BEFORE STEVEN M. WOLF
ARBITRATOR

NATIONAL COUNCIL OF EEOC LOCAL NO.. 216, AFGE, AFL-CIO, Union,	)	
and	)	FMCS Case No. 071012-00226-A
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Agency.	)	FLSA GRIEVANCE

AGENCY'S POST-ARBITRATION SUBMISSION

On April 7, 2006, after being informed by the Agency that it was changing the status for its investigators and mediators to exempt from non-exempt, the Union filed a grievance which is the subject of this arbitration. The Union grievance, in applicable part, alleged:

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

The Agency denies that there is any validity to the Union's claims and seeks dismissal of the overtime portion of the grievance.

This Agency submission will discuss: (1) jurisdictional issues raised pre-hearing; (2) regulatory requirements relating to suffered and permitted overtime; (3) exceptions to requirement to pay overtime; (4) analysis of the evidence presented; and, (5) damage considerations.

The Agency's position is that: (a) approval by management is required before employees can work extra hours, for pay or otherwise; (b) management has made it known to employees that overtime for pay will not be approved, telling them there is no money in the budget for overtime pay; (c) management wishes that investigators, mediators and paralegals perform their duties within 40 hours a week or 80 hours a pay period, and do not require work beyond those limitations; (d) employees, at times, knowing that paid overtime will not be approved, voluntarily request to work beyond their scheduled tour of duty for compensatory time off for personal convenience, in lieu of invoking existing options to avoid the extra work time; or they work extra time without prior approval; (e) where the extra voluntary work is made known to management, the employee receives compensatory time off on an hour for hour basis. In virtually every case of alleged overtime, the employee had the choice to work the extra time for comp time or not work the extra time at all. Furthermore, much of the alleged "overtime" worked is not suffered and permitted overtime at all.

I. PRE-HEARING ISSUES

The Agency reiterates the arguments made in its motions to dismiss filed prior to the hearings on the second phase of the arbitration. The Agency argued then and argues again here

that this arbitration is fatally flawed because of Union non-compliance with two obligations: the requirement of Section 41.07 of the CBA that the Union identify the employees involved, office involved, date of occurrence, and how the incident is in violation in any grievance and, the opt-in provision of the Fair Labor Standards Act [hereinafter "FLSA"], 29 U.S.C § 216(b). These provisions were designed to give notice of a claim so that the Agency would not be blindsided by a grievance, that is, denied sufficient information to understand the nature of the claim before the hearing. Unfortunately, the Arbitrator's rulings left the Agency in a position of identifying witnesses and exhibits for hearing without understanding any specifics relating to Union claims. The Agency raised these procedural issues by motion, both oral and written, and again requests that the arbitrator now dismiss this portion of the grievance on jurisdictional grounds.

After hearings lasting eight weeks, the Union failed to offer any proof that Agency managers and supervisors required investigators, mediators or paralegals to work more than forty hours a week or eighty hours a pay period. The only issue in this case is whether the Agency "suffered and permitted" investigators, mediators and paralegals to work extra hours beyond their tour of duty without compensation.

A. Non-compliance With The Requirements Of The CBA, Section 41.07

The Union failed to meet the minimum requirements of the grievance procedure contained in the CBA. To define an issue, the CBA at Section 41.07, Step 1, requires that "a written grievance at a minimum shall: (a) identify the employee and office, and (b) identify the incident and the date it occurred." Contrary to these requirements of the CBA, in Step 2 of the grievance process, the Union gave no specifics, but instead alleged that Agency supervisors knew of alleged overtime and that the supervisors "knew" that employees could not accomplish the work without working extra hours. No names, incidents or specifics are provided.

According to the CBA, Section 41.07, Step 2: "Any issues not raised in the grievance by Step 2 are waived." The Agency therefore requests the Arbitrator to dismiss this grievance for failure to provide the required specifics by Step 2 of this grievance process to allow the Agency to respond. The fact that the Union may have fleshed out its claims during the Arbitration does not cure the clear words of this contract deficiency at the Step 2 stage. Further, the opt-in requirement under the FLSA was crafted to insure that unions seek relief only for employees who affirmatively agree with the union's FLSA claims. In this case a substantial number of union witnesses refused or failed to cooperate and presumably would not have opted into the proceedings if they had been given the opportunity to do so.[1] As a result of the Union's failure to comply with the CBA and the opt-in provisions of the FLSA, the Agency was forced to prepare to defend against nonexistent claims which wasted valuable Agency resources and negatively impacted the Agency's attempt to defend itself in this action. Further, without details regarding the Union's claims, the Agency had difficulty complying fully with the Union's document request, and when the Union finally identified representative witnesses, the Arbitrator precluded the Agency from supplementing its response with additional relevant documents. The Agency incorporates herein by reference its pre-arbitration motions and memoranda regarding arbitration procedures related to this proceeding.

B. Timeliness Of Grievance – 30 Day Time Limit For Filing – No Date Of Violation Specified In A Grievance, Therefore No Opportunity To Raise Timeliness

Because the Union failed to supply any information as to the date of an alleged violation pertaining to an investigator, mediator or paralegal, the Agency was unable to raise the issue of timeliness of the grievance under the CBA, Section 41.07, requiring that the grievance be filed

[1] For example, of 885 potential Investigator witnesses, 100 Investigators were identified in the Union's pre-hearing submission for the overtime phase of this arbitration, but only 50 Investigators testified. At least 6 of the Investigators who testified stated that they did not work extra hours.

within 30 days of the alleged violation. Although the Arbitrator rejected this argument because it was not raised in Step 1 or 2, the Agency hereby preserves this issue as related to the lack of specificity in the grievance discussed above.

Union counsel complained consistently throughout the proceedings that she did not get all necessary documentation concerning the hours of work of non-exempt employees. The CBA, by expressly requiring specific information relating to grievances in Section 41.07 and providing a requirement that grievances be filed "within 30 calendar days after the incident giving rise to the grievance occurs," contained provisions intended to limit the burdensomeness of document disclosures required by statute. Unfortunately, the Union ignored compliance with those provisions and the Arbitrator interpreted the provisions to permit a general, non-specific description of the grievance. That interpretation is contrary to the spirit and intent of Section 41.07 of the CBA. Had the Union identified the affected individuals allegedly suffered and permitted to work overtime in a timely manner, the search for documents could have, and would have, been more effective.

The Union asked questions of most of the timekeepers that was clearly aimed at demonstrating that the Agency did not make an adequate or indeed any search for the records requested by the Union as part of its records demand prior to the arbitration. In almost every situation, the timekeepers remembered that in the recent past they had been asked to accumulate and submit time records. In a few cases, they did not.[2] However, the Union selected the timekeeper witnesses. Others not selected to testify, or did not appear although originally listed, might have been involved in the search for documents in that particular office. Again, because the Agency had little prior knowledge that this irrelevant and improper issue would be raised

prior to the simultaneous submissions of witness lists and exhibits, it did not have the opportunity to properly defend itself against these charges and did not identify or present timekeeper witnesses.

Under the statute the Agency has the obligation only to supply relevant records reasonably available. 5 U.S.C. §7114 (b)(4). The Agency did that, and while its response wasn't perfect, it was adequate to the request. There is no discovery under the CBA. Neither party was entitled to discovery; and, of course, the Agency had no ability to obtain any information from the Union, apart from the 30-day pre-arbitration submission.

The Union's remedy, if it felt the Agency's response under the Federal Sector Labor Management Relations Statute was inadequate or incomplete, was to file an Unfair Labor Practice charge. Because the Union has stewards in most, if not all, of the offices and since most of the timekeepers are in the bargaining unit, the Union had to know whether the document production by the Agency was adequate and responsive. Having failed to file a ULP within six months of any alleged breach, the matter should be regarded as closed. Moreover, the Arbitrator foreclosed inquiry or explanation by the Agency into its process for responding to the Union's information request, indicating that, for him, it was not at issue simply because the Union attorney criticized its sufficiency. (T. 2916-2919)

C. Representational Witnesses And Evidence Is Not Sufficient To Establish Class-wide "Suffered And Permitted" Violations

"Suffered and permitted" is a concept unique to the supervisor/employee relationship. Did the particular supervisor know or should he or she have known of the extra time worked? Did the supervisor have the opportunity to prevent the extra work prior to it being done? Was

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[2] One of the timekeepers who didn't recall any request was Ms. Moore from Cincinnati. She was confused about everything during her testimony and was hardly reliable. Her testimony was contradicted directly and specifically by the Cincinnati Director Wilma Javey. (T. 5737-5738).

the extra time worked so frequently that the supervisor should have anticipated the extra work and prevented it? Was this a flexible schedule worker whose extra time was not overtime? As the testimony clearly showed, the incidents where bargaining unit employees chose to work extra hours varied from office to office and from supervisor to supervisor within those offices[3].

This hearing was conducted improperly, and against the Agency's will, because the arbitrator decided to conduct it as a so-called "representative" proceeding, instead of requiring proof for each claimant and proof that all persons for whom relief was being sought were subjectively interested in pursuing relief, i.e., had opted into the proceeding, a requirement found in the FLSA itself. In fact, had the process been followed correctly, the actual number of individuals electing to participate in any type of award would likely be rather small.

The Arbitrator appears to have taken the position that the Agency waived the right to protest this process because of something former Agency Representative James Sober (in the exemption phase of this arbitration), was understood to have said early on in the process. Mr. Sober does not recall agreeing to that arrangement. But any offhand comment made early in the process before any progress was made towards scheduling should not preclude a different position later. The Agency filed a formal motion in June 2007 arguing that a representative proceeding was unauthorized by the FLSA. We persist in that position but will not burden this Submisssion with a repetition of the arguments previously advanced in support of that position. We will confine ourselves here to pointing out that at the time this issue was presented, the parties had not expended any energy on the merits case so there was no prejudice to the Union by the Agency changing its position (if that is indeed what happened) on whether the proof could be

[3] The Agency contends this hearing demonstrated that witnesses were not representative of much. The use of "representative witnesses" made sense in the exemption phase of the instant arbitration because investigators, mediators and paralegals were covered by job descriptions that were consistent for each job category.

representative. Further FLRA law that characterized the FLRA opt-in proceeding to be procedural, and hence not binding in the administrative (i.e., arbitral) forum, merely authorizes, but doesn't require, representative proceedings. Moreover, there is a basis to believe that that authority would not be followed by the FLRA if submitted to it as a legal issue in a more compelling circumstance than the one in which the FLRA characterized the opt-in rule, where there were very few affected employees. United States Department of the Navy Naval Explosive Ordinance Disposal Technology Division Indian Head, Maryland and AFGE, Local 1923, 57 F.L.R.A. No. 280 (2001); United States Department of Interior Bureau of Reclamation and International Federation of Professional and Technical Engineers Local 128, 59 F.L.R.A. No. 123 (2004); De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 310 (3d Cir. 2003); Prickett v. DeKalb County, 349 F.3d 1294, 1297 (11th Cir. 2003); Kern v. Siemens Corp., 393 F.3d 120, 128 (2d Cir. 2004); and Cameron-Grant v. Maxim Healthcare Services, Inc., 347 F.3d 1240, 1248 (11th Cir. 2003).

The Arbitrator's decision to interpret the Agency Representative's statements prior to the exemption phase of the Arbitration as agreeing to a representational type of hearings procedure for the claims phase was inconsistent with his other rulings which treated the two phases separately on other issues; e.g. separate pre-hearing submissions for each phase. The subsequent Agency representative enlisted for the claims phase sought, weeks prior to the date pre-arbitration submissions were ordered, to require the presentation of each claimant witness to establish liability. The Arbitrator's denial of that procedural request was beyond the Arbitrator's authority under the CBA and contrary to the spirit of CBA provisions and the letter of the FLSA. The Agency continues to maintain that "suffered and permitted" overtime issues are unique to each supervisor and his or her subordinates. And further, the FLSA itself mandates proof of

subjective agreement by each employee for whom relief is being sought based on such a claim. To extrapolate to other supervisors and alleged grievants denies the Agency due process to which it is entitled as a matter of law.

Although the FLSA does permit an employee to bring a claim for himself and other "similarly situated" employees, 28 U.S.C. § 216(b), such a collective action is not per se appropriate in every circumstance. Where, as here, employees are stationed in different offices and units within an office, work at the direction of different office directors and supervisors, are subject to varying practices, rules and policies governing the performance of their work and perform that work on a variety of different work schedules, the employees are not similarly situated. It would be an abuse of discretion to impute the experiences of a few to the group as a whole. See England v. New Century Financial Corporation, 370 F.Supp.2d. 504, 510 (E.D. La. 2005) (allowing a collective FLSA action is inappropriate where the group of plaintiff-employees work under different managers and were "subject to different managerial requirements which occurred at various times as a result of various decisions by different supervisors made on a decentralized employee-by-employee basis."). In addition, the witnesses presented by the union testified to their individual circumstances, but did not demonstrate any first hand knowledge of the hours worked by others working in their own office, much less the schedules and working habits of employees working in other EEOC offices throughout the nation.

At a minimum incidents of alleged overtime were random, scattershot and not the product of an over-arching, nation-wide policy or practice. Under such circumstances, the group is not homogenous and a collective action is wholly inappropriate and contrary to law. Holt v. Rite Aid Corp., 333 F.Supp.2d 1265, 1273 (N.D. Ala. 2004) (where incidents of overtime were

anecdotal and varied according to how each employee chose to undertake his duties, no general conclusions could be drawn regarding FLSA violations and individualized inquires into the circumstances of each employee was necessary to determine liability); Clausman v. Nortel Networks, Inc., 2003 WL 21314065 (S.D. Ind. 2003) (same). Furthermore, the testimony of Union witnesses demonstrates that whether or not an employee allegedly worked overtime turned on individual circumstances peculiar to the employee, and was not the product of general rule, policy or practice of the employer. For example, Novella West, according to her supervisor in Philadelphia, approached her duties with such a compulsive diligence that she allegedly worked at home off-the-clock in secret to insure she achieved perfection, only occasionally mentioning to her supervisor that she did some extra work at home. (T. 1565; 1618; 1650-1651 and 1662) Certainly this standout employee's desire to work extra time at home cannot mechanically be imputed to all group members. Basco v. Wal-Mart Stores, Inc., 2004 WL 1497709 (E.D. La. 2004) (a court can foreclose a plaintiff's right to proceed collectively where the action relates to specific circumstances personal to the plaintiff rather than any generally applicable policy or practice.)

