FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFL-CIO, LOCAL 3614
(Union)

And

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
(Agency)

O-AR-3821

AGENCY STATEMENT ON ARBITRATION CLARIFICATION

May 9, 2005

The Issues

The Federal Labor Relations Authority, by Decision dated January 28, 2005, has remanded a portion of the March 15, 2004, Award by Arbitrator Lucretia Dewey Tanner back to the parties for resubmission to the Arbitrator, absent settlement, to clarify: 1) whether individual employees are entitled to overtime pay under the FEPA or the FLSA; and 2) which employees, if any, are entitled to overtime pay, minus the value of time off already granted, because they were erroneously granted comp time in lieu of overtime pay to which they were entitled.[1] Decision at 10. The Authority also listed at p. 8 of the Decision the following matters as requiring clarification by the Arbitrator:

[1] The Parties failed to reach settlement.

1. The Arbitrator did not discuss the standards set forth by the FEPA (for exempt employees) and by the FLSA (for the non-exempt employees) for overtime work performed, nor how much of the overtime work performed was irregular and occasional.

2. The Arbitrator should clarify whether employees who worked uncompensated overtime are entitled to overtime pay under the applicable standards. Such employees should be identified individually and categorized as exempt or non-exempt.

3. The Arbitrator should address the amount of compensation to which each such employee is entitled for each employee she identifies as being entitled to compensation under either the FEPA or under the FLSA.

4. The Authority found the following statement by the Arbitrator to be unclear: "[T]he Union has not shown that the entire bargaining unit has a claim to back pay for overtime worked or that Supervisors knew or should have known that overtime work was being performed." Award at 24.

5. The Arbitrator found that at least some non-exempt employees were given comp time. There was conflicting information regarding whether the Agency grants non-exempt employees the option of overtime pay or comp time. The Authority found it unclear if any of these employees were entitled to overtime pay under § 551.501, but were required to take comp time in lieu of pay because they were unaware that comp time may be granted only at their request. The appropriate remedy for such required comp time is the payment of overtime pay, reduced by the value of the comp time already granted.

Additionally, the Authority noted that it did not address the Union's remaining exceptions to the Award. These appear to include the following issues:

1. Whether the Arbitrator improperly found that employees worked overtime without compensation, but that the overtime worked in increments of less than one hour is "de minimis."

2. Whether the Arbitrator improperly failed to resolve whether the employees who testified were representative of the bargaining unit.[2]

3. Whether the Arbitrator improperly concluded that employees did in fact work compensable overtime without compensation, but that no compensation was to be awarded. In other words, did the Arbitrator improperly find that there was a "wash" with employees getting a very flexible work schedule instead of earned overtime pay.

[2] Presumably, if the Union witnesses were representative of the bargaining unit and one or more grievants who testified should properly receive an award, then those members of the bargaining unit represented by each successful grievant/witness should likewise receive similar compensation. Alternatively, if the Arbitrator found that the Union witnesses were not representative of the bargaining unit, the Arbitrator would then have to simply deny any compensation as to the other bargaining unit members because the Union did not meet its burden of proving any violation as to the other bargaining unit members.

The Agency understands that the Arbitrator believes that her Award was correct; therefore, the Agency is not going to reargue the merits of the Union's grievance claims. Rather, the Agency will hereby provide suggestions to the Arbitrator, consistent with the spirit of the original award, which will hopefully satisfy the Authority when the Union files new exceptions to this Award, as clarified by the Arbitrator.[3]

Agency Statement

1. FLSA (covered/ non-exempt) and FEPA (exempt from the FLSA) Standards

a. Two Preliminary Matters

Preliminarily, the Agency brings to the Arbitrator two critical legal issues related to the exempt employees. First, the Agency reiterates the new legal standards governing consideration of claims for compensation for overtime work by exempt Federal employees, as set forth in the Federal Circuit Court of Appeals Decision, Doe v. United States, dated June 23, 2004. (mailed to the Arbitrator under separate cover on May 6, 2005). On or about March 7, 2005, the Supreme Court denied the Petition for Certiorari by the Plaintiffs in that case, so that Decision is now the law nationwide as to claims for overtime work by exempt Federal employees. The Agency notes that on pages 28-30 of the Plaintiffs' attorneys' brief, also provided to the Arbitrator, even the Doe Plaintiffs agree that the Federal Circuit Court of Appeals Decision governs claims for overtime pay by all exempt Federal employees. In short, that Decision,

