Kerns, Holmes-Frazier and Cogswell all testified that they had worked beyond their authorized tour of duty by working through lunch, after their workday and/or on weekends. Clarke testified as to a discrete instances where she worked beyond her tour of duty. Gonzalez testified to rare instances where he worked a quarter or one-half hour of uncompensated overtime.¹⁰

Investigators work intake by interviewing walk-ins who wish to file charges and assisting individuals in filing charges. Before Hutter was the Director, individuals who came into the WFO to file a charge were typically told to come

¹⁰ I discount Ullah's testimony in its entirety. Ullah initially testified that he left the Agency due to his discomfort with his ethics and only when confronted with the issue, acknowledged that he resigned before he could be terminated for performance reasons. In light of questions concerning his credibility, based on his own testimony, as well as testimony that conflicts with credible testimony from Stump and Cogswell, and the fact that he could have much to gain from embellishing his work at the Agency, I find Ullah's testimony not to be credible.

back the next day if they came in after 3:30 p.m. Hutter has changed the policy to keep the doors open until 5:00 p.m., but individuals who walk in after 4:30 p.m. are given a form to fill out and asked to return the next day unless they are nearing the statutory deadline. Hutter acknowledged that investigators are sometimes required to call a witness early in the morning or in the evening and, when investigators are conducting an onsite investigation, witness interviews may go beyond the scheduled time, or outreach may take place outside of the workday. (2T. 591-592). Cogswell testified that she has been asked to handle a late walk-in who was nearing a statutory deadline. (5T 760). The September 19, 1995 HRMS Overtime Memorandum explicitly acknowledged that this situation would occur, using it as an example of an exception to the requirement that overtime be authorized in advance.

Similarly, Hutter acknowledged that investigators sometimes work through lunch handling intake. (2T. 595). Kerns and Holmes-Frazier testified credibly that they often worked through lunch when assigned to intake. (1T. 339; 2T. 522). Cogswell testified that Hutter and Stump frequently had to remind her to eat lunch and that she often worked through lunch.

Investigators may also work in excess of their tour of duty when they are performing outreach or an onsite investigation. For example, Clarke testified that she worked on a Saturday doing an outreach program in September of 2005 speaking to a Sikh organization and that she received comp time equal to the number of hours she worked performing the outreach. (5T. 563-565).

Hutter testified that the WFO supervisors worked with employees to address situations where employees worked a half hour to an hour extra by allowing them to use the time another day. (3T. 710). However, Hutter did not distinguish between flexible schedule employees who can earn credit hours and compressed schedule employees who do not earn credit hours. Stump and Cogswell testified to an informal arrangement to allow Cogswell to take time off when she stayed late handling intake.

Cogswell, Stump, and Hutter all acknowledged that Cogswell has worked well in excess of 80 hours per pay period on many occasions and the building security logs show that she signed out frequently after 7:00 p.m. and came in for extended periods on many weekends. Even if, some or all of the time Cogswell was in the office after hours is discounted based upon her testimony that she and Clarke had lengthy personal conversations after work, Cogswell's testimony that she worked on weekends is supported by the building security sign-in logs.

Based upon this evidence, I find that investigators worked in excess of their authorized tour of duty throughout the period from January 2000 to the present. Turning to the issue of whether the employee's supervisor knows or has reason to believe that the work is being performed, I initially reiterate my finding

that of Fernandez' tacit acknowledgement that employee's were working overtime.

Addressing the period from December 2003 to the present, Hutter acknowledged that the WFO was short-staffed, that he was in the process of hiring two new investigators and would like to hire even more investigators. At the time of hearing, the WFO had approximately four investigators, in contrast with the 16 investigators employed in 2000. Although Hutter testified that the performance goals were based upon staffing levels, the special projects to close cases exemplifies the pressure to reduce the backlog despite the low staffing levels. Indeed, the Agency's witnesses, Gonzalez and Cogswell, both testified to the difficulty in getting the work done within 80 hours per pay period with low staffing levels. Gonzalez, who no longer works as an investigator, expressed doubt that the work could be completed within 80 hours per pay period with existing staffing levels, and Cogswell testified that it was not possible to complete her job within 80 hours per pay period. (3T. 982; 5T. 660). From both the evidence that the WFO was understaffed, at least with respect to investigators, and, from the testimony from investigators proffered by the Agency that the job could not be completed in 80 hours per pay period, I find that supervisors knew, or had reason to know that investigators were working in excess of their authorized tour of duty in order to complete the assigned work.