D. Documentation Issue

A great deal of arbitration hearing time was used by Union counsel to elicit testimony that extra work time was not recorded on the biweekly cost accounting sheet and/or in the Federal Personnel Payroll System [hereinafter "FPPS"]. It is clear that not all Agency District, Field, Area and Local offices keep track of extra hours worked for credit or compensatory time in the same way, and not all offices record credit or compensatory time on the biweekly cost accounting sheet or the FPPS. However, there is no requirement that every hour worked be reflected on the cost accounting sheet, which is used to track where the payroll is distributed

according to function, or the FPPS, which are merely alternative means of tracking credit and compensatory hours worked. Numerous ways of keeping track of extra hours worked were described in testimony, such as by email communication, separate lists kept by clericals in the office, and calendars maintained by individual timekeepers and/or supervisors.[4]

Despite the extensive testimony produced regarding record-keeping, that was not an issue raised in the instant grievance. The method of record-keeping does not prove or disprove whether employees were "suffered and permitted" to work overtime without compensation.

In early 2006, the Union made a blanket request for all documents relating to virtually every record relating to time and attendance for all of the Agency's fifty two offices for the three years prior to the request. The Agency did its best to comply with that unduly burdensome document request. In the resulting hearing, no evidence of "suffered and permitted" treatment was offered for numerous Agency offices.[5] The request for information obviously related to the general Agency-wide, non-specific overtime "suffered and permitted" grievance filed just prior to the request. Because the Agency had no information as to which employees were involved in the grievance, and knowing that not all investigators, mediators or paralegals could be claiming that they were suffered and permitted to work overtime, the Agency went to timekeepers for existing records. That process alone was extremely time consuming and expensive. Paper records were located, copied and shipped.[6] That process was unduly burdensome, but the

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[4] Indeed, in those instances where extra time was kept informally, there was reliable uniformity that self-interested employees kept track themselves of their own hours and routinely used them.

[5] The Union did not even attempt to present evidence of "suffered and permitted" overtime for 20 of the 52 offices of the Agency. (Among those were Minneapolis, Milwaukee (attempted but unsuccessful), Cleveland, Denver, Boston, Norfolk, St. Louis, New Orleans , Nashville, Jackson, Mobile, Raleigh, Greenville, Fresno, San Juan, Oakland, San Jose and the Washington Field Office.) Of those bargaining unit witnesses who testified, at least seven testified that they did not work any extra hours at all.

[6] The Agency sent over 30 bankers' boxes to the Union.

Agency did what it could to comply. Further, electronic records were retained by the Department of the Interior.[7] Requests were made for the relevant information. However, the first computer disk provided to the Agency showed compensatory leave earned, but included compensatory leave used under the general leave heading. The Agency offered a second computer disk showing both comp time earned and used that was entered into the FPPS, but the Agency's offer was rejected by the Union.

The Union identified the "representative" bargaining unit witnesses at the same time the Agency was required by the Arbitrator to identify its exhibits and witnesses. After the Union identified these witnesses, the Agency was finally in a position to identify particular supervisors who allegedly suffered and permitted employees to work overtime. The Agency was then able to seek particularized documentation from them. Unfortunately for the Agency, the Arbitrator refused to permit the use of these additional documents by the Agency at hearing, based upon the Union's contention that every piece of paper and electronically available information should have been disclosed in response to its earlier request. Because the Agency did not meet that impossible and unreasonable burden of production, the Agency's ability to present a thorough defense was prevented.[8] During a discussion of the Agency's request for an order requiring the Union to disclose its witnesses and exhibits two or three weeks before the Agency's pre-arbitration submission was due, the Arbitrator required simultaneous submissions stating that he would consider additional rebuttal evidence from the Agency at the hearing. Then at the hearing,

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[7] The U.S. Department of Interior has been responsible for the Agency's payroll records since 2002.

[8] This case points out the substantial limitations of the arbitration process in getting at both sides of a dispute as compared to those available in other processes, such as Merit Systems Protection Board and federal district court proceedings where discovery provides an opportunity for the parties to learn who is complaining and the basis of the complaint before a hearing is held, protected from a potential arbitrary interpretation of statutory and CBA provisions. The process is particularly inequitable in large class action arbitrations.

the Agency's offers of rebuttal documentation were denied and the Agency was limited to testimonial evidence to attack credibility of union witnesses.

II. LEGAL STANDARD FOR SUFFERED AND PERMITTED OVERTIME LIABILITY

The CBA contains provisions relating to overtime. Section 31.01 provides: "The assignment of overtime work is a function of the EMPLOYER. The EMPLOYER retains the right to determine the need for overtime work."

Section 31.09 of the CBA provides:

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

See also 5 CFR § 551.104.

To prevail in a FLSA claim for overtime activity suffered or permitted to be performed, the Union must carry the burden of proof on all of the elements of the particular claim. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 686-87 (1946). The Union "must establish that each activity for which overtime compensation is sought constitutes 'work.' For an activity to constitute work, [the Union] must prove that the activity was (1) undertaken for the benefit of the employer; (2) known or reasonably should have been known by the employer to have been performed; and (3) controlled or required by the employer." Bull v. United States, 68 Fed. Cl. 212, 220 (2005) (quoted in Abbey v. United States, 82 Fed. Cl. 722 (2008)). "To benefit the employer, an activity need not be 'productive' – rather, it must be necessary" to the employee's ability to accomplish the principal duties owed to the employer. Bull, supra, at 223. "This actual or constructive knowledge must be attributable to someone with authority to bind the

government." Id. at 224. Under Office of Personnel Management (OPM) regulations, "An agency is responsible for exercising appropriate controls to assure only that work for which it intends to make payment is performed." 5 C.F.R. § 551.402(a) (2006).

Exceptions to the FLSA's requirement that overtime compensation be paid "at the rate not less than one and one-half times the regular rate," 29 U.S.C. § 207(a)(1), are contained in Title 5 of the United States Code. See 5 U.S.C. §§ 5543, 6122-23. Section 5543 provides as follows:

> The head of the agency may – (1) on request of the employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment under section 5542 or section 7 of the [FLSA] for an equal amount of time spent in irregular or occasional overtime work[.]…

5 U.S.C. § 5543(a). In 1982, Congress amended Title 5 of the United States Code "to provide permanent authorization for Federal agencies to use flexible and compressed employee work schedules. Federal Employees Flexible and Compressed Work Schedule Act of 1982 (WSA), codified as amended at §§ 6120-6133. Pursuant to § 6123:

> The head of the agency may, on request of the employee, grant the employee compensatory time off in lieu of payment for such overtime hours, whether or not irregular or occasional in nature and notwithstanding the provisions of sections 5542(a), 5543(a)(1) and section 5544(a) of this title, section 7453(e) of title 38, section 7 of the [FLSA] (29 U.S.C. [§]207), or any other provisions of law [.]…

5 U.S.C. § 6123(a)(1). The WSA also allowed agencies to grant credit hours for work in certain circumstances. See 5 U.S.C. §§ 6121(4), 6122. See also 5 U.S.C. §§ 6120-6133, which allows compensatory time to be granted for hours worked beyond an employee's flextime schedule. See discussion of flexible schedule employees and overtime, infra.

In order to establish liability for suffered and permitted overtime, the Union must do more than show that non-exempt employees worked more than their scheduled time on any given

day. The Union must prove that "extra time worked" was actually overtime. Then it must prove that the overtime proven was "suffered and permitted."

To prove that extra time worked was overtime, the Union must prove that:

(1) employees worked more than forty (40) hours in a week or eighty (80) hours in a pay period.[9] This means that employees worked more than two and a half hours in addition to their scheduled hours in a week, or more than five extra hours in a pay period, where employees take an hour for lunch, since covered employees' tours of duty reflected either 37 and ½ hours of work per week (for those on a flexible schedule) or 75 to 76 hours of work per pay period (for those on 5/4/9 or 4/10 schedules); and,

(2) employees who worked such extra hours were not on a flexible schedule since hours worked by flexible schedule employees in excess of 40 hours per week automatically convert to "credit hours," which are not overtime hours unless such hours are officially ordered in advance by management as overtime hours. Employees must use credit hours to shorten a subsequent workday or workweek prior to any use of comp time or annual leave and the Agency is only allowed to pay employees for credit hours earned in very limited circumstances, not applicable to any of the witnesses who testified in the grievance.

To prove that the overtime was "suffered and permitted," the Union must prove that:

(1) any extra hours were spent working; that the Union's non-exempt investigator, mediator and paralegal witnesses asserted credible claims of hours worked for which they were not compensated; and,

[9] Overtime pay for overtime work over eight hours in one day is authorized only when ordered and approved in writing by someone with authority to do so. The Union has not claimed the existence of any such writing and there is no evidence that the Agency ever authorized overtime in excess of 8 hours per day in advance and in writing and then failed to compensate the employee ordered to work the extra time with overtime pay.

(2) the employer (supervisor or manager) knew or should have known of such work and had the prior opportunity to prevent the extra work;

(a) EEOC management had reason to believe that assigned work could not be performed within 40 hours per week/80 hours per pay period and, therefore, management had reason to believe that overtime was being worked;

(b) if the sign-in sheets used in some offices are submitted as proof by the Union that the Agency knew or should have known employees were working extra hours, the Union must prove the sign in sheets were used by, known to, and considered reliable by supervisors to show actual time worked; and they can be considered evidence of employer knowledge of overtime worked;

(c) in the few instances where supervisors did know or suspected that overtime was being or had been worked and had the opportunity to prevent the work, that supervisors failed to order non-exempt grievants to stop working and go home;

(3) the extra time worked was not the result of the employee voluntarily choosing to work extra time for compensatory time or of opting between compensatory time or of not working the extra time at all.

In order to make a class-wide finding of a "suffered and permitted" violation, the Arbitrator must find that the Union’s very limited number of non-exempt investigators, mediators and paralegals who testified can reasonably be found to be representative of all current and former non-exempt investigators, mediators and paralegals in all offices of the Agency.

The Union's case is fatally flawed because to prevail the Union would have to have proven that, not only did non-exempt employees work extra hours on a particular day, but also the work performed needed to be performed during that extra time, rather than during the next

work day or later. This is true because the overwhelming weight of the evidence was that most extra hours were either without the knowledge of the manager or were completely voluntary and at the request of the employee for his or her convenience or personal desires, and neither ordered or required by management nor necessary for business reasons. Further, virtually all witnesses were on a flexible schedule and not entitled to overtime pay for extra hours even if the Agency suffered or permitted them to work the extra hours. Clearly, investigators, mediators and paralegals occasionally work beyond their scheduled time knowing that they will be able to take off from work an equivalent amount of time as credit or compensatory time later, but this does not entitled them to overtime pay.[10]

The Union did not demonstrate more than a handful of instances where non-exempt employees arguably were "suffered and permitted" to work a short period of extra time without compensation. Moreover, there is no evidence of any illegal Agency-wide policy or practice to deny employees compensation for the time that they work.[11]

A. Flexibility For Investigators, Mediators And Paralegals

If there is any generalization that could be made from the eight weeks of testimony, it is that the Agency treats the vast bulk of its investigators, mediators, and paralegals, with respect and as professionals, irrespective of how they are classified under the FLSA. Most have extensive flexibility within which to schedule their work. The Agency's primary concern has

[10] There was virtually no proof that the net result of any work outside of the work schedule was that any employee worked more hours in any given year than he or she was scheduled to work. In other words, employees in effect didn't work extra hours, but rather time shifted – worked more hours in one period to work less in another period.

[11] For example, according to existing records, the investigator in Pittsburgh, Mr. Wozniak, should have received four and a half hours of overtime pay because of compensatory time granted but not used for at least two years. While the hearings uncovered this potential mistake in compensation, this is not an example of the Agency refusing to compensate Mr. Wozniak for work it suffered and permitted him to perform, at issue in the grievance, but rather involves an isolated failure to pay Wozniak for compensatory time not used within 26 pay periods. There

been and is in getting work done, and most supervisors permit each investigator, mediator and paralegal extraordinary freedom regarding their hours of work. They are, for the most part, not monitored when they arrive and leave the office, or when they go to lunch. They are free to take breaks or to attend to personal needs as they require, without being concerned that supervisors and managers are watching the clock and punishing them for minor deviations from their regular work schedules. Indeed, the best way to know if employees work more than their schedules is whether they claim extra hours when they self-report, which is the system employed in the vast majority of the offices where there was testimony.

Most supervisors allow investigators and mediators, especially, to control their own work planning and execution. They are allowed control of their work and the flexibility to modify schedules. Investigators unilaterally decide when and how on-site visits will be conducted and how intake interviews will be kept within reasonable time limits using alternative methods for avoiding extra time worked. Mediators are in control of the mediation process determining whether or not to continue through lunch and whether to continue discussions beyond the regular work day rather than continue the mediation another day. They are given the flexibility to modify their work schedules to adjust work time to their own convenience. The work of paralegals in the Agency is in the nature of administrative/clerical type duties, work that, for the most part, can be postponed to another day or given to a clerical to assist in the work. No investigator, mediator or paralegal needs to work outside of his or her normal tour of duty. But all are free to modify their work schedules as they choose in exchange for compensatory time off.

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is no evidence or even allegation that the Agency has a pattern or practice of failing to pay for compensatory time not used within 26 pay periods.

In an analysis of whether employees were suffered and permitted to work extra time overtime, the first issue that must be considered is whether extra hours were worked overall in any given week or a pay period.

B. Overtime Which Is Only "Suffered And Permitted" Under The FLRA, As Opposed To Ordered Or Approved In Advance In Writing, Is Only Compensable If The Employee Works Over 40 Hours In A Week Or 80 Hours In A Pay Period; Merely Working Over 8 Hours In A Workday Is Not Sufficient To Establish A Claim Based On Suffered And Permitted Overtime.