[3] The Agency has little doubt that the Union will file/refile exceptions to this Award, absent a complete reversal by the Arbitrator. In this light, the Agency urges the Arbitrator not to award members of the bargaining unit with even a small amount of compensation simply as an act of compromise -- in the hopes that the Union will be satisfied with a small victory and not appeal this matter any further. If no members of the bargain unit deserve additional compensation, as the Arbitrator concluded in the Award, then that conclusion should not change with the Clarification. In the event of even an unwarranted compromise clarification, the Agency expects that the Union will most certainly appeal in the hopes of achieving complete compensation from the FLRA under the grievance and also attorneys' fees. The Agency notes that following Arbitrator Powell's decision awarding five bargaining unit employees $1,500.00 each, he then awarded Union attorney Michael Snider approximately $51,000.00 in attorney's fees and costs.

relying upon the relevant Office of Personnel Management ("OPM") regulations, requires that overtime be officially "ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated." 5 C.F.R. § 550.111(c). In this arbitration, EEOC v. AFGE, there was, of course, no writing ordering or approving overtime for exempt employees, nor has the Union asserted (or could the Union properly assert) the existence of such a writing. Nor has any evidence been proffered (nor does such evidence exist) regarding any delegation to any Baltimore District Office manager of authority to order or approve such overtime. Therefore, in addition to any other clarification, the Agency urges the Arbitrator to include in her clarification that the claims of all the exempt grievants must be dismissed, in accord with the Doe interpretation of Section 550.111(c) as applied to the facts of this case.

The second legal issue the Agency wishes to bring to the Arbitrator's attention is the fact that Federal Agency heads are specifically authorized to establish a system or rule of compensating exempt employees in a position of GS 10, step 10, or higher, for overtime with compensatory time off only, instead of overtime pay. 5 C.F.R. § 550.114(c). It has long been the Commission's policy that exempt employees whose rate of basic pay exceeds the maximum rate of GS 10, step 10, shall receive only compensatory time instead of overtime pay. See EEOC's September 19, 1995, Memorandum, at Agency Pre-Hearing Submission Tab 1, page 4, under "General Policy" Part 2b. (This Tab 1, in relevant part, is attached to this Brief). As a factual matter in this case, the rate of all BDO exempt employees exceeds the GS 10, step 10 rate. See Agency Exhibit B, attached to the Agency Post-Hearing Brief (provided to the

Arbitrator under separate cover), which lists the grade of all BDO exempt staff as being either grade 13 or grad 14.[4]

This Agency contention -- that exempt employees may be compensated for overtime work with compensatory time only, not with compensatory pay -- was presented to the Arbitrator before the hearing and has not been disputed in any way by the Union. The Agency brings to the Arbitrator's attention that the Agency explained the significance of this information from the September 19, 1995, Memorandum in the Agency Post-Arbitration Brief at 7-8. (This Brief was provided to the Arbitrator under separate cover.) The Arbitrator did not mention this undisputed Agency policy, presumably because the Arbitrator had not found compensable overtime for any exempt staff and, therefore, did not have to compute either the manner or amount of compensation for any exempt staff. But in light of the Authority's request for clarification, the Agency urges the Arbitrator to cite to the Agency Pre-Hearing Submission Tab 1, page 4, and to the high grade of the exempt staff and then clarify that, in contrast to the choice which non-exempt employees may make regarding compensable overtime, exempt employee covered by this grievance at BDO who work overtime may not receive any overtime pay but rather receive only compensatory time off.[5]

b. Remaining Agency Response

The standards set forth by the FLSA and the FEPA were summarized by the Agency in its Post-Hearing Brief at pgs. 7-10, and the Arbitrator is urged to review them and set them forth to the extent she has considered them, as suggested by the Authority.