The Agency argues that the efforts of Hutter and other supervisors to tell employees to go home demonstrate its efforts to prevent investigators from working overtime. Although the Agency, through Hutter and his supervisory staff, did urge employees to go home at the end of the workday, the Agency did not otherwise discourage or attempt to prevent investigators from working beyond their authorized tour of duty. Specifically, the Agency did not make attempts to modify caseloads to ensure that work was completed within the tour of duty, nor were employees directly ordered not to work beyond their authorize tour of duty. Although Hutter and Stump testified as to their efforts to keep Cogswell from working overtime, Cogswell testified that she continued to work overtime "in secret". Cogswell acknowledged, however, that Hutter and Stump were aware that she continued to work overtime based upon her work product. Based upon this evidence, I find that the Agency tacitly allowed investigators to work beyond their authorized tour of duty, and limited its efforts to discourage overtime to simply telling investigators to "go home."¹¹ Accordingly, I find that the Agency suffered and permitted its investigators to work overtime.

Turning to program assistants and other support staff, the only support employee who testified was Mills who provides support to the ADR Unit and has reported to Anderson and to Woods. Mills testified that she has come in early, worked late and on weekends and has taken work home. Mills testified that

¹¹ Hutter was more successful at stopping employees from taking work home. However, Holmes-Frazier did not stop taking work home until September of 2005, after Stump brought it to Hutter's attention. (1T. 342-344).

when she first came to the WFO's ADR unit in 2001, there was huge backlog and she spent time typing acknowledgement orders, calling respondents, and doing filing on weekends. (1T. 248). The sign-in/sign-out sheets for the period from December 31, 2000 through December 27, 2002 reflect that Mills often did not complete the sign-in/sign-out sheets. However, the sign-in/sign-out sheets reflect that when Mills did fill them out, she did so at the time she arrived and the time she left rather than simply including the hours of her tour of duty. Additionally, the sign-in/sign-out sheets reflect that Mills frequently worked in excess of her tour of duty on any given day, and worked a total of 87 hours and 10 minutes for the pay period from February 25, 2002 through March 8, 2002. Anderson's testimony that Mills worked overtime, including on weekends corroborates Mills' testimony for the period of December of 2003 when Mills began reporting to Woods. (1T. 139-140).

Mills testified that on occasion she would take work home and she would put documents on a disk and type up the information so that when she returned to work she would simply print it out. (1T. 271). Mills estimated that she worked approximately five (5) to ten (10) hours per month at home until sometime in 2003. (1T. 271-273). According to Mills, when she took work home when Woods was a mediator, he knew that she had taken acknowledgement orders home to work on them. (1T. 302). Mills testified further that for the period when Anderson and Fellin supervised her they were aware that she worked overtime but did nothing to discourage her from doing so. (1T. 302).

Mills explained that the ADR unit is busy and she ensures that her work is up to date, sometimes by working through lunch, and approximately 10% of the time she was compensated by having the opportunity to leave work early or to come in late through informal arrangements with her supervisors but she was not compensated for all the time she worked (1T. 245, 252-253). Mills testified that her supervisors were aware that she was working through lunch because they would come into her office and ask her questions while she was eating and after hours they would also ask questions. Woods testified that to the best of his knowledge, Mills never worked through lunch. (6T. 133). According to Woods, Mills eats lunch at her desk and lets everyone know that she is at lunch and is not to be disturbed. (6T. 133).

Since the WFO moved to headquarters at 1801 L Street, when Mills works weekends, she is required to sign in. (1T. 251). Mills testified that she needs to work extra to keep her work current and indicated that she has not been compensated for work she performed when staying after the end of her workday or on weekends or her day off. (1T. 252-253). From September 2004 through September 2005, the building sign in logs for 1801 L Street show that Mills came into the building on a weekend day for over one hour on at least six occasions and was in the building for one half hour or more on two other occasions. Woods testified that the only time he can remember seeing Mills in the office on the

weekend was in November and December of 2005 was when she was working on the special project with the administrative judges. (6T. 124-125).