There are two statutes which govern the requirement to pay overtime to FLSA non-exempt employees: the FLSA and the Federal Employees Pay Act, 5 U.S.C. §§ 5541-5550a (2000) ("FEPA"). Both FLSA and FEPA provide frameworks for calculating overtime pay for federal employees. Under FEPA and its implementing OPM regulations - with its heightened standards of proof - overtime must be ordered or approved in advance in writing by someone with authority to obligate the government to overtime pay. See Doe v. United States, 372 F.3d 1347 (Fed. Cir. 2004); 5 C.F.R. § 550.111(c). In Christofferson v. United States, 64 Fed. Cl. 316, 322 (2005), the Federal Court of Claims clarified the interplay between the FLSA and FEPA for employees such as the Agency's FLSA non-exempt grievants regarding overtime claims for working more than 8 hours in one day. The Court of Claims acknowledged that 5 C.F.R. § 551.501 of the FLSA regulations (Part 551) begins with the premise that "[a]n agency shall compensate an employee who is not exempt ... for all hours of work in excess of 8 in a day...." Id. at 321. But subsection 551.501(a)(2) of this FLSA regulation excludes claims that are not also overtime hours of work under Part 550, the OPM regulations which pertain to FEPA. As noted above, under FEPA, overtime must be ordered and approved in advance in writing. As a consequence, the Court of Claims concluded "[t]herefore, to make an eight-hour claim under the FLSA, the overtime must also have been ordered or approved in writing." Id. at 322. In this

case, the Union does not, nor can it, claim that the Agency ordered or approved overtime over eight hours in one workday[12] in writing in advance and then failed to compensate any employee for working those extra hours.

The Court concluded that only claims for hours worked in excess of forty in a single workweek may be considered under the lower FLSA suffered or permitted standard. Id. at 323. The analysis relied upon by the Court in Christofferson would apply to eighty hour compressed schedules as well, requiring hours worked in excess of eighty in a single two-week pay period to prove suffered and permitted FLSA overtime. The Union can only prove a claim in this case if it can prove the employees who allege they worked more than 8 hours in a day also worked more than 40 hours in a week or 80 hours in a pay period. Most of the evidence presented by the Union focused on extra hours an employee may have worked on any given day, without focusing on whether those extra hours also resulted in the employee working more than 40 hours in a week or 80 hours in a pay period.

C. Extra Half Hour At Lunch Is Not Considered Time Worked

As demonstrated above, in order to assert a claim for overtime under the FLSA, an employee must first show that he/she logged more than 40 "hours of work" in an administrative workweek.[13] "Hours of work" includes all time spent for the benefit of the agency and under the control or direction of the agency, and *specifically excludes time set aside for eating.* See 5

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[12] In addition, only someone with delegated authority to authorize overtime funds can issue an effective order. See Doe v. U.S. ,372 F.3d 1347, 1362 (2004). In the case of EEOC, only District Directors can authorize payment of overtime funds.

[13] This section states, "Bona fide meal periods are not considered hours of work...." While the phrase "bona fide meal period" is not defined under 5 C.F.R. part 551, it is defined in 29 C.F.R. part 785, which implements FLSA in the private sector. Under that authority, a "bona fide meal period" must be at least 30 minutes in length and the employee must be completely relieved from duty for the purpose of eating.

C.F.R. § 551.411(c).[14] See also Armour & Co. v. Wantock, 323 U.S. 126, 132 (1944) (under FLSA, time set aside for eating is not work for purposes of compensation unless it involves activities "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer...."); U.S. DOT, FAA, Chicago, Ill, and Nat'l Air Traffic Controllers Assoc., 41 FLRA 1441, 1450-51 (1991) (bona fide meal periods were not compensable where actual interruptions for job-related duties were rare, despite "on-call" status of the employees); AFGE, AFL-CIO, Local 3231 and DHSS, SSA, 25 FLRA 600, 601-03 (1987) (bona fide meal periods are not compensable under the FLSA unless employee performs substantial job-related duties).

The testimony here reflects, with rare exceptions, that witnesses routinely took daily lunch breaks of one hour. Thus, while sign-in sheets – reflecting the morning arrival and evening departure times of the employees – generally reflect an 8 and ½ hour span of time from sign-in to sign-out, subtracting for this daily lunch hour, witnesses actually worked no more than 7 ½ hours per day, 37 ½ hours per week or 75 hours per pay period.[15]

Nor has the Union established that these one-hour lunch breaks involved activities "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer" – its burden if it is to claim that this time should be counted as hours of work. See Armour & Co. v. Wantock, supra. Rather, no employee claimed that he or she was restricted

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[14] This section states, "Bona fide meal periods are not considered hours of work...." While the phrase "bona fide meal period" is not defined under 5 C.F.R. part 551, it is defined in 29 C.F.R. part 785, which implements FLSA in the private sector. Under that authority, a "bona fide meal period" must be at least 30 minutes in length and the employee must be completely relieved from duty for the purpose of eating.

[15] For employees on a 5/4/9 or 4/10 compressed schedule, their tours of duty similarly reflected 75 ½ hours and 76 hours of work per pay period respectively.

during any part of the one hour lunch break from leaving the building or engaging in non-work activities of their choice.

Under the "old" CBA, effective 1995, employees were specifically permitted to add two paid 15 minute rest breaks to their half-hour lunch period in order to extend that period and be paid for part of it. See Article 32. This provision was omitted from the current CBA Article 32, effective September 2, 2002, following the FLRA determination that it was impermissible to compensate employees any time set aside for eating. See US. Department of the Air Force, Travis Air Force Base, California and AFGE, Local 1746, 56 FLRA 434 (June 16, 2000) (paid rest breaks could not be added to lunch break to extend the lunch period). Nonetheless, despite this change in the CBA, the undisputed testimony demonstrates that in reality employees still take one-hour lunch breaks. The Agency's largesse in effectively continuing to pay employees for part of their lunch periods -- for the two "rest" periods -- when these employees are rarely performing Agency work, should not be used against the Agency. The Union still needs to demonstrate that Agency work was performed during any and all lunch periods that the Union wants to count as a part of any overtime claim to prove work for the Agency was performed in excess of a 40-hour workweek/80-hour pay period, and it cannot do so (with rare exceptions) regarding any part of grievants' lunch "hour". Indeed, any finding to the contrary would run afoul of the FLSA and OPM regulations. Id. at 439. The Arbitrator simply does not have discretion to order that time set aside for eating be counted as hours of work, when this is expressly prohibited by law. Id. By being generous in one context, the Agency does not thereby waive its right to assert the requirements of the FLSA (nor can the Agency or the Arbitrator "waive" that law) and FLRA case law in the context of this case.

In sum, to prevail in this case, the Union must demonstrate that each and every employee worked more than 4-5 hours of uncompensated overtime per pay period beyond their tours of duty.

D. Flexible Schedule Employees and Overtime

Section 30.07 of the CBA provides:

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

(Emphasis added).

Hours worked by flexible schedule employees in excess of 8 hours per day/40 hours per week are "credit hours" to be applied before annual leave and are not FLSA "Overtime." Under Federal law, flexible schedule program overtime must be officially ordered in advance.

The concept of suffered and permitted overtime is not applicable to employees on a "flexible" schedule, as that term is used in the law and in the CBA.[16] Essentially, all investigators, mediators, and paralegals who did not work a compressed schedule are on such a schedule. Mr. Nick Inzeo, Director of Field Programs for the Agency, testified that, at least as of the time of the hearing, about 41 percent of investigators were on such a schedule. (T.L.A. 838-839) Although the Union would be expected to select witnesses to support its case who are not

[16] The accumulation of twenty-four (24) hours of credit time permitted in 5 U.S.C. § 6126 is limited to the accumulation of eight (8) hours by Section 30.07 of the CBA.

on flexible schedules, most bargaining unit witnesses who presented evidence were on flexible schedules.[17]

Most Agency employees worked flexible schedules under the Federal Employees Flexible and Compressed Work Schedule Act, 5 U.S.C. §§ 6120-33 [hereinafter "WSA"]. These employees enjoy the latitude to arrive and depart from work at varying times within a three hour time-band. See 5 U.S.C. § 6122(a); and CBA Article 30. They earn "credit hours" when they "elect" to work more than eight hours per day. 5 U.S.C. § 6121(4).[18] These credit hours may be used to shorten a subsequent work day or workweek. Id.

Congress enacted the WSA with the belief that offering schedule flexibility would improve employee morale, productivity and attract the best and brightest to the ranks of civil service. See S.Rep. 97-365 (1982). However, prior to its enactment, Congress had to "consider whether any changes were needed in the mechanism for authorizing and paying for overtime hours." See Aletta v. United States, 70 Fed. Cl. 600, 602 (2006). Implicit was the concern that it would be unduly burdensome for supervisors to monitor and control the accrual of overtime hours of employees who had so much flexibility to come and go or work extra hours on their own volition; or that employees who ostensibly earned credit hours, would subsequently claim the right to overtime compensation for those hours. See Aletta at 602; S.Rep. 97-365 at 10-11. In light of these concerns, Congress changed the definition of "overtime hours" as applied to employees on flexible schedules. Specifically, the WSA defines overtime hours as follows:

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[17] See Glenda Bryan-Brooks, Julie Hodge, Rosemary Caddle, Mark Maddox, Thomas Freietag, Brinda George, Chistopher Kwok, Maria Minks, Beverly Collins, Helen Garrett, Patrick Malley, David Skillman, Derrick Anderson, and numerous non-witnesses on flexible schedules were identified by supervisors.

[18] Section 6121(4) reads:

"credit hours" means any hours, within a flexible schedule established under section 6122 of this title, which are in excess of an employee's basic work requirement and which the employee elects to work so as to vary the length of a work week or a workday ....

> "overtime hours", when used with respect to flexible schedule programs under sections 6122 through 6126 of this title, 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;**

(Emphasis added). 5 U.S.C. § 6121(6). Note that credit hours are not overtime hours. In its legislative report accompanying the passage of the legislation, Congress explained the reasons behind this modification:

> This legislation does not relieve an agency of its existing statutory obligation to compensate an employee for 'overtime hours' .... However, due to the permissive nature of a flexible work schedule which allows an employee to voluntarily extend his work hours to accumulate credit hours, an accommodation with existing statutory provisions relating to overtime entitlement is necessary .... The requirement that overtime be ordered in advance eliminates the problem which would arise under flexible schedule if an agency were required to determine, after the fact, whether it is appropriate to approve as "overtime", hours in excess of 8 hours per day or 40 hours per week which an employee voluntarily elected to work.

S. Rep 97-365 at 7 (1982). OPM regulations acknowledge and incorporate the different definition of "overtime hours" for employees working under flexible schedules. The applicable regulation states, in pertinent part:

> **551.501 Overtime Pay**
> (a) An agency shall compensate an employee ... for all hours of work in excess of eight in a day or 40 in a workweek at a rate equal to one and one half times the employee's hourly regular rate of pay, **except that an employee shall not receive overtime compensation under this part –**
> *
> *
> **(6) For hours of work that are not "overtime hours," as defined in 5 U.S.C. 6121, for employees under flexible** or compressed schedules**.**

5 C.F.R. § 551.501(a) (Emphasis added**).**

Thus, on the plain language of the WSA, an employee working under a flexible schedule does not work overtime for hours in excess of 40 in a workweek, but rather works credit time. Moreover, hours beyond those considered credit hours are not compensable as overtime unless the extra hours were "officially ordered in advance." 5 U.S.C. § 6121 (6); Aletta, supra, at 10. In the absence of such an official, advance directive, hours worked in excess of 40 in a workweek are not compensable. See 5 U.S.C. 6121(4).[19]

The statute does not directly address the situation in which an employee elects to work beyond the statutory limit of 24 credit hours in a pay period, but the statute is clear that those hours cannot legally be treated as overtime hours because such hours are not "officially ordered in advance." As explained above, given the employee flexibility granted by WSA, Congress sought to eliminate any confusion between credit hours and overtime hours by requiring overtime hours be "ordered in advance." Thus, overtime hours must both be "ordered," the employee must affirmatively be ordered to do the work and not simply volunteer to work, and the hours must be ordered in advance, not simply approved after the fact. Similarly, although the CBA limits credit hours to 8 hours in a pay period, it also states that any hours "authorized to be worked" beyond those 8 hours shall be treated as "overtime." Because the CBA must be interpreted consistently with requirements of federal law, the meaning of "authorized" in this section of the CBA must mean "officially ordered in advance."

Union witnesses working on a flexible schedule have offered no evidence, as is their burden, that they were officially ordered in advance by a supervisor to work for overtime pay. Indeed, the grievance in this case is premised on the "suffered or permitted" theory –

[19] In many offices of the Agency, the terms credit hours and compensatory hours are used interchangeably. Whatever term is used, flexible schedule employees earn credit hours to a permissible limit. They can also earn compensatory time.

conceptually opposite of working overtime pursuant to a supervisor's specific orders. Moreover, the record demonstrates that the witnesses took full advantage of the credit hours they accrued. The sign-in sheets, even if accepted as a reflection of actual time worked (which the Agency disputes), were accompanied by witness testimony that for every week in which these employees ostensibly worked more than 40 hours, there were subsequent weeks where the employee worked less than that, but still got paid for the full workweek. In other words, these employees took full advantage of the credit hour provision of the WSA, were compensated for all hours worked, and cannot now be heard to complain of unfair treatment or entitlement to overtime pay.

The current CBA does not limit how long credit hours may be carried over until applied. However, the CBA requires that the flexible schedule employees must use the accrued credit hours prior to compensatory time accrued or annual leave. While credit hours may be earned with supervisory approval under CBA section 30.07, there is nothing limiting the manner of such approval. Id. There is no requirement that credit hours be approved in writing, or even that credit hours be approved in advance. 5 U.S.C. § 1621(4); CBA Section 30.07. In fact, the flexibility which the WSA brought to the workplace would be undermined by such requirements.