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[4] The 2004 pay for all general schedule Federal employees in the Baltimore-Washington, D.C. area can be located at the OPM website: http://opm.gov/oca/04tables/pdf/saltbl.pdf This matrix screen reveals that in fiscal year 2004 the GS-10, step 10 salary $59,862 was lower than the lowest pay for a GS 13 employee (at the step 1 level) of $72,108.

[5] In light of the Authority's apparent lack of knowledge of the Agency policy regarding compensation for overtime worked by exempt EEOC employees, the Agency urges the Arbitrator to make this point clear, even if the Arbitrator clarifies no overtime by exempt staff was ordered or approved by a properly delegated person.

Irregular or occasional overtime work (not regular or authorized) is overtime that is not scheduled in advance of an employee's work week. 5 C.F.R. § 551.501 (8)(c). Such irregular or occasional overtime work is credited in a quarter of an hour increments, with odd minutes being rounded up or down to the nearest full fraction of the hour used to credit overtime work. Thus, any such overtime eight minutes or more which is compensable is not de minimis. 5 C.F.R § 551.521(b)

The Agency reiterates that FLSA overtime is either authorized on one hand or suffered or permitted on the other hand. Authorized overtime means overtime authorized in advance or simply put: it must be requested and authorized before being performed.[6] The Union has made no claim that authorized overtime was not compensated. Rather, the Union's claim is only that suffered or permitted overtime was performed by the non-exempt employees and should be compensated under FLSA standards. Suffered or permitted work is any work performed by a non-exempt employee for the benefit of the Agency, whether requested or not, provided the employee's supervisor knew or had reason to believe that the work is being performed and has an opportunity to prevent the work from being performed. 5 C.F.R. § 551.104. Agency policy disapproving suffered or permitted overtime work is long standing and has been repeated in regular office issuances, including at Tab 1 at pg. 4. Therefore, the burden on the Union to demonstrate that managers knew or should have known of such improper overtime, if any, should be a high one.

It is also undisputed that if compensatory time is proper compensation for overtime worked, either for all FEPA overtime worked or for FLSA overtime in lieu of overtime pay, then

[6] Authorized overtime may be irregular or occasional if authorized during the work week performed. The Agency would suggest that "off the books" authorization is also irregular or occasional overtime as opposed to scheduled overtime. The Agency also notes that while "off the books" agreements may not be proper under Agency guidelines, the existence of such "off the books" agreements is not an issue in the grievance/arbitration raised by the Union for relief.

the Agency may determine that the amount of such compensatory time is equal to the amount of such irregular or occasional overtime (or 1 hour compensatory time for 1 hour overtime worked). 5 C.F.R. § 550.114(a). In the governing EEOC September 19, 1995, Memorandum, at tab 1, pgs. 3-6, EEOC provides that compensatory time is in fact computed at that rate of one (1) hour earned for each hour overtime worked. This fact becomes significant if and when the Arbitrator computes the value of such compensatory overtime worked.

2. Are Employees Who Worked Overtime Entitled To Overtime Pay?

It has been the Agency position that no overtime by non-exempt staff was suffered and permitted. That is, any overtime claimed by non-exempt staff which was not compensated was not demonstrated to be known by supervisors, therefore, it does not meet the definition of suffered or permitted. Rather, the Agency contends that all overtime worked by non-exempt staff and known to supervisors was 100% compensated by supervisors with voluntarily requested compensatory overtime at the rate of one hour comp time for one hour overtime. All comp time requested was voluntarily requested. The Agency urges the Arbitrator to adopt these statements in her clarification.

Almost all comp time requests were granted simply based on the honor system, that is, based simply on the employee's request. On rare occasions, a comp time request was denied when the employee's claim was not credible. On all occasions where comp time was granted, the amount of comp time was one hour of comp time for one hour of overtime. No supervisor of FLSA-covered staff knew or had reason to believe that other irregular or occasional work (not the basis of a comp time request) was being performed and had an opportunity to prevent the work from being performed. Much of the comp time requests arose from overtime work first reported after the fact, that is, for overtime work for which the Agency had no legal obligation to

provide any compensation whatsoever. Nothing in the Arbitrator's Award is inconsistent with these conclusions.