Mills testified that "once in a blue moon" a supervisor would tell her not to stay late or not to work weekends but that was never enforced. Mills explained that the supervisor would simply say "go home" and she was not sure whether they were joking or were serious. (1T. 277). Mills explained that Woods would tell her to go home when he was going home himself and then Woods would depart. (1T. 281). Mills testified that when she came in on her flex day, Woods asked her why she had come to work and she had replied that she was there to finish some work and Woods simply said "okay." (1T. 306).

In contrast, Woods testified that when he saw Mills working late he would tell her to go home, and learned that she stayed late because she had a second job for a while and would stay until it was time to go to her second job. However, Mills testified that her second job began at 3:00 p.m. on Friday, her flex day. Since Mills worked a second job on her flex day, it is likely that if Woods was discussing when she would leave work, it was because Mills was in the office on her AWS day.

Woods testified that he does not believe that Mills worked more than 80 hours per pay period since 2003. (6T. 122). Woods testified that Mills had no need for overtime because the way her "employment is structured, it definitely can be done within the time frame that's allotted..." (6T. 126). However, Woods also testified initially that there was "absolutely no work" that Mills could do at home because her primary duties are filing, data input and telephone calls, then later acknowledged scheduling letters could be sent from home, but he preferred that they be completed in the office. (6T. 130, 206). Woods was aware of only one phone call that Mills made outside of work, that was shortly before she was scheduled to have surgery, and she had forgotten to inform an attorney of another party's participation in mediation, so she called that attorney from the hospital. (6T. 130). Woods testified that he was surprised that Mills had called the attorney from the hospital, but he did not provide compensation for that call. (6T. 131). Woods testified that he has never seen or been aware of whether Mills arrived and began working before 7 a.m. (6T. 135).

First, I find that the record demonstrates that Mills performed some uncompensated work beyond her tour of duty before December of 2003 and that some of that work was reflected on the sign-in/sign-out sheets reviewed by Fernandez. As noted herein, Fernandez took no action to prevent Mills from working overtime and her testimony reflects that at least when there was a backlog, completing her job required additional time. Accordingly, I find that Mills worked some suffered and permitted overtime before December of 2003. For the period after December 2003, Mills continued to perform uncompensated work beyond her tour of duty, on occasion with Woods' tacit acquiescence. Although Woods testified that he told Mills to go home, Mills testified that he would leave

directly thereafter so he was not aware of whether she did so. Additionally, although Woods may have meant his injunction to go home to be an instruction, Mills indicated that she believed that he was joking. Woods also indicated that the only work outside of her tour of duty that he knew about was her call to an attorney from the hospital. Woods also acknowledged that it was possible for Mills to complete some of her work from home. Mills' testimony that in response to her requests for assistance, Woods indicated that he was working on it, but no help was forthcoming, shows that Woods was aware of the nature of Mills workload and, although he made efforts to provide assistance, they were unsuccessful.

Despite Woods protestations that he believed that Mills was able to complete her work during her tour of duty, their discussions regarding her workload, Woods' observation of Mills in the office after hours and on flex days leads to the conclusion that Woods was aware that Mills worked in excess of her tour of duty without additional compensation and the only step he took to prevent that work was to tell Mills, perhaps in a less than fully serious manner, to go home. For these reasons, I find that Mills worked suffered and permitted overtime from 2000 at least through the date of the hearing.

Testimony regarding other support staff shows only that several supervisors believed that their support employees had no need to work beyond their authorized tour of duty and that they did not do so. However, in light of my finding that Mills, the representative support staff employee worked permitted and suffered overtime, I find that other non-exempt WFO support staff may have worked permitted and suffered overtime.

In sum, I find that the Agency violated Article 31.09 when it permitted and suffered some WFO investigators and support staff to work overtime from January of 2000 to date.