Case law also supports the conclusion that employees on flexible schedules earn credit hours, not overtime pay, for extra hours which are not approved in advance. In Doe v. United States, 513 F.3d 1348 (Fed. Cir. 2008), nonexempt employees on flexible schedules argued that the Social Security Administration was not allowed to grant credit hours or compensatory time instead of pay for overtime work.[20] The Court of Appeals for the Federal Circuit concluded, "[b]ecause Title 5 authorizes the SSA to grant compensatory time and credit hours to non-

[20] The complaint in Doe alleged that the employees received a combination of credit hours and compensatory time for work performed in excess of 40 hours per week and that the employees had chosen to receive compensatory time instead of overtime pay. The complaint did not allege that the agency precluded plaintiffs from receiving monetary compensation.

exempt federal employees, and because section 5542(c) does not limit that authority, the trial court correctly dismissed the appellants' FLSA claims for failure to state a claim." Id. at 1358.

1. Compressed Work Schedules (CWS) Under The Statutory Definition Pursuant To 5 U.S.C. § 6121

The Agency is obligated to compensate employees on a compressed or regular schedule for hours worked outside of the basic work requirement, even if those hours are not authorized in advance by management, if those hours are "suffered or permitted." According to OPM regulations, "[a]ll time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency is 'hours of work.' Such time includes: . . . (2) Time during which an employee is suffered or permitted to work." 5 CFR § 551.401(a).

There are several enumerated exceptions to this general rule, one of which is that an employee shall not receive overtime compensation for hours worked "that are not 'overtime hours,' as defined in 5 U.S.C. 6121, for employees under flexible or compressed work schedule." 5 CFR § 551.501(a)(6). The Work Schedules Act states that hours which constitute an actual compressed schedule are not overtime hours, but that hours worked in excess of a compressed schedule are overtime hours. 5 USC § 6128. Similarly, under the CBA, employees on a compressed schedule who perform work in excess of the established compressed schedule [must receive overtime]. (For example, an employee on a bona fide compressed four ten-hour-day weekly schedule is entitled to overtime pay for work **officially ordered** and performed beyond the daily ten (10) hours or forty (40) hours for the week.)" CBA Section 31.07(Emphasis added). In addition, employees on a compressed schedule cannot earn credit hours. 5 U.S.C. § 6121(4). See also CBA Section 30.07 (Credit Hours).

2. Virtually All Of The Schedules Of Investigators, Mediators And Paralegals Are De Facto Flexible Schedules And The Agency Has No Obligation To Pay Overtime Compensation For Work Which Is Not Ordered in Advance

The Agency urges the Arbitrator to recognize that even those on compressed schedules were de facto flexible schedule employees. Many witnesses freely acknowledged that they routinely availed themselves of the flexibilities permitted by most supervisors to modify their schedules, by coming in and/or leaving early or late and by changing their AWS days, and extending the length of one day while shortening another.

The Agency should not be held liable for overtime hours worked by a nonexempt investigator, mediator, or paralegal on a flexible schedule if they have been compensated with credit/compensatory hours, unless such overtime was ordered (required) and authorized in advance as paid overtime. A flexible schedule is any work schedule in which the employee does not arrive and depart at a fixed time on fixed days determined by the Agency, but instead has the flexibility to decide or adjust arrival and departure times. The CBA sets forth three types of schedules: flexible work schedule, compressed work schedule and a basic work week (regular work schedule). The CBA describes a flexible schedule as follows:

> 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.
>
> CBA Section 30.04. This is consistent with the statutory definition of a flexible schedule which allows each agency to establish, programs which allow the use of flexible schedules which include—
>
> (1) designated hours and days during which an employee on such a schedule must be present for work; and

> (2) designated hours during which an employee on such a schedule may elect the time of such employee's arrival at and departure from work, solely for such purpose or, if and to the extent permitted, for the purpose of accumulating credit hours to reduce the length of the workweek or another workday.

5 USC § 6122 (a).

An OPM Fact Sheet **(**attached as Exhibit 1) describes **five** different types of flexible schedules. An employee who is "allowed to select starting and stopping times within the flexible hours" but whose hours become fixed once selected, until the agency decides otherwise, is on "flexitour." Id. An employee who has a basic work requirement of 8 hours a day and 40 hours a week, but who "may select a starting and stopping time each day, and may change starting and stopping times daily within the established flexible hours" is on a "gliding" flexible schedule. Id. An employee on a "variable day" flexible schedule works "core hours each day and has a basic work requirement of 40 hours in each week of a biweekly pay period. However, the employee may vary the number of hours on a given workday within the limits established for the organization." Id. A "variable workweek schedule is a work schedule containing core hours on each workday in the biweekly pay period in which a full-time employee has a basic work requirement of 80 hours for the biweekly pay period. The employee may vary the number of hours worked on a given workday or the number of hours each week within the limits established for the organization." Id.

The most flexible schedule is a maxiflex schedule. A "maxiflex" schedule is a work schedule that contains core hours on fewer than 10 workdays in the biweekly pay period in which a full-time employee has a basic work requirement of 80 hours for the biweekly pay period. The employee may vary the number of hours worked on a given workday or the number of hours each week within the limits established for the organization." Id. This is the situation in

most Agency offices for employees on a 5/4/9 or 4/10 schedule who are permitted to work extra hours one day and come into the office or leave early the next day.

A compressed schedule, in contrast, is a fixed schedule with no flexibility at all, but which allows the basic work requirement to be completed in less than ten days in a pay period.. Under the CBA, a "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." CBA Section 30.04(d). This is almost identical to the statutory definition. Under statutory law, "'compressed schedule' means-- (A) in the case of a full-time employee, an 80-hour biweekly basic work requirement which is scheduled for less than 10 workdays. . . ." 5 USC § 6121 (5)(A). OPM stresses that while "agencies may change or stagger the arrival and departure times of employees, there are no provisions for employee flexibility in reporting or quitting times under a CWS program." OPM Handbook. The handbook emphasizes that "[c]ompressed work schedules are always fixed schedules." Id.

The handbook notes that while maxiflex schedules are allowed, hybrid schedules incorporating parts of flexible and compressed schedules are not:

> There is no authority to establish hybrid work schedules that borrow selectively from the authority for flexible work schedules and the authority for compressed work schedules in an effort to create a hybrid work schedule program providing unauthorized benefits for employees or agencies.

See Comptroller General Report B-179810, December 4, 1979, and 50 FLRA No. 28, February 23, 1995. However, it should be noted that some forms of flexible work schedules (e.g., maxiflex) allow work to be compressed in fewer than 10 workdays in a biweekly pay period."

In GSA, Washington, D.C., 50 FLRA 136, 139 (1995), the agency informed the union during contract negotiations that it would no longer honor a provision of the CBA which

expressly authorized employees "to combine compressed and flexible work schedules." Id. OPM filed a brief supporting the Agency's decision. The FLRA noted that the Alternative Work Schedules Act "separately defines and authorizes flexible and compressed schedules, and that the two types of schedules have different requirements with respect to such matters as overtime, holidays, and night pay" but that the Act itself "is silent with respect to combining the two schedules." Id. Giving Chevron deference to OPM's interpretation of the statute, the FLRA found in favor of the Agency's refusal to honor what was an illegal CBA provision.

Substantial testimony in this case discloses that some employees work what can fairly be characterized as a maxiflex schedule. Employees work 4/10 or 5/4/9, but have schedules which allow them to control their starting and departure times – to unilaterally modify their schedules - and which allow them to earn and use credit or compensatory time. These schedules are de facto maxiflex schedules. The Agency is not exposed to a claim of suffered and permitted overtime for individuals on a maxiflex schedule. Testimony regarding the flexibility of mediators almost uniformly shows that, in practice, they are allowed to control their starting and departure times, whether their schedule is designated 10/4, 5/4/9 or eight hours a day. In many offices, investigators are also given similar control of their starting and departure hours.

While a maxiflex schedule is not specifically authorized by the CBA, it fits within the definition of a flexible schedule contained in the CBA. Further, while the CBA only specifically mentions flexitour and gliding flexible schedules, it allows room for the parties to adopt additional schedules. "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." CBA Section 30.05(b). Further, since the Agency has a past

practice of allowing such schedules, they may be read into the CBA. See, e.g., AFGE, Local 2128, 58 F.L.R.A. 519, 523 (2003) ("Where a past practice establishes a condition of employment, that condition of employment is incorporated into the parties' collective bargaining agreement") and AFGE, Local 3529, 35 F.L.R.A. 316, 322 (1990) (arbitrator did not err in rejecting " the Agency's argument that the parties' agreement provided [only] a flexible work schedule and found that '[i]n any event, the Agency sanctioned the employee's option to work compressed schedules by [its] approval of [such] schedules on a wholesale basis, and by its payment of ten hours holidays, and particularly by its payment of retroactive holiday pay to reverse an earlier contrary position'"). It should be noted, however, that a maxiflex schedule also arguably fits within the CBA's definition of a compressed schedule defined as "any schedule" which allows work to be performed in less than ten days in biweekly pay period. CBA Section 30.04(d).

Testimony established that Agency management permits maximum flexibility in most offices permitting investigators and mediators, particularly, the power to voluntarily modify their schedules to suit their convenience, as long as their work time averages forty hours a week or eighty hours a pay period. This practice has been in effect for many years without objection from the Union and should be read into the CBA.

Despite the restrictions on combining flexible and compressed work schedules, the Federal Service Impasses Panel ("FSIP") has ordered parties who have reached impasse in negotiating alternative work schedules to adopt maxiflex schedules which appear to be 5/4/9 or 4/10 schedules, but which allow flexible start and finish times and disallow or limit credit hours. In HUD and Local 259 NFFE, 99 F.S.I.P. 84 (1999), the agency objected to the union's proposal for a compressed schedule with flexible start and finish times, which was based on eight years of

practice. The agency's objection was based entirely on the argument that such a schedule was illegal. The FSIP concluded that "[i]nstead of joining the parties' debate over the legality of the Union's proposal, our preference is to effectuate the Union's intent by imposing wording which clearly falls within OPM's definition of a maxiflex schedule." Id. at 4.

In DOD and Local 3529 AFGE, 02 F.S.I.P. 200 (2003), the Union proposed a maxiflex schedule which would not require a fixed number of working hours on each day and the employer proposed a maxiflex schedule which would involve either a 4/10 schedule or a 5/4/9 schedule with the possibility of earning up to 2 credit hours a day "to be arranged with supervisory approval between 6:30 a.m. and 6 p.m." Id. at 11. FSIP required the parties to adopt the employer's proposal noting that there was nothing to justify "the expansion of the range of day length possibilities" that was inherent in the union's proposal.

Neither of these FSIP decisions discusses holiday pay, but implicit in the award is that employees will be paid holiday pay based upon the hours normally scheduled for the day on which the holiday falls. Both decisions purported to be attempting to maintain the status quo where employees were allowed to work on a compressed schedule but have flexibility in regard to start times or with regard to earning and using credit hours. The FSIP resolved the conflict by ordering the parties to adopt a maxiflex schedule. The lack of any mention of holiday pay suggests that employees would be paid more than 8 hours of holiday pay if scheduled to work more than 8 hours on the day on which a holiday falls. Otherwise, the opinion likely would have discussed how employees would be compensated for 80 hours during a pay period in which a holiday fell on a day they were otherwise scheduled to work for more than 8 hours.

Although FSIP approved 5/4/9 and 4/10 maxiflex schedules, it can be argued such schedules only fit the true definition of a flexible schedule if employees have the flexibility to decide not to work more than eight hours in a day.

There is support for the conclusion that Agency employees nominally on a compressed schedules that offers them flexibility, are in fact working flexible maxiflex schedules. Such schedules are not compressed schedules due to their added flexibility. Since the Agency gave employees the flexibility to earn and use credit hours or compensatory time to shorten another work week or another work day at their discretion, the schedules have more in common with flexible work schedules than compressed schedules and should be treated as such for this purpose.

Once it is determined that the work performed is overtime work, one must look to the circumstances under which it was performed and whether there is a statutory requirement for paid overtime for the work.

E. Much of the Extra Work Time Alleged Does Not Fall Within The Definition Of "Suffered And Permitted" Overtime

In order for the Union to prove work is suffered and permitted, it has the burden to show in each individual case that the supervisor knew or had reason to believe that the work was being performed and had an opportunity to prevent the work from being performed.

1. Know Or Had Reason To Know

The testimony of investigators, mediators and paralegals presented various situations where extra time beyond the normal tour of duty could be worked without supervisors' knowledge, and without there being any reason for the supervisor to know. Investigators, mediators and paralegals can work through their lunch period without the knowledge of the supervisor. In some offices, there is no set lunch period. The only way a supervisor would know

an employee was skipping lunch would be for the employee to tell the supervisor. No testimony was elicited that a supervisor constantly checked employees to see if they are taking a lunch break. Even in offices that have a defined time for lunch, the lunch period is usually one spanning two hours or more, so the fact that a supervisor observed an employee working some time during that period does not mean the employee did not take lunch before or after the supervisor's appearance.

Supervisors are rarely in a position to know if an investigator is working extra time on an intake interview. The time needed for interviews varies with the starting time of the interview, the verbosity of the investigator and /or the interviewee and the complexity of the problem to be discussed. If an intake interview is running late, the investigator may end the interview and finish it by telephone at another time, submit the needed information by mail in a questionnaire, or have the interviewee return another day. In some offices, the supervisor can be notified and will assign someone with a later quitting time to finish the interview, or the supervisor will finish it. An investigator who chooses to finish the interview by putting in extra time, is voluntarily making that choice to work rather than not working the extra time at all.

Similarly, time needed for on-site visits is not predictable and there are options available to avoid working extra time. Investigators plan their own on-site visits. Investigators know that if they anticipate extra hours (overtime) will be required on an on-site, prior written approval is required. The request will not be approved unless the investigator is volunteering to work for compensatory time because there are other means by which the work could be completed within the investigator’s regular schedule. Otherwise the investigator is required to arrange to do the on-site during his/her tour of duty or not do it at all. The investigator decides whether an on-site visit is needed, when it will be conducted, and who will be interviewed at the employer's

location. Where prior approval is not sought, the supervisor assumes extra hours are not necessary, that the investigator will modify his or her schedule to leave later in the morning or will finish the interviews in enough time to return home within the regular workday or stay overnight.