The testimony of some of the FLSA-covered bargaining unit staff and of all Agency management witnesses was consistent with this position. Those Union witnesses who testified to the contrary were not credible, and the arbitrator identified the reasons in each case for such lack of credibility. The Arbitrator need only confirm that she did not find such inconsistent testimony credible and that she therefore did not credit it.

After an exhaustive review of the entire transcript, the undersigned Agency representative was able to summarize the pertinent testimony of each and every witness and cite to the correct page of the hearing transcript. See Agency Post-Hearing Brief at pgs. 11-15. The Arbitrator is urged to review this summary, confirm its accuracy by reviewing the transcript and then cite to it, in support of the Arbitrator's Award.

The Union presented the following FLSA-covered witnesses: Harding (Baltimore Office Legal Tech), Pisik (Norfolk Office Investigator), McPhie (Richmond Office Investigator) and Scholtz (Norfolk Investigator). The Agency presented FLSA-covered witnesses Davis and Bosque (both Baltimore). The Agency also presented management witnesses from various offices and various jobs regarding FLSA overtime claims: Tanner (Baltimore Supervisory Investigator), Cassell (Baltimore Sup. Investigator), Sciscione (Baltimore Sup. Mediator), Dillard (Richmond former Sup. Investigator), Glisson (Richmond Sup. Investigator), and former overall Directors for all three offices Kiel and Lee.

Harding agreed she worked no uncompensated overtime under her supervisor Lawrence (TR 192) and that she elected comp time in writing, so there was no coercion (TR 146, 164-66). When she worked unapproved overtime, her supervisor told her not to do it again. (TR 186).

Kiel testified that Harding had been given a choice in terms of library work, either to work overtime for comp time now or wait till overtime pay was available in the budget. Harding's subsequent decision to request comp time for overtime work is therefore "voluntary." (TR 524).

Pisik's testimony was not credible, and the Arbitrator noted these reasons. Pisik stayed late beyond her tour of duty either to talk about non-work-related matters (TR 687-88) or to be accompanied to the parking area (TR 689-90). Brown explained that Pisik was upset at EEOC, as she had to pay back leave money provisionally granted to her during the pendency of her workers comp claim, when that claim was denied (TR 742-45) and she evidenced extreme subjectivity when she threatened suicide (TR 751). This subjectivity was also in evidence during her testimony. The Agency urges the Arbitrator to confirm that she found Pisik's testimony lacking in credibility, so as not to credit her claims.

Similarly, McPhie demonstrated that her "computation" of uncompensated overtime was error-prone, arbitrary and unsupported by records the Union introduced or which she claimed to possess but failed to provide. See cross-examination generally starting at TR 802. Supervisor Glisson confirmed that McPhie was loose with numbers (TR 856), that she often missed work (TR 862), and that Glisson had cause to mistrust McPhie's representation of hours worked ((TR 863, 865). McPhie's motivation for testifying against the EEOC after she left was explained by her knowledge that Glisson often did not believe her to be truthful (TR 866) and by Glisson's refusal to remove a negative narrative from McPhie's appraisal (TR 874-75). The Agency also urges the Arbitrator to confirm that she found McPhie's testimony unconvincing and therefore that the Arbitrator did not credit McPhie's testimony.

Scholtz essentially confirmed that he performed no uncompensated overtime (TR 935-37). Davis did not tell her supervisor when she occasionally worked during lunch (TR 351) and

she made de minimis phone calls lasting just minutes (TR 355). Bosque testified she was fully compensated for outreach and on-site work she performed outside her tour of duty (TR 468).