Turning to the issue of the remedy, the Union seeks a broad remedy for all non-exempt WFO employees as detailed in its arguments from January 2000 to the present. The Agency argues that there is no evidence that employees have worked permitted and suffered overtime since the beginning of this hearing and thus any remedy should end with the beginning of the hearings in this proceeding in November of 2005. However, Cogswell's testimony in January of 2006 shows that permitted and suffered overtime continued at least until that point. Accordingly, the period for which the remedy will be addressed is from January 2000 to date.

Although the Agency has permitted and suffered some WFO investigators and support staff to work overtime, the extent of that violation as well as the appropriate remedy require discussions and negotiations between the parties. Accordingly, upon request from either party within the next 90 days, I will address

the issue of remedy. I retain jurisdiction over the remedy for the Agency's permitting and suffering overtime in violation of Article 31.09.

I now turn to the Union's claim that the Agency "failed to offer employees their guaranteed right to choose between compensatory time and overtime." The Union emphasizes that employees were specifically and repeatedly advised that there was no money available for overtime compensation and were only permitted to accept involuntary comp time and thus should be compensated for the Agency's failure to provide a choice between comp time and overtime.

In accordance with the applicable law and regulations, Section 31.06 of the parties' Agreement provides that "employees may elect to receive compensatory time in lieu of pay."¹²

The record reflects that employees were given the opportunity to earn compensatory time on a "volunteer basis" working on a special project closing aged cases. (A. Ex. No. 12). Although participation in this special project was entirely voluntary, employees were instructed that only compensatory time was available, and they were not given the option to elect overtime.

Hutter testified that when employees are unable to take time for lunch or work beyond their tour of duty they work it out with their supervisors to leave early either that day or the next. (2T. 596, 3T. 705). Clarke testified that when she performed outreach on a Saturday, working a full day, she was given comp time. (5T. 562-563). Likewise, Stump and Cogswell both testified that when Cogswell was required to work late completing an intake interview, she was given time off the next day. There is no evidence that at any time when an employee was required to work in excess of their tour of duty, except for the office move, and a special project that in which Mills participated, were employees offered the option to receive overtime pay. Instead employees were advised only that compensatory time was available. This is in direct violation of Section 31.06 of the parties' Agreement which provides for an election between compensatory time or overtime at the employee's option.

The Union seeks a remedy that would provide liquidated damages to employees for this violation of the Agreement. However, in these situations, employees did receive compensation in the form of comp time for their extra work, and additional compensation for the Agency's failure to provide the choice between overtime and comp time to employees for irregular overtime work is not justified in this situation. Additionally, the Agency is directed to advise non-exempt employees of the option to earn overtime or compensatory time, at their election, each time work in excess of their tour of duty is required.

¹² 5 CFR § 551.531(a) provides that an agency "may grant compensatory time off from an employee's tour of duty instead of paymentfor an equal amount of irregular or occasional overtime work."

AWARD

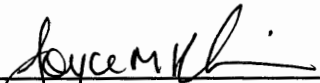
The grievance is sustained to the extent that the EEOC's Washington Field Office suffered and permitted overtime performed by some investigators and support staff from January 2000 to the present as described herein in violation of Section 31.09 of the Collective Bargaining Agreement.

Upon request from either party within the next 90 days, I will address the issue of remedy. I retain jurisdiction over the remedy for the Agency's violation of Article 31.09 as described in the above paragraph.

The grievance is sustained to the extent that the Agency violated the Section 31.06 of the Collective Bargaining Agreement when it failed to offer employees the option to elect overtime or compensatory time for work in excess of their tour of duty with advanced approval. The Agency is directed to advise all non-exempt WFO employees in writing of the option to earn overtime or compensatory time, at their election, each time work in excess of their tour of duty is required.

The remainder of the grievance is denied.

Dated: September 13, 2006
Sea Girt, New Jersey



Joyce M. Klein

State of New Jersey }
County of Monmouth }ss:

On this 13th day of September, 2006, before me personally came and appeared Joyce M. Klein to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.



Gretchen L. Boone

GRETCHEN L. BOONE
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 8/13/2008