Investigators may make decisions while at respondent employer locations which cause them to spend more time than originally planned. In that case, they have the option of stopping in order to go home on time and returning another time, finding a place to stay the night and resume the next day, skipping interviews and doing them by telephone later, or finishing and working extra time. The investigator is free to voluntarily choose any one of the options. If the investigator chooses the latter option, he or she will receive compensatory time off. See Analysis of Individual Witness Testimony infra, (c and d).

Mediators are in control of their mediations. They generally decide when to begin the mediation session. They decide whether or not to continue without lunch or after hours. They have the option of breaking for lunch. Mediators are in control in deciding whether to voluntarily continue mediation discussions beyond their tour of duty or to stop and continue discussions another day. If the mediator chooses to continue another hour beyond his or her regular quitting time, supervisors and mediators testified that the mediator could come into work an hour late the following day or leave and hour earlier. Most mediations can be successfully completed during the regular business day. See Analysis of Individual Witness Testimony infra, (b).

Paralegals only work extra hours if they want to do it. There is no reason for a paralegal to work beyond his/her regular tour of duty out of necessity. Except for attendance at trials, which are rare, the clerical type work EEOC paralegals do can be put off until the next work day.

When paralegals attend trials and work extra hours, it is because they voluntarily choose to do it for comp time. What a paralegal can do at trial can be done by a second attorney or even a clerical who chooses to volunteer for comp time. No paralegal is required to attend a trial and work extra hours. Ms. Penny Horne, for example, a paralegal in Kansas City (and the only witness appearing from that office), was allowed to attend a trial after she waived paid overtime in writing. Ms. Horne willingly participated in the trial for compensatory time. It was her choice. No one forced her to waive overtime pay and accept compensatory time. See Analysis of Witness Testimony infra, (c and d).

The Agency's flexibility in allowing different schedules for employees also determines whether the supervisor is in a position to know if extra time is being worked. Individual employees have different starting and quitting times, as do supervisors. In a number of instances, testimony showed that supervisors left the office before the scheduled quitting times of subordinates, making it impossible for the supervisor to know the investigator, mediator or paralegal was working later than scheduled. In some offices of the Agency, mediators are physically located in a different city than their immediate supervisors. See Analysis of Individual Witness Testimony infra, (c).

Similarly, mediators have testified that mediations, on occasion, will run later than expected or the mediator and the parties decided to mediate through lunch, and the supervisor is not in a position to know about or prevent the extra work time. It is usually brought to the supervisor's attention after the completion of the mediation, if at all. According to the supervisors and mediators who testified, mediators have the flexibility to control mediations and to modify their schedules when and how they choose, regardless of whether they are formally on a five day

a week, 5/4/9 or 4/10 schedule. They are given the flexibility to do the job as professionals. See Analysis of Individual Witness Testimony infra, (b).

The employee, in the various circumstances presented, has options to avoid working beyond scheduled hours. An employee who wants to work outside her or his schedule for the employee's convenience, or decides unilaterally to work (sneaks) the time and then informs the supervisor afterwards, knows, from most but not all supervisors, that he or she will receive hour for hour compensatory time, even though it is not "suffered and permitted" overtime requiring any compensation. See Analysis of Individual Witness Testimony infra, (c).

An individual Agency supervisor can be ignorant of extra hours worked by a particular subordinate for many reasons. Schedules of subordinates differ and times scheduled to work also vary from employee to employee. The employee might have a schedule of eight hours a day, five days a week, or be on a 5/4/9 or 4/10 schedule.[21]

Added to the various schedules is the practice of the Agency in most offices to allow flexibility to investigators, mediators and paralegals to modify their schedules for their own convenience. Supervisors may not be in the office when particular employees arrive or when they leave. They usually are not in a position to observe whether the employee is actually working instead of taking lunch. Supervisors have many duties unrelated to keeping track of the presence or absence of subordinates. Where there is a sign-in, sign-out system, supervisors do not consider the sign-in and sign-out sheets to be reliable, and many supervisors do not pay attention to them.

[21] There was no proof proffered concerning extra hours worked off-site as part of the flexiplace program. In fact, testimony appeared to be the opposite. Elizabeth Marcus, mediator in Boston, testified that she would sometimes adjust her hours to 40 in the week by working fewer hours on her flexiplace day.

2. Opportunity To Prevent Work From Being Performed

If an employee works extra time but the supervisor is not in a position to prevent it, that work does not constitute "suffered and permitted" overtime and the supervisor is not obligated to grant compensatory time off, even though many EEOC supervisors allow compensatory time in those circumstances anyway.[22] In order for work to create liability for "suffered and permitted" overtime, the supervisor must have known or have been in a position to know it was worked; therefore each suffered and permitted violation would be unique to each individual supervisor and her or his subordinate. Circumstances arise episodically that cannot be anticipated by the supervisor or the employee.

The supervisor is not usually with the investigator doing an on-site, and is not in a position to prevent the extra work time. In most cases, the supervisor does not learn of the overtime until the next day. Even in instances where the investigator telephones the supervisor near the end of the business day to inform the supervisor that the interviews are running late and extra time will be needed to drive home, employees are choosing to work beyond their schedule for comp time rather than terminate the on-site for the day. Of course, where late notice to the supervisor is provided, the supervisor is not in a position to prevent the extra work time.

F. Sign-in/Sign-out Sheets

In the few exhibits showing sign-in sheets which are complete for an entire pay period (most Union exhibits did not show an entire week or pay period), the Union is expected to argue that the supervisor was in a position to prevent the extra hours worked. That is assuming that the supervisor believes that sign-in sheets reflect actual hours worked rather than merely when the employee arrived or left the office. Examples reflecting this issue are found in sign-in sheets

from Philadelphia involving Investigators Mark Maddox and Diane Vallejo-Benus. Both investigators reported to the same supervisor and both claimed to have worked the extra time shown on the sign-in sheets, although Ms. Vallejo-Benus did admit to going for coffee after signing in and that she received compensatory time for any extra time worked. However, Investigator Evangeline Hawthorne, who reported to the same supervisor, testified that she could do the job in forty hours a week or eighty hours a pay period. Ms. Hawthorne's productivity was far greater than that of Mr. Maddox or Ms. Benus suggesting that the time between signing in and signing out was not necessarily all work time for Mr. Maddox and Ms. Vallejo-Benus.

Alternative courses of action for supervisors exist where extra hours are worked by investigators and mediators without prior supervisory approval. Disciplinary action could be taken. It might result in the employee no longer working extra hours, or the employee might work extra hours without notifying the supervisor of the practice resulting in the employee not receiving any compensatory time for the work done for the benefit of the Agency. Less efficient employees would more likely take the latter course of action. A supervisor could refuse to give any compensatory leave to the employee who worked extra hours without prior notice or approval, and warn the employee not to do it again. But if the Agency proceeded in that fashion, the Agency would get the benefit of the employee's work without compensation. It would also encourage employees to conceal extra hours of work from Agency management and supervison.

For the same reasons that supervisors cannot always know when extra time is being worked by subordinates, they are not in a position to prevent the extra work before it occurs.

G. Workload

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[22] Some supervisors, ADR Coordinators Perez and Urbanski, for example, supervise employees who work in locations many miles distant from their own duty stations and are able to visit those employees only irregularly. The distance alone limits if not eliminates the ability to prevent work beyond schedule.

The CBA only requires the Agency to pay employees overtime wages for overtime work which is authorized in advance. If a legal obligation exists to pay overtime wages for hours worked which are not authorized in advance, it stems from legal requirements outside of the CBA and incorporated into the CBA by reference.

> 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.

This proceeding does not deal with instances where extra hours of work are ordered or approved (required) by management. Clearly, employees ordered (required) to work extra hours beyond their scheduled times are entitled to a choice of overtime pay or compensatory time off. Ordered and approved work must be approved by management in writing.

Mr. Inzeo (T.L.A. 834)[23] and Ralph Soto, Supervisory Program Analyst (T. 2943-2945) in the same office, both testified that, although there is overtime money set aside in the Agency budget, field personnel are told that there is no money for overtime for investigators and mediators because employees in those positions are expected to perform their jobs within forty hours a week or eighty hours a pay period. Paid overtime is generally limited to special projects specifically approved in writing by headquarters management, usually for clerical work, but not always.[24] Except for special projects initiated by management, employees know that paid

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[23] The transcript pages are consecutively numbered through the first three hearing sites. The Los Angeles transcripts, however, begin again with page 1. For that reason, all of the references to the Los Angles transpripts include the letters "L.A."

[24] An example of investigator paid overtime was Ms. Lili Llanas, an investigator in Milwaukee, who was approved to go on an outreach to Iowa to talk to a group that appeared to have a potential class case. (T. 1807-1816) Also, see Agency exhibit 12.

overtime requests will not be approved. Virtually every investigator, mediator and paralegal who testified on the issue, testified they understood there is no money for overtime. If approval for paid overtime is requested, it will be denied. When an employee asks for approval to work beyond scheduled hours, the employee knows he or she is volunteering to work for compensatory time because it would not be approved otherwise. The employee is choosing to work the extra time for compensatory time, and has no obligation to work that extra time.

In all but rare instances, non-exempt witnesses testified that they received and later used credit or compensatory time off for time worked beyond their schedule in a given day. This fact supports managers' testimony that the productivity expectations for investigators, mediators and paralegals can be accomplished overall in forty hours per week or eighty hours per pay period. When the employee is off due to credit or compensatory time, he or she is not doing the productive work of the Agency. Often, non-exempt employees voluntarily, at times without prior knowledge of the supervisor, in effect, modify their work schedules for their own convenience, working late one day and making up for it shortly thereafter by coming in late or leaving early – using unproductive (credit or compensatory) time for which they are paid.

Only a very few Union witnesses testified that they complained to their supervisors that the assigned workload required more than the normally scheduled time. One investigator from Richmond, Ms. Brinda George, admitted that she was told by the Charlotte Director Ruben Daniels, responding to her claim of too much work, that she was only expected to work the forty hours regardless of the amount of work backlog (T. 1032), and she was not permitted to work overtime. Ms. Patricia Glisson, her immediate supervisor in Richmond, confirmed that testimony. (T. 2085) Supervisors of the other Union witnesses denied that the extra time was required to complete the work. However, supervisors tend to allow employees to voluntarily

elect to work extra hours one day for compensatory time to be taken later if the employee is more comfortable with that schedule modification. Supervisors throughout the Agency attempt to treat investigators, mediators and paralegals as professionals, allowing as much flexibility as is reasonable.

Many supervisors require employees to obtain prior approval to work beyond the employee's scheduled hours of work, including for compensatory time. When prior approval to work extra time is sought in writing, the forms used often specifically state that compensatory time is being requested. See Pittsburgh (Union Exhibits 26 through 32) and Baltimore (Union Exhibit 41) forms. If the approval is given, it is given with the understanding that the extra time is completely voluntary, and that the employee is working the extra time for compensatory time knowing the extra time need not be worked that day at all. The issue is one of timing – when will the work be performed. Management does not order or expect or even want work to be done outside of an employee's tour of duty.

Any work performed beyond scheduled hours, without prior approval for paid overtime, is nonetheless usually reimbursed with hour for hour compensatory time off. Therefore, if the employee chooses to take the time in that same week or pay period, no more than 40 hours in the week or 80 hours in the pay period would be worked. Equivalent compensatory time off plus total hours worked would not exceed the 40/80 hour total.

There was testimony from supervisors that, although they encourage the employee to use the acquired compensatory time within the same pay period, they have permitted employees to use the compensatory time at a later time according to the wishes of the employee. Such flexibility is solely for the benefit of the employees.

H. Extra Hours Worked Were Voluntarily Worked For Compensatory Time

Extra hours worked were voluntary and were in effect a choice by the non-exempt employee to elect to work for comp time rather than postpone the work to the next day, or use available options to avoid extra-schedule work.

An agency may award compensatory time instead of overtime pay, at an employee's request, if the employee is non-exempt under the FLSA. Further, compensatory time may only be granted if the extra hours are not scheduled in advance of the work week unless an employee is on a flexible schedule in which case this restriction does not apply.[25]

By statute:

> [t]he head of an agency may, on request of an employee, grant the employee compensatory time off from the employee's scheduled tour of duty instead of payment under section 5544 or section 7 of the Fair Labor Standards Act of 1938 for an equal amount of time spent in irregular or occasional overtime work. An agency head may not require an employee to be compensated for overtime work with an equivalent amount of compensatory time-off from the employee's tour of duty.

5 USC §5543(b).

For employees on flexible schedules, "[a]t the request of an employee. . . the head of an agency may grant compensatory time off from an employee's basic work requirement under a flexible work schedule . . . instead of payment under § 551.501 of this part for an equal amount of overtime work, whether or not irregular or occasional in nature." 5 CFR §551.531(b). Extra hours not scheduled in advance of the workweek meet the definition of "occasional or irregular." 5 C.F.R. §551.501 (c).

[25] Most extra hours worked by an employee on a flexible schedule are likely to be credit hours and not compensable overtime for which compensatory time may be substituted.

It is not necessary for an investigator, mediator or paralegal to work more than 40 hours in a week or 80 hours in a pay period - because of workload or any other reason. EEOC employees are told they are not supposed to work more than 40 hours per week or 80 hours per pay period. Every supervisor testified that he or she does not order or otherwise require employees to work beyond the employee's scheduled hours without offering paid overtime. Work performed outside of scheduled hours is voluntary and is initiated by the employee. In outreach situations, employees are given the opportunity to volunteer to do outreach presentations in return for compensatory time off. There is no evidence in the record of coercion to volunteer. Although outreach is part of an investigator's duties, it is available during normal business hours too; and employees can satisfy outreach responsibilities without working outside their schedules. Indeed, the evidence was that outreach was unnecessary to achieve an outstanding evaluation. If non-exempt employees do not wish to volunteer for after hours outreach in return for compensatory time off, the outreach is done by exempt personnel or not at all.

OPM regulations emphasize that employees may not be forced to take compensatory time instead of overtime pay.

> An agency may not require that an employee be compensated for overtime work under this subpart with an equivalent amount of compensatory time off from the employee's tour of duty. An employee may not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any other employee for the purpose of interfering with such employee's rights to request or not to request compensatory time off in lieu of payment for overtime hours.