All supervisors testified they believed the work can be completed within 40 hours per week (TR 376, 416, 513, 561, 585-86, 779), that sign in/out sheets were not reliable (TR 372-73) and that they were unaware of employees working through lunch and not taking lunch at a different time (TR 378, 421-22, 574) except for one time when an employee was told not to do it again (TR 407), that all comp time requests were granted (TR 393-94, 563)(except for McPhie) and that they were not aware of uncompensated overtime worked (TR 377-78, 508-09, 784). The Arbitrator acknowledged this testimony at the bottom of pg. 22 of the Award. The Arbitrator need only state that she credited this testimony. Therefore, supervisors could not have a reason to expect that overtime would have to be worked, thereby suffering or permitting it.

In sum, the testimony made clear that all compensable overtime worked by FLSA-covered staff was compensated by comp time on a one hour for one hour basis, including some comp time requests made after the fact for which no compensation was legally required. Alternatively, any other uncompensated overtime was not suffered and permitted as the supervisors were unaware of such overtime work. On those occasions – Pisik and McPhie – where witnesses claimed to have performed suffered and permitted overtime, the Arbitrator should find those Union witnesses not credible and rather credit the respective supervisors who testified that they were unaware of any such overtime work, they believed that the work could be done in normal tour of duty and did not require overtime to accomplish and/or that they concluded that the claimed overtime work was not credibly demonstrated.

Exempt staff testimony was also not helpful to the Union.[7] The only attorney to complain that work could not be performed within 40 hours was Norken, a Union official (TR 783). But Norken agreed he had been directed by Supervisor Kleinman not to work more than 40 hours average per week, and that he agreed to comply (TR 283 and Agency Exhibit 1). Much of Norken's claimed overtime was travel-related. However, he agreed that he controlled the setting of hearing dates and times (TR 277), so such time was not compensable.[8] Trial Attorney (TA) Caldwell agreed she was compensated for all overtime reported (TR 206). TA Andrew testified that she received unofficial comp time for overtime worked (TR 92). Dillard testified she has performed her Administrative Judge (AJ) job within an average of 40 hours per week (TR 559) and she was granted all comp time she requested (TR 560). Supervisory TA's Lawrence and Spicer confirmed that all attorneys under their watch got comp time for all overtime worked (TR 581-82, 608-09). Former AJ Richmond's claims are inconsistent with the rest of the testimony and should not be credited by the Arbitrator. In sum there were no substantiated claims of overtime performed by exempt staff for which they were not compensated hour for hour with compensatory time.

3. The Amount of Compensatory Pay Proven by the Union

Legally, the Union cannot demonstrate or prove its claim for compensatory pay for exempt staff, both because (1) no overtime was officially ordered or approved in writing by a properly delegated person and (2) because the Agency policy directed that all overtime worked be compensated only by overtime hours, not by pay. Therefore, it would be unnecessary for the

[7] The arbitrator does not have to consider these factual matters, because all overtime pay for the exempt staff is precluded both by section 550.111(c), as defined in Doe, and by the Agency policy that exempt staff may not be compensated with overtime pay. Nevertheless, this testimony provides the Arbitrator with an alternate or additional basis for a finding justifying no overtime pay for exempt staff.

[8] See legal standards for compensation for travel time for exempt staff at Agency Post-Hearing Brief, p. 9.

Arbitrator to compute such overtime performed for exempt staff. And the Arbitrator may add that all compensable overtime worked by exempt staff was fully and properly compensated by comp time, based on witness testimony.

As to the FLSA-covered staff, neither Pisik's nor McPhie's claims should be credited. Harding could only make a "wild guess" about her claimed uncompensated overtime, and such speculation should not be credited. The Union presented no specific number of hours of overtime performed by any staff where such overtime was known in advance by Agency supervisor(s). Therefore, it would be unnecessary and impossible for the Arbitrator to compute such overtime performed. The Arbitrator might add that, in any event, the amount of comp time requested by FLSA-covered staff for overtime to be worked (before the fact) appeared to be extremely rare, that such requests were clearly voluntary requests, that such requests were almost always granted with one hour of comp time for each hour of overtime.