5 CFR §551.531.

The CBA is consistent on this point. "Compensatory time is time off in lieu of occasional or irregular overtime which has been approved in advance by the supervisor. All

employees in positions which are nonexempt under FLSA . . . . 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." CBA Section 31.08. See also OPM Handbook.

In AFGE, Local 3614, 58 F.L.R.A. 378 (2003), the Union argued that the agency violated 5 CFR §551.531 by coercing its employees to agree to take compensatory time instead of being paid overtime. The agency offered its employees the option of changing their work schedules for one pay period to include non-overtime weekend work or continuing with their existing schedules and accepting compensatory time off for overtime work performed on one particular Saturday. The arbitrator found that the agency did not offer overtime pay because it was operating at a financial loss. The employees chose to accept compensatory time, which meant only working one Saturday, instead of changing their schedules which would have required working two Saturdays. The arbitrator found that employees were not coerced into accepting compensatory time, but chose compensatory time to minimize Saturday work. The FLRA upheld the arbitrator's decision stating as follows:

> The regulation . . . requires that employees be given an un-coerced option of whether or not to request compensatory time; it does not require the payment of overtime in any particular circumstance. **In particular, there is no indication that pay is required if the employee is permitted to refuse to work overtime hours but chooses to work those hours in return for compensatory time. Put simply, nothing in the regulation prohibits an employer from offering the employee the choice of overtime work for compensatory time or no overtime work at all.** (Emphasis added.)

Id. at 380. This decision was cited by the FLRA in a previous grievance AFGE brought against the EEOC. "While not relevant in this case, we note that an employee may be given the choice to work overtime for comp time, or no overtime at all. See AFGE, Local 3614, 60 FLRA No. 121 (2005) at 7 n.5; AFGE Local 507 and VA Medical Center West Palm Beach, 58 FLRA 378,

380 (2003). It is the Agency's position that employees preferred the informal process rather than time-consuming written requests for comp time, where credit hours are not viable. Employees may elect compensatory time off from the employee's tour of duty instead of payment. 5 C.F.R. § 550.114(a). This informal process can appropriately be viewed as the equivalent of employee election of compensatory time. This compensatory time may be "an equivalent amount" of time (hour for hour), if so provided by the Agency. In the governing Agency Memorandum, dated September 19, 1995 at 3-6, the Agency does provide that compensatory time is computed at the rate of one (1) hour earned for each hour of overtime worked. See Agency Exhibit 5a at 3.

Under both case law and CBA section 31.08, when compensatory time is awarded, it is awarded in amounts equal to the numbers of overtime hours worked. In Doe v. United States, supra,, 513 F.3d at 1348, employees of the social security administration argued that they should have been awarded 1 ½ hours of compensatory time or credit hours for each overtime hour worked, but the court rejected that argument noting that the section of the Fair Labor Standards Act cited by the employees only applies to local and state government workers and not to federal employees.

I. Refusal Of Supervisors To Approve Paid Overtime For Investigators, Mediators And Paralegals

The Union presented extensive testimony from non-exempt witnesses that they were led to understand that there was no money available for overtime. Indeed, most management witnesses testified that they believed that no money was available to pay overtime to investigators, mediators and paralegals.

It is the Agency's position that its budget has no relevance to the issues before the Arbitrator. The obligating of Agency funds without adequate funds to cover those expenses

raises questions of whether there were violations of the Anti-Deficiency Act.[26] However, that is not an issue germane to this proceeding.

Non-exempt employees know that they are required to obtain approval to work extra hours. Knowing that any request for overtime for pay will not be approved, employees know that if they voluntarily request to work extra hours, the request will be approved only if the employee is volunteering to work extra hours for credit or compensatory time. In most cases, the issue is not whether the work will be done, but when it will be done. The employee is given the flexibility to determine whether the work will be done during extra time today, or it will wait until another day to be completed, or in some cases, not done at all. In other words, the employee knows he or she is choosing to do the work after his or her tour of duty – say, from 6:00 PM to 7:00 PM – for compensatory time, or not working the extra hour at all.

J. The Union's Evidence Does Not Prove Systemic Overtime Violations By The Agency

The Union's proof falls far short of demonstrating a systemic pattern of overtime violations - that there was any regular pattern of uncompensated overtime being worked by investigators, mediators, and paralegals. The Union named only a small subset of all such employees, and ended up calling substantially fewer than it named.[27] Few of those employees

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[26] Mr. Nick Inzeo, now head of Office of Field Programs, was formerly Deputy Legal Counsel with responsibility, among other things, over fiscal issues for the Agency. Mr. Inzeo testified convincingly that none of the Agency's practices regarding comp time violated any fiscal laws including the Anti-Deficiency Act. He also testified that, although individual field offices may not have had money in their individual office budgets, at all times relevant to this case, the Agency had funds to pay for any overtime worked.

[27] Only 32 offices of the Agency's 52 offices were represented at all. Of those 32 offices, no investigators testified from Detroit, Kansas City or San Francisco. The one investigator formerly in Los Angeles testified to one hour of extra time, and she transferred to Atlanta. According to Agency exhibit 7a, there were 621 investigators working in the 52 field offices as of February 12, 2007. Exhibit 9 in the exemption phase established that there were also 264 former investigators for a total of 885 potential investigator witnesses. The Union named 100 investigators in its pre-arbitration submission, but only 50 investigators actually testified, many of them union representatives. Of the investigators who testified, at least 7 did not work any overtime during the relevant period: Bloomer and Lianas in Milwaukee, Carlo in Buffalo, Kwok as an investigator in New York, Allen in Atlanta, Morrison in Houston, Feiertag in Cincinnati and Kinzel-Barnes in San Diego. Of the 101 mediators counted in Exhibit 9, only 15 (if Kwok is included) were listed in the Union's pre-arbitration submission, and 11 testified. Patricia Folino and

testified to anything more than a de minimus overtime, virtually all of which, if known to the supervisor in advance (or even after the fact) was fully compensated by one-for-one hours of compensatory time, or more.[28] In some cases, more than one-for-one compensatory time was granted. And, a substantial majority of the limited instances where investigators, mediators, or paralegals worked outside of their schedules, the employees testified that they did so voluntarily, with knowledge that the only compensation they could get would be comp time. Again, a substantial majority of these situations were cases where employees freely and willingly elected between the two options available to them: work for comp time outside of their schedule or not perform that particular job function at that time.

The freedom that investigators, mediators, and paralegals are customarily offered as to time and attendance undoubtedly accounts for the lack of cooperation the Union experienced from its own scheduled witnesses. The Agency believes that the vast bulk of the Agency's employees are satisfied with the manner in which the Agency treats them, and that to some extent that satisfaction came through in the testimony of the relatively few who testified (all presumably hand-picked by the Union), and for the decision by so many Union members not to cooperate with the Union in its attack on the fairness of Agency compensation. It explains why, when asked if any union member or union official ever complained about the fairness of the overtime compensation system utilized in any particular office, not a single witness could remember any such complaints.

Elizabeth Marcus (called by the Agency) testified they did not work more than 40 hours per week. Most of the others, testified that if they worked late one day, they would come in late or leave early the next day or within the pay period. They simply modified their schedules to stay within the 40 hours per week or 80 hours per pay period.

[28] There is both testimonial and documentary evidence indicating, for example, that employees in the Dallas District who volunteer to work at Outreach events not scheduled during regular business hours are awarded two hours of compensatory time (the so-called "2 for 1 special") for each hour worked at such events.

In this regard, during the Atlanta phase of the hearing, the Union made several thinly veiled accusations that witnesses who were not showing up had been deterred by improper Agency action. With both parties' permission, the Arbitrator spoke on the phone out of the presence of the parties with two witnesses who had been listed but did not show up at the hearing. He thereupon reported back off the record on his conversation. The Arbitrator's call accomplished nothing, certainly nothing for the Union. Neither witness apparently said anything indicating improper action by the Agency. Perhaps one had personal problems at home to deal with and didn't want to travel.[29]

Ultimately, the Union urged a motion on the Arbitrator that he find agency misconduct in dissuading two witnesses from Director Wanda Milton's Little Rock office from participating in the arbitration. (T. 6419-6435) The Union maintained it had proof of Agency misconduct and wanted the Arbitrator to hear it. The Union asked that the Arbitrator take an inference that testimony that the deterred witnesses would have given would be adverse to the Agency and that exhibits that would otherwise have been authenticated by them be admitted. Alternatively, it insisted that the record remain open so that it could call deterred witnesses at a later point (presumably the Los Angeles portion). It presented an FLRA decision it asserted was authority for its position.

Ultimately, both Levi Morrow (by phone (T. 6708-6716) and Wanda Milton (live) testified concerning alleged interference. Milton's testimony was first-hand, as it was her actions that were vilified by Morrow, who had supposedly spoken with the two deterred witnesses. Milton explained directly and emphatically her limited involvement with the two witnesses and denied that the exchange that Morrow said he was told about ever occurred. (T. 6681-6684) Her

[29] It is worthy of note that, although the Union got its way whenever it requested telephone testimony for just about any reason offered despite the Agency's objections, it did not request permission to put either of these

testimony is not reconcilable with Morrow's. Morrow's was hearsay. Milton's was first-hand and therefore, per se, more credible.

Days after the testimony, the Union reurged its motion. The arbitrator acknowledged that he was not prepared to find that Milton's testimony was not true, as it was straight-forward, strong, and credible. He noted that Morrow's testimony was rank hearsay as argued by the Agency. The Arbitrator declined to take the Agency up on its suggestion that, as with the other two witnesses whom he called, he call the two Little Rock witnesses.

The issue went away. It was a transparently bogus attempt to blame the Agency for the unwillingness of employees to cooperate with the Union. The fact is that the Union simply couldn't accept that witnesses were declining to participate, even where the witnesses stood to make money by cooperating.

III. ANALYSES OF INDIVIDUAL WITNESS TESTIMONY

The individual witness testimony can be generally categorized as: (a) those who indicated no extra hours worked at all; (b) those who modified their own schedules; (c) those employees who notified their supervisors of the extra hours worked after it was worked or not at all; (d) those who requested extra hours for comp/credit time; and (e) those who obviously lacked credibility. Of course, some witnesses fall into more than one category.

The bargaining unit witnesses that are in category (a)(no extra time) are: Ms. Jennifer Carlo – Buffalo; Ms. Pamela Bloomer (part-time) and Ms. Lili Llanas – Milwaukee; Mr. Thomas Feiertag – Cincinnati; Ms. LaVerne Morrison – Houston; Ms. Deborah Kinzel-Barnes – San Diego; Ms. Patricia Folio – Philadelphia and Ms. Mildred Allen – Atlanta.

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witnesses on by telephone. One was Investigator Toni Baskin, described by Union counsel as "very hostile."

Category (b)(schedule modification) applies to most mediators, but specifically to: Ms. Regina Husar – Chicago; Ms. Elizabeth Marcus – Boston; Mr. John Davis – Indianapolis; Ms. Patricia McNeil – Detroit; Ms. Sharon Baker – Louisville; Mr. Craig Kempf – San Antonio; Mr. Jose Gurany – El Paso; and Mr. Kenneth Warford – Atlanta.

Category (c) (worked extra, but informed the supervisor after doing it if at all) are: Ms. Novella West, Ms. Evangeline Hawthorne, Ms. Diane Vallejo-Benus and Mr. Mark Maddox – Philadelphia; Ms. Loretta Miller – Baltimore; Ms. Brinda George – Richmond; Mr. Christopher Kwok and Ms. Esther Gutierrez - New York; Ms. Nanisa Pereles and Ms. Janel Smith – Chicago; Ms. Eris Yarborough – Newark; Nelida Sanchez – Buffalo; Joseph Tedesco – Indianapolis; John Ahlstrom, Tonya Shriver, Maria Minks and Ms. Diane Webb - San Antonio; Mr. Arturo Carrion, Mr. Rollin Wickenden and Ms. Sandra Cox - El Paso; Ms. Sandra Chavez and Mr. Melvin Hardy-Charlotte; Mr. David Kingsberry and Ms. Jannes James – Greensboro; Ms. Irma Boyce – Memphis; Ms. Doralisa Wroblewski, Ms. Julia Diaz and Ms. Beverly Collins – Tampa Ms. Rosalyn Williams, Mr. Kenneth Warford and Ms. Helen Garret – Atlanta; and Ms. Rita Montoya – Albuquerque.

Category (d)(specifically requesting comp/credit time) are: Ms. Bettina Dunn, Ms. Brenda Hester, Ms. Sylvia Williams – Philadelphia; Mr. Patrick Malley and Ms. Susan Kelly – Pittsburgh; Ms. LaEunice Chapman and Ms. Yvonne Williams – Baltimore; Ms. Kathleen Harmon – Richmond; Ms. Sarronda Harris – Chicago; Mr. Derrick Anderson – Louisville; Ms. Maria Saldivar – Cincinnati; Ms. Penny Horne - Kansas City; Ms. Melva Best and Ms. Azella Dykman – Dallas; Mr. Robert Hill - Oklahoma City; Ms. Elaine Weintritt and Ms. Samantha Chan – Houston; Mr. Diego Torres – Savannah; Mr. David Skillman and Ms. Lorraine Strayhorn

- San Francisco; Ms. Janis Richardson – Phoenix; Ms. Kathlyn Johnson – Albuquerque; and Ms. Glory Gervacio and Mr. Raymond Griffin – Honolulu.

There were serious credibility problems with the testimony of Ms. Gloria Smith-Dallas; Mr. Arturo Carrion and Ms. Mary-Christine Bobadillo - El Paso; Mr. Mark Maddox and Ms. Diane Vallejo-Benus – Philadelphia[30]; Ms. Glenda Bryan-Brooks; Ms. Julie Hodge-Birmingham; and Ms. Rosemary Caddle – Miami. Ms. Nanisa Pereles and Ms. Janel Smith – Chicago claimed they had too much work to do in the time permitted, but they received and used the compensatory time. When compared to the testimony of their coworkers and supervisors, the testimony was exaggerated and unbelievable. Interestingly, Mr. Maddox, Ms. Bryan-Brooks, Ms. Hodge and Ms. Caddle were all on a flexible schedule and not entitled to overtime pay even if they worked extra hours which were suffered and permitted by the Agency.