Nevertheless, the Arbitrator may want to summarize the standards for computing overtime compensation, which the Agency has summarized at p. 10 of its Post-Hearing Brief. If there is a violation of the FLSA overtime provisions, an employer shall be liable to the employees affected in the amount of their overtime compensation, and an additional equal amount as liquidated damages. 29 U.S.C. § 216(b). However, under 29 U.S.C. § 260, liquidated damages may be reduced or eliminated if an employer shows that it acted in good faith and reasonableness when it nevertheless violated the FLSA. The Agency notes that supervisor testimony reflects that almost all compensatory time requests were granted, and that this reflects the Agency good faith. Therefore, the Agency contends that liquidated damages should be eliminated from any computation.

4. The Union Has Not Shown The Entire Bargaining Unit Has A Claim For Back Pay; Or Supervisors Knew Or Should Have Known That Overtime Was Being Performed

Clearly, the Arbitrator concluded that the individual FLSA witnesses who testified did not demonstrate a claim for back pay, either because their testimony was not credible or because they did not demonstrate that their supervisor(s) knew or should have known that overtime work was being performed. Otherwise, the Arbitrator would have granted such back pay for those witnesses. Nevertheless, the FLRA has concluded that the Arbitrator has not made that finding explicit enough, so the Arbitrator should state this explicitly.

Also, the Arbitrator found that "the Union called eight witnesses who represented both exempt and nonexempt from FLSA coverage. These employees worked in the Baltimore office and its field offices in Richmond, Va. And Norfork (sic), Va." Without a doubt the Arbitrator had concluded that the witnesses were representative of the entire bargaining unit.[9] Nevertheless, given the Authority remand, the Arbitrator is urged to restate this fact.

5. Computation Of Overtime Pay Reduced by Value Of Compensatory Time Granted

To the extent that the Arbitrator (or the FLRA) does conclude that overtime was performed, that it was claimed before the fact or that supervisors knowingly suffered or permitted such overtime work and that employees who requested overtime compensation rather than overtime pay did not do so voluntarily or did so without being fully aware they had the right to overtime pay, then the Arbitrator must compute the overtime pay reduced by the value of compensatory time granted. In this case, there is no witness testimony that compensatory time granted was not used. Therefore, the Arbitrator need only value the compensatory time granted, and reduce the overtime pay by that value. At EEOC, the Agency had determined that "[c]ompensatory time is computed at the rate of one (1) hour earned for each hour of overtime

[9] Perhaps the Authority was concerned that the Arbitrator had concluded that the Union had shown that some of the bargaining unit – but not the entire bargaining unit – had a claim for backpay. The Arbitrator can easily clarify this.

worked." Agency Pre-Hearing Submission, tab 1 at p. 5, under "Compensatory Time," 4.a. Therefore, it must follow that where one hour of compensatory time has been granted and used, the value of the comp time was equal to the overtime pay earned. Thus, any award should be reduced to zero. For this reason, it would also be unnecessary for the Arbitrator to compute the exact number of overtime hours performed by each FLSA-covered employee. Zero times any number equals zero pay.

6. Other Union Exeptions Not Addressed By The Authority

The Union claimed "The Arbitrator's Award is contrary to law since she found that employees worked overtime without compensation, but that overtime worked in increments of less than one (1) hour is 'de minimis.' (Award at 22)." However, the Union has simply misrepresented what the Arbitrator actually said. The Arbitrator, referring to "off the books" and informal arrangements practiced by some supervisors, noted that supervisors and employees both are "better served by permitting informal arrangement if the requested overtime *after the fact* is of a de minimis amount, less than one hour." (emphasis added). Clearly, the Arbitrator was not discounting compensable overtime as the Union claimed. Rather, the Arbitrator was condoning a practice where some Agency supervisors voluntarily provided compensatory overtime, reported after the fact, where such compensation was not legally required.

The Union also claimed that the Arbitrator did not clearly resolve whether the witnesses who testified represented the bargaining unit. But to the contrary, the Arbitrator did so at p. 6 of the Award by noting that the Union's eight witnesses "represented both exempt and nonexempt." The Union also asserted that the Arbitrator's decision not to award compensatory pay for compensable overtime worked as "wash" for providing employees with a flexible schedule. However, the Arbitrator's reference to flexibility was to point with approval (or at least without

disapproval) to the "off the books" informal arrangements by supervisors. The Arbitrator actually wrote that "[t]his flexibility appears to out weigh the need *to account* for the very few hours of overtime that may or may not have been worked, except in extreme situations." (emphasis added). Award at p. 23.