Below are summaries of the testimony of union investigator, mediator and paralegal witnesses and their supervisors.

IV. SUMMARIES OF WITNESS TESTIMONY [31]

HEADQUARTERS

Nicholas Inzeo, Director of the Office of Field Programs, testified that he has overall

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[30] For example, Mr. Maddox, Ms. Vallejo-Benus and Ms. Hawthorne all reported to Mr. Gurmankin. Agency Exhibit 8 (resolution reports) show that in fiscal year 2004, Mr. Maddox had 83 total resolutions, Ms. Vallejo-Benus had 108, and Ms. Hawthorne had 152; in fiscal year 2005: Mr. Maddox had 101, Ms. Vallejo-Benus had 92, and Hawthorne had 162 resolutions; and in fiscal year 2006: Maddox had 87, Vallejo-Benus had 90 and Ms. Hawthorne had 139. Ms. Hawthorne testified that she did not work extra hours except occasionally through lunch, while Mr. Maddox and Ms. Vallejo-Benus submitted sign-in/sign-out sheets showing extra hours worked daily for some periods of time. Based upon productivity, it would appear that Mr. Germankin could easily conclude that when Mr. Maddox and Ms. Vallejo-Benus were in the office extra time, they were not necessarily doing Agency work.

[31] CAS denotes cost accounting sheet; CWS denotes a compressed work schedule; AWS denotes an alternate work schedule

responsibility for all investigators and mediators in the field, as they work in field offices ultimately under district directors who report in turn to Mr. Inzeo. Mr. Inzeo himself reports directly to the Chair of the Agency. Mr. Inzeo testified as to his varied background which gives him expertise in many areas of federal employment. He noted his background as Deputy General Counsel and before that as Deputy Legal Counsel, having responsibility to give the Agency advice in a broad range of legal issues, including federal fiscal and employment issues. (T.L.A. 829-830) He authenticated Agency Exhibits 7A and 7B. He testified that there were 652 investigators in the field (T.L.A. 838) and that 267, or 41 percent, are on a flexible schedule as defined in Joint Exhibit #1 (the CBA) (T.L.A. 838-839) Mr. Inzeo further testified that in his opinion, there was no connection between the availability of funds in a district office's particular budget and the ability to authorize compensatory time, an issue that the Union had harped upon the entire arbitration. (T.L.A. 835-836) In fact, the Agency has always had overtime funds available, although it was not necessarily in any district office's budget, but rather maintained by the Chief Financial Officer (T.L.A. 834) He testified that there is a big difference between authorizing overtime pay and authorizing comp time, in terms of exposure under the Anti-Deficiency Act. For the former, there is an actual expenditure at the time overtime is worked. However, that is not the case with comp time which has to be used before annual leave. Only in the unlikely event that comp time is not used within a year of earning it would there be a payout. And Mr. Inzeo said that the possibility of that occurring is "so small as to be nil." (T.L.A. 838) Mr. Inzeo testified that in his opinion as the former Deputy Legal Counsel, the Agency does not violate any fiscal rule by permitting comp time.[32] (T.L.A. 842)

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[32] Unfortunately, either Mr. Inzeo misspoke or the reporter got it wrong because the transcript shows that Mr. Inzeo further responded by adding to his opinion that EEOC didn't violate any fiscal law by approving comp

Joann Riggs, Assistant Director of Human Resources, testified that from the period in early 1995 to April 7, 2006, other than the grievances in the Baltimore office and the Washington field office, she has not received any other overtime grievances. (T. 2891-2892) Ms. Riggs described steps taken after the settlement of the 1995 grievance, in concert with the Union, to develop policies on the implementation of the FLSA. Ms. Riggs testified that the Agency issued memoranda reflected in Agency Exhibit 5A and 5C through 5F, published articles in the management newsletter, and developed and provided training to Agency managers in its management development institutes. Ms. Riggs and her staff visited several offices to provide training in which the overtime subject was covered. Agency Exhibit 6 is that training provided. (T. 2898-2899) Training sessions were conducted at various times for first line supervisors, managers and regional attorneys. (T. 2903) And, Ms. Riggs would participate in conference calls with directors and regional attorneys to discuss the subject. Ms. Riggs testified that the biweekly cost accounting form (Agency Exhibit 14) was developed for the purpose of getting a handle on what the different activities cost to assist the Chief Financial Officer in developing the budget. The Union representative was involved in the development of this form. (T. 2904-2905) When the cost accounting form was first used, it was not clear that compensatory time earned and used was to be put on the form. The purpose of the form was to tell the Chief Financial Officer where the money was going. (T. 2908-2910) There is no legal requirement that compensatory time earned and used be entered into the FPPS. (T. 2911-2912) Ms Riggs testified that she knows money is budgeted by the Agency for payment of overtime. The money must be requested by field management from the Office of General Counsel or the Office of

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time "even if, you know, overtime funds were available." Obviously, Mr. Inzeo meant to say even if funds weren't available. The response makes no sense otherwise.

Field Programs in headquarters so they can keep a handle on the use of overtime funds. (T. 2914) When the Agency offered testimony from Ms. Riggs regarding her efforts to collect documents requested by the Union, the Union Representative pointed out that her accusations were simply attorney argument and factual testimony on behalf of the Union was not presented. The Arbitrator stated that he did not look upon it as a substantive issue. Therefore, the Agency Representative understood that factual testimony was not necessary because document collection was not at issue. (T. 2914-2919) Ms. Riggs testified that it is mandated that the hours an employee is paid for be entered in the FPPS. (T. 2929)

Ralph Soto, the Supervisory Program Analyst in the Agency's Office of Field Programs (OFP), testified that he assists the Director to oversee and manage enforcement operations in the field. (T. 2942-2943) Mr. Soto testified that a request for overtime pay must by submitted by the director of a field office to headquarters where it is denied, approved or modified. (T. 2943) Generally overtime is not approved for investigators and mediators because the budget is very limited, and OFP does not expect that investigators and mediators need to work overtime in the normal course of business. If an investigator has to make a phone call in the evening, he or she can make it up by coming in late the next day. (T. 2944) OFP requires offices to record compensatory and credit time but not in a specific format and not in the FPPS. (T. 2945-2946) Field offices are required to use the biweekly cost accounting forms. Mr. Soto explained the Integrated Management System (IMS), the information and reports it provides, are the official EEOC records. (T. 2947-2948) Mr. Soto testified generally how OFP supports an employee-friendly system at EEOC. (T. 2948-2950) Mr. Soto stated that the rule regarding money needing to be available applied to situations in which compensatory time is not used by the end of the year, and overtime pay was therefore required. Mr. Soto explained that if a District

Director tells an employee that although there is no money available to the office for overtime , there is still overtime money in headquarters, and the employee can work compensatory time. (T. 2956 and 2959) Field Directors, as a practice, are told that they do not need overtime money in their individual office budget to grant compensatory time because there are overtime funds in the Agency budget. So if an employee needs to be paid overtime because the compensatory time was not used at the end of a year, he or she can be paid. (T. 2959-2962) Mr. Soto testified that Ms. Ibarguen did not have authority to issue the statements she issued governing the administration of overtime at EEOC. (T. 2962-2963) Managers are informed at the beginning of the year that there is overtime money and they have to request it. (T. 2963-2964) Mr. Soto testified that the FPPS is supposed to track the number of hours an employee works in a pay period. It does not track if a person worked eight and a half hours one day and seven and a half the next. (T. 2978-2979) The Office of Field Programs does not require a specific recording system for compensatory time. (T. 2982)

PHILADELPHIA

Within the Philadelphia District Office, timekeepers testified to different ways of keeping track of hours worked. **Adrian Rhaney** kept time for mediators who filled out their own cost accounting sheets. Compensatory time earned and used by mediators was not entered into the FPPS. **Phil Goldman**, ADR Coordinator, and **Patricia Folino**, Mediator, testified that when she voluntarily continued a mediation after her quitting time, she would leave earlier the next day to make up for the time. She never worked more than forty hours per week. (T. 199-200; 202- 203) Ms. Folino knew that paid overtime was not available and would not be approved. (T. 188) Ms. Folino also knew she could discontinue the mediation if she wished to do so, but occasionally would choose to work later knowing she could take a corresponding amount of time off later.

(T. 197) She testified that it was rare that her mediations went beyond 4:30, maybe once a month or once every two months. (T. 208) If she mediated after quitting time or through lunch, her supervisor would not know that. (T. 204-206) She would only inform her supervisor when she chose to do so. (T. 219-221) Ms. Folino also testified that the sign-in/sign-out sheet was filled out in error when she was first employed by the Agency. She testified that she was permitted to flex her schedule to come in later and work later if she chose to do so (T. 214), but normally she worked an 8:00 to 4:30 schedule. Union Exhibit 9, a time and attendance form applicable to Ms. Folino, had "gliding" under her name. Phil Goldman testified that he didn't look at the sign in/sign out sheets. He trusted the timekeeper and subordinates to do the time and attendance. While Mr. Goldman testified he was not in a position to prevent work during lunch or after hours (T. 82; 89) and did not know when Ms. Folino worked beyond her quitting time, Ms. Folino recalled telling him when her mediation went longer and she chose to continue and work past her departure time. (T. 219). Ms. Folino was on flexible schedule where she modified her time according to the time needed to conduct a mediation. The credit/compensatory time was taken the next day or soon after working the extra time. (T. 202-204)

Barbara Marcucci, timekeeper for the Philadelphia District Office Legal Unit, testified that she kept track of all time including compensatory time, and entered it into the FPPS. During her testimony she showed that the CD (Agency Exhibit11) did not break down the various codes, grouped compensatory time used under "LVE" for paralegals. The Agency offered a later CD which appeared to separately show compensatory time earned and used, but that evidence was not accepted by the Arbitrator. She showed where paralegal Yvonne Davis requested compensatory time and used it later by referring to the sign in/sign out sheets (Union Exhibit 10; Agency Exhibits 21 and 22; T. 160–169)

The investigators in the Philadelphia District Office who testified were subordinates of two supervisors, **William Cook**, Enforcement Manager, and **Howard Gurmankin**, Supervisory Investigator. Three Investigators reported to Mr. Cook: **Novella West**, **Brenda Hester** and **Karen McDonough,** but only two of these investigators testified**,** Ms. West and Ms. Hester.

Mr. Cook did not know when Ms. West or Ms. McDonough worked extra hours. Occasionally they would tell him after the fact or he would see it on the sign in/sign out sheet. Ms. West testified that she believed that she received equivalent compensatory time for the extra hours she worked and was treated fairly. The evidence presented was primarily from 2003, Union Exhibit 8. There was one time and attendance record for a pay period covered in 2006 and a cost accounting sheet for pay period ending 1/20/06 but these exhibits showed no extra hours worked. Ms. West testified that she was almost sure that she received comp time for the extra hours. (T. 237-238) There is no evidence that the dashes for lunch one day were known to Mr. Cook prior the end of the day so that he could prevent Ms. West from working through lunch. Ms. West explained that in 2003, she went into work early because she rode in with her husband who retired sometime in 2004. Ms. West testified that she opted to work the extra hours knowing she would get compensatory time. (T. 254) There is no evidence, even in 2003 that Mr. Cook knew beforehand that Ms. West would be working extra time.

Ms. Hester, another of the investigators supervised by Mr. Cook who is also a union representative, testified that she worked extra hours without compensation. She admitted having discussions with Mr. Cook as far back as 2002 or 2003 where he told her she was not supposed to work overtime because overtime money was not available. Ms. Hester continued to work extra hours and Mr. Cook told her that she had the choice of working extra hours for compensatory time or not working the extra hours at all. Ms. Hester continues to work the extra

hours, and through emails, Mr. Cook keeps track of the extra hours and Ms. Hester receives compensatory time. The hours Ms. Hester spends on union business is supposed to be fifty percent of her time. Mr. Cook trusts her to keep to that arrangement without keeping track of her union time himself. Although Ms. Hester testified that she was expected to do as much work as the other two investigators that worked full time, Mr. Cook testified that her workload was assigned with the union time in mind.

Bettina Dunn, a Paralegal in the Philadelphia District Office Legal Unit, testified that her time was closely monitored and she was not allowed to work extra hours. She was told to go home. It was brought out that Ms. Dunn was called to testify in New York where she attended on a Friday and Monday. Her attendance at a Merit Systems Protection Board hearing was on behalf of the union. Ms. Dunn's testimony was that she was Jewish and got religious days off Ms. Dunn testified that she did not remember ever working overtime in Philadelphia. (T. 1324-1325) Ms. Dunn was allowed to work for compensatory time to be used for religious days off as a religious accommodation. (Union Exhibit 11)

Ms. Dunn's testimony is an illustration of the union's blatant abuse of the arbitration process. The union obviously had not communicated with Ms. Dunn about her situation before forcing her to testify as an alleged aggrieved employee on behalf of the union. Agency management attempts to treat its investigators, mediators and paralegals professionally. Although management believes there is no need for these employees to work extra hours, employees are allowed, in many offices, to request to work extra hours in return for comparable hours off at a later time. The employees are, in many cases, allowed to take that time off when it is convenient for them. The bargaining unit employees appreciate this flexibility. Several employees named by the union as witnesses refused to appear and testify. Others have appeared

reluctantly after being told by the union that they are required to do so. This entire "suffered and permitted" exercise is the result of the union leadership's desire to "punish" the Agency for its action in changing the status of investigators and mediators from non-exempt to exempt. This process is contrary to the letter and spirit of the Fair Labor Standards Act.

Sylvia Williams, another Paralegal in the Philadelphia District Office Legal Unit, testified for the Union. Ms. Williams testified she did not recall doing any overtime. (T. 1345 and 1360) When reminded that she received compensatory time, she stated that pay was not an issue with her. She opted for compensatory time. (T. 1349) Despite the Union Representative's attempt to confuse this witness, Ms. Williams maintained that she did not recall requesting overtime. (T. 1355) Also, Ms. Williams testified that any compensatory time worked in 2004, 2005 and 2006 was only occasional and did not amount to much time. (T. 1360-1361)

Mark Maddox, an Investigator in the Philadelphia District Office, testified that he did not know and was not advised about any overtime policy at EEOC even though he was employed there for about ten years. Mr. Maddox referred to having a "flexi-schedule" early in his testimony. (T. 1370) He did not seem to recall anything that occurred in 2004 or 2005. He had an understanding that there was no money for overtime, but he could not recall how he got that understanding. He could not positively identify his supervisor's initials on time sheets. (T. 1372 and 1419–1420) From Mr. Maddox's testimony, we do not know who saw his time sheets. His supervisor arrived around 8:30 AM, left the office around 4:00 or 4:30 PM, and was never in the office on weekends according to the witness. (T. 1383-1384; 1405 and 1400-1401) So his supervisor was not in a position to verify when Mr. Maddox arrived or when he left. Mr. Maddox also testified that he did not inform his supervisor, Mr. Howard Gurmankin, when he worked extra hours or through lunch. In short, it is not clear from the testimony of this witness

that Mr. Gurmankin was in a position to prevent Mr. Maddox from working the extra hours before they were worked or that he knew Mr. Maddox worked extra hours at all. Although Mr. Maddox claimed his supervisor knew he was in work on a Saturday, he supported that by saying that William Cook, his second line supervisor, was in the office then. There is no evidence that Mr. Cook would be aware, if he saw Mr. Maddox in the office on a Saturday, that he was there to work or for some other personal reason.

Dianne Vallejo-Benus is an Investigator in the Philadelphia District Office called to testify by the union. Unfortunately, Ms. Benus did not recall many specifics in attempting to interpret the documents shown to her despite the Union Represntative's repeated attempts to lead her to answers. However, Ms. Benus did testify that she believed she was given compensatory time for any extra time worked. (T. 1443) Union Exhibits 7 and 149 are so confusing that the witness was uncertain how they should be interpreted. Ms. Benus also testified that she went for coffee and food when she arrived in the morning and ate at her desk. (T. 1457) She also testified that her supervisor would allow her to leave earlier than shown and that would not be reflected on the time and attendance sheets. (T.1458-1461) In short, the time and attendance sheets are not a reliable indication of when this witness actually worked. Mr. Maddox testified that Howard Gurmankin did not arrive at work until 8:00 or 8:30 AM and left at 4:00 or 4:30 PM.

Evangelina Hawthorne is also an Investigator in the Philadelphia District Office called by the Union. She also reported to Howard Gurmankin. She testified that she knew that employees had to get prior authorization to work overtime. Ms. Hawthorne did a lot of outreach. Union Exhibit 148 showed an outreach by Ms. Hawthorne that took four hours on a Saturday. However, Agency Exhibit 26 indicated numerous outreach assignments during the workday

which took far less than a full day and Ms. Hawthorne did not return to the office and received a full day of pay. Ms. Hawthorne testified that she might skip lunch on occasion, but her supervisor would not know beforehand whether she would do it.

William Cook, Enforcement Manager in the Philadelphia District Office, testified that he directly supervised three investigators: Novella West, Karen McDonough and Brenda Hester. All of the investigators knew that they were supposed to obtain approval to work overtime before it was worked, and no overtime for pay would be approved. For Ms. West and Ms. McDonough, he knows that they have worked extra hours at home at night and on weekends, but he has not kept records of the extra hours worked. It is not clear that he was told the exact amount of time worked by Ms. West and Ms. McDonough. He was not told by them that they intended to do the work until after the work was done. He did not have the opportunity to prevent them from working the extra hours prior to the hours being worked. With Ms. Hester, a Union official, records were kept based on her entries in the time and attendance sheets. Ms. Hester claims to have worked the extra time without prior approval and insisted that she would continue doing it. She suggested to Mr. Cook that he write "overtime not approved" on he time sheets. She would continue to do what she wanted to do. Ms. Hester even refused to fill out her cost accounting sheet.

Jacqueline McNair, Regional Attorney in Philadelphia, testified that she has responsibility for attorneys, paralegals and legal unit clerks in Philadelphia, Cleveland, Baltimore and Pittsburgh. At the time of her testimony, she was the second level supervisor of Paralegals: one in Baltimore; two in Cleveland and three in Philadelphia. She testified that there is no need for Paralegals to work more than 40 hours per week. (T. 2662) If paralegals volunteer to work extra hours, they are doing it for compensatory time and they have the option of not doing the

extra time at all. (T. 2662-2663) The Paralegal fills out a form asking for approval to work extra time for compensatory time and, if approval is given, they receive the comp time. When a Paralegal attends a trial, it is entirely voluntary. (T. 2664) There are options open to the attorneys if a Paralegal does not wish to volunteer to attend a trial for compensatory time. An attorney or a clerical could attend instead. (T. 2668) Compensatory time earned and used goes into the FPPS. (T. 2669) Ms. McNair believes she received the training reflected in Agency Exhibit 6. (T. 2710) If she needs overtime money, she contacts the Office of General Counsel in Headquarters and asks for it. (T. 2713-2714)

There is no evidence that the Agency suffered and permitted any employee in the Philadelphia District Office to work overtime hours or failed to properly compensate them for extra hours worked. Some employees were on flexible schedules and earned and used credit hours. Supervisors made clear that working extra hours was not required, but if employees volunteered to work extra hours, they would be compensated with compensatory time or credit hours. Some employees expressly requested, received, and used compensatory time for extra hours worked. The Union also did not put on credible evidence that any employee in the Philadelphia District Office worked more than 40 hours in a week or 80 hours in a pay period, even if on occasion they worked more than 8 hours in a day, for which they received credit hours or compensatory time. Because no employee in this office has an individual claim for overtime pay, none can be representative of a class claim.

Pittsburgh

Patrick Malley, an Investigator in the Pittsburgh Area Office, worked a flexible, slide-and-glide schedule. (T. 2441) He testified that he knew that paid overtime was not available and would not be approved. He requested and received compensatory time when he chose to work

extra hours. Because Mr. Malley was on a flexible schedule, the extra hours worked were actually credit hours and would not be considered overtime in any event. Mr. Malley submits a form which request permission to work extra hours beyond his schedule for compensatory time, sometimes before and other times after he has worked the extra time. The only time Mr. Malley testified that he worked extra time was when he went over with a charging party at intake. Even then, he testified that he recalled Mr. Eugene Reid, his supervisor during the relevant period, telling him to let him know if he was running over and the schedule would be changed. Mr. Malley testified that his supervisor would not know if he was working the extra time during intake until after it was worked, and only if Mr. Malley informed him of the fact. Mr. Malley testified that he received compensatory time off for the extra time worked.

Marilee Hallam, a Timekeeper in Pittsburgh, testified that employees must use the compensatory time earned within 26 pay periods, or one year, from the time it was earned. Logically, taking the first in, first out approach, a review of the compensatory time records will show that employees use their compensatory time well within the 26 pay periods. If a balance of leave remains for more than 26 pay periods, this does not mean that the leave itself is more than 26 pay periods old since the balance column is a revolving item. Old accumulated leave is subtracted and new leave earned is added. The employee must use the compensatory time "within 26 pay periods from the time you've earned it." (T. 828) Only one employee, John Wozniak, failed to use his compensatory time within 26 pay periods. His compensatory time of 4 and ½ hours could have even been earned before 2003 and was forgotten. The evidence does not indicate whether or not Mr. Wozniak was on a flexible schedule or not at the time.

Joseph Hardiman explained how the outreach worked in Pittsburgh. Supervisors asked for volunteers willing to do the outreach after hours for compensatory time. The employees did

not have to do it, but if they did, they knew they would receive compensatory time. (T. 842-843) Mr. Hardiman testified that time and attendance, overtime and compensatory time procedures are reviewed with staff at the beginning of each fiscal year. (T. 2368) He testified that employees were informed that if overtime money was available, they would be told about it. Otherwise, extra hours worked is to be approved in advance and was voluntary, worked for compensatory leave. He testified regarding Union Exhibits 21 through 29 and 30 through 33, showing investigators requesting and being granted comp time for extra time worked voluntarily. The compensatory time earned was to be used within two to four pay periods. (T. 2368-2369) He explained that a team of volunteers was formed to do outreach after hours and weekends for compensatory leave. The outreach assignments were distributed on a rotational basis, but could be refused for any reason, and the offer would go to the next person. (T. 2370-2372) Mr. Hardiman explained numerous documents reflecting requests by investigators for approval to work extra hours for compensatory leave before and after the work was performed. Outreach was part of the investigators' performance plans, and outreach during regular business hours was an alternative to doing outreach after hours or on weekends. (T. 2396-2397) When investigators were submitting the forms for approval to work extra hours for compensatory time, they were seeking permission to modify their schedule with the expectation of getting time off later. In the case of outreach, they were free to not do outreach after hours or volunteer to do it for compensatory time. Mr. Hardiman testified that he would not know if an employee worked through lunch unless he was told by the employee. (T. 2436) The last intake is scheduled for 2:30 PM, so extra hours for intake interviews would not be expected and there were options for avoiding extra time. (T. 2437-2438) The only potential overtime violation evident in Pittsburgh is the 4.5 hours of comp time carried for at least two years for Mr. Wozniak. Although some

investigators are on a glide schedule, the Pittsburgh office did not differentiate between credit and compensatory hours. (T. 2441)

Susan Kelly is an Investigator in Pittsburgh. She testified regarding Union Exhibit 27. (T. 615-617) She explained that she requested compensatory time and received it. She had a 5/4/9 schedule. She testified about deciding to go on an on-site that came up unexpectedly, choosing to do it knowing it would go beyond her regular quitting time. (T. 619) She worked the time and got comp time for it. Ms. Kelly also testified regarding her voluntary attendance for outreach projects which may be after hours or on weekends. Ms. Kelly volunteered for the outreach team to work extra hours for comp time. (Union Exhibit 27) She testified that when she volunteered to work extra hours she knew it was for comp time because she understood that paid overtime was not available. (T. 623, 629) She never requested paid overtime. She and Marilee Hallam both keep a record of her comp time earned and used. (T. 648) Ms. Kelly marked one form stating that she was directed to do an outreach on a Saturday. She requested compensatory time on the form, but she said she did not really want to do that one for personal reasons. (T. 666-667) However, she did not tell the Director she did not want to volunteer for that particular outreach assignment. Ms. Kelly testified that she was never denied comp time. (T. 671) When she reported working through lunch or on intake, she received compensatory time.

There is no evidence that the Agency suffered and permitted any employee in the Pittsburg Area Office to work overtime hours or failed to properly compensate them for extra hours worked. Some employees were on flexible schedules and earned and used credit hours. Supervisors made clear that working extra hours was not required, but if employees volunteered to work extra hours or to conduct outreach at times other than their usual working hours, they

would be compensated with compensatory time or credit hours. Some employees expressly requested, received and used compensatory time for extra hours worked. There was one individual, John Wozniak, who may not have used his leave within 26 pay periods, but this is an isolated example of a possible mistake and not representative of a class claim. Further, Woziak is not an example of an employee who the Agency suffered and permitted to work overtime without compensation, at issue in this case.

Baltimore

LaEunice Chapman is a Paralegal working in the Baltimore Field Office. She testified that she requested and received compensatory time. She was told that paid overtime was not available. Ms. Chapman decides when she needs to work extra hours. Compensatory time earned and used is recorded in the Federal Personnel Payroll System. She requested and earned compensatory time for extra hours worked and used the compensatory time. (Union Exhibits 34-41)

Yvonne Williams is a retired Paralegal who also worked in the Baltimore Field Office. She claimed that she had excess work that required her to work extra hours. However, like everyone else, she requested and earned compensatory time for extra hours worked and used the compensatory time. (Union Exhibits 34-36, 38 and 40) Therefore the claim that too much work caused her to work extra hours is not credible. Over time, Ms. Williams work time averaged out to 40 hours a week or 80 hours a pay period. As with Ms. Chapman, Ms. Williams chose to work extra hours some days and less than nine hours other days.

Loretta Miller is an Investigator in the Baltimore Field Office. She testified that she worked extra hours and did not receive compensatory time for the extra hours. She also testified that she did not get prior approval to work the extra hours and her supervisors did not know she

was going to work the extra hours before she worked them. Ms. Miller stated that her supervisors left for the day prior to her deciding to work the extra time. Also, her supervisors did not know when she decided not to take a lunch break. When questioned about what happened in 2005, she testified that she did not know what happened in 2005. (Union Exhibit 42 showed nothing and Union Exhibit 44 appears to show that Ms. Miller took 2 days off in the same week where hours worked are not shown.) Her direct testimony was largely responses to leading questions from the Union Representative. Ms. Miller did not even know what schedule she was supposed to be on. She testified that her work schedule was a compressed 5/4/9 schedule working from 7:30 AM to 5:00 PM. Then she testified she had every second Friday and Wednesday off. (T. 1268) However, on a 5/4/9 schedule working nine hours a day, the employee is entitled to only one day off every two weeks. Ms. Miller was the only bargaining unit employee who testified (during the hearings in Philadelphia) that she was not given compensatory time when she notified her supervisor that she worked extra time.

Debra Lawrence, a Supervisory Trial Attorney in Baltimore, testified that she has supervised Paralegal LaEunice Chapman since 2002. She testified that paralegals in Baltimore know they are not to work overtime without prior approval. Ms. Lawrence does not require her paralegals to work beyond their tour of duty. (T. 2468-2469) Ms. Lawrence allows Ms. Chapman to decide whether or not she wants to work extra hours. There is no urgency in the work she has to do. She testified that Ms. Chapman voluntarily decides to work the extra hours. Nobody imposes that on her. She has a choice of working the extra hours that day or not working the extra hours at all. (T. 2470) When the other paralegal, Yvonne Williams, retired in September 2006, Ms. Chapman had two clericals: Cassandra Brace and Martha Foster to help.

Ms. Chapman could delegate work to them. They could perform most of the tasks that Ms. Chapman had been performing. (T. 2474-2478 and 2484-2485)

There is no evidence that the Agency suffered and permitted any employee in the Baltimore Field Office to work overtime hours or failed to properly compensate them for extra hours worked. Some employees expressly