In sum, the Arbitrator's Award was correct in its original result and, if augmented consistent with these suggestions, the concerns of the FLRA should be addressed thereby.

Respectfully submitted,

James M. Sober
Agency Representative

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

JUN 2 3 2003

Office of the Chair

Mr. Michael J. Snider, Esq.
General Counsel, AFGE Local 1923
G-314 West Hi Rise Building
6401 Security Blvd
Baltimore, Maryland 21209

Dear Mr. Snider:

This is in response to the Step 3 grievance filed by Regina Andrew on behalf of bargaining unit employees in the Baltimore District Office. The grievance was filed pursuant to Article 41.00, Negotiated Grievance Procedure, of the Collective Bargaining Agreement (CBA) between the Equal Employment Opportunity Commission (EEOC) and the National Council of EEOC Local No. 216. Although the Union sought to combine the grievances for the Baltimore District Office and the Washington Field Office, I cannot agree to such combination. Therefore, I am issuing a separate Step 3 decision for each. Pursuant to Ms. Andrew's request, this decision is being directed to you.

The grievance asserts that the Agency violated the Fair Labor Standards Act (FLSA), the Back Pay Act and the Collective Bargaining Agreement when it failed to properly classify bargaining unit employees as FLSA non-exempt; failed to pay proper compensation for overtime worked to bargaining unit employees; improperly offered bargaining unit employees compensatory time in lieu of overtime, and failed to pay suffered and permitted overtime to employees. The Union also asserts that the Agency failed to pay FEPA/Title 5 overtime pay to exempt employees pursuant to 5 USC 542 and required exempt employees, whose rate of basic pay is less than the maximum rate of GS-10, Step 10, to accept compensatory time in lieu of overtime pay.

As a remedy, the Union asks that the Agency reclassify all improperly classified bargaining unit employees, retirees, and past employees as FLSA non-exempt, retroactive three years; back pay under the CBA, the Back Pay Act, the FEPA and the FLSA; pay for suffered and permitted overtime retroactive at least three years; liquidated damages; overtime pay for any compensatory time worked retroactive six years and reasonable attorney fees, costs and expenses.

With respect to the assertion that the Agency failed to properly classify bargaining unit employees as FLSA non-exempt, I note that the Union did not provide the names or titles of any employee whom it believes has been improperly classified. It should also be noted that in 1995 Agency representatives sat down with the Union and discussed and agreed to specific designations of bargaining unit employees as FLSA exempt or non-exempt. That agreement is memorialized in a Settlement between the Agency and the Union and attached to HRMS Memorandum No. 550.006-6 dated September 19, 1995 (attached).

With respect to the claim for compensation for all overtime/compensatory time/suffered and permitted overtime worked, you have not offered any specific information identifying any employee or dates and times of any overtime violations. In your Step 3 grievance you indicate that support for your assertions can be found in Sign-In/Out Sheets. However, Sign-In/Out sheets are unreliable as indicators of overtime. They are used for the sole purpose of recording an employees presence in the office for time card purposes. Therefore, absent more specific information from you, I am unable to address the substance of your assertions.

Based on the above, this grievance and requested remedies are denied. If you are not satisfied with this decision, you may elevate it in accordance with the CBA.

Sincerely,

Leonora E. Guarraia
Chief Operating Officer

Attachment

cc: James Lee, Acting Director
Office of Field Programs

Silvio Fernandez, Acting Director
Washington Field Office

Gerald Kiel, Acting Director
Baltimore District Office

2

HRMS

U.S. Equal Employment Opportunity Commission
Human Resources Management Services
MEMORANDUM

No. 550.006-6
Date: September 19, 1995

TO: Chairman
Vice Chairman
Commissioners
Executive Director
Headquarters Office Directors
District Office Directors
Washington Field Office Director

FROM: Patricia Cornwell Johnson, Director
Human Resources Management Services

SUBJECT: OVERTIME

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

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

Originator:	Program Planning and Policy Development Division
Contact Person:	Kenneth Myers (202) 663-4342
Filing Instructions:	File with EEOC Order 550.006, Overtime
Expiration Date:	September 19, 1996
Type of Memo:	Informational

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

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

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

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

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

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

3. Computation of overtime pay

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

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

4. Compensatory Time

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

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

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

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

5. Time spent traveling

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

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

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

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

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

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1) The travel involves the performance of work while traveling. This means work which can only be performed while traveling (such as monitoring communication, or signal devices used in air or rail traffic) and consequently, this provision will generally be inapplicable to EEOC employees. However, EEOC employees are entitled to compensation for any work they are officially directed or approved to perform (such as preparing questions while on an airplane for the next day's deposition). Compensation for such work is limited to the time spent working rather then the total time in a travel status;

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

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

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

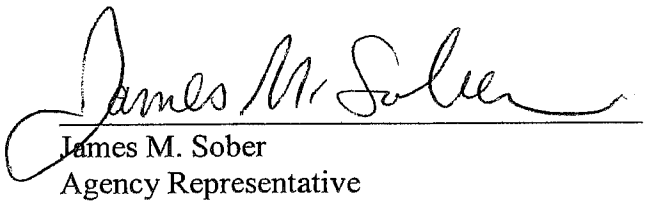
Attachments

cc: All Field Personnel Management Specialists
Administrative Officers

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2005, a true and correct copy of the Agency Statement on Arbitration Clarification was filed by first class mail or by fax to Arbitrator Lucretia Tanner, 14300 Baden Westwood Rd., Brandywine, MD 20613/fax no. (301) 888-9526, and served upon the following by first class mail:

Michael J. Snider
Union Representative
AFGE, Local 1923
G-314 WHR Building
6401 Security Boulevard
Baltimore, MD 21235



James M. Sober
Agency Representative

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

May 6, 2005

Arbitrator Lucretia Tanner
14300 Baden Westwood Road
Brandywine, MD 20613

Re: Arbitration Award Clarification in the matter of
U.S.EEOC and AFGE, AFL-CIO, LOCAL 3614

Dear Arbitrator Tanner:

I am hereby providing you with records and documents relevant to your Clarification of the Award, but not the Agency brief. I intend to fax you that brief Monday, May 9, 2005. I assume you have maintained the hearing transcript and the parties' briefs and exhibits, but out of an abundance of caution I am sending you under this cover letter the Agency post-hearing brief and the hearing transcript, which I believe you may want to consider.

In addition, I am providing you with a new Federal Circuit Court of Appeals Decision, Doe v. United States, dated June 23, 2004. On or about March 7, 2005, the Supreme Court denied the Petition for Certiorari by the Plaintiffs in that case, so that Decision is now the law nationwide as to claims for overtime work by exempt Federal employees. In the pages following that decision I have also included pages 28-30 of the Plaintiffs' attorneys' brief acknowledging that the Decision governs all exempt Federal employee. In short, this decision, relying upon the relevant Office of Personnel Management ("OPM") regulations, requires that overtime be officially "ordered or approved ... in writing." 5 C.F.R. § 550.111(c). In the EEOC v. AFGE case you are arbitrating, there was, of course, no writing ordering or approving overtime for exempt employees, nor has the Union asserted the existence of such a writing. Therefore, in addition to any other clarification, the Agency urges you to dismiss the claims of all the exempt grievants in accord with this case and its now controlling interpretation of Section 550.111(c).

Respectfully submitted,

James M. Sober
Agency Representative

Enclosures:

1. Doe v. United States, the DOJ Plaintiff's March 7, 2005 Litigation Updates and relevant portion of Plaintiff's brief requesting Certiorari by the Supreme Court;
2. The Agency Post-Hearing Brief plus Exhibit B, Staffing Chart, and
3. All three volumes of the hearing transcript (condenses version)

cc: Michael Snider (to be served with the Agency brief on May 9, 2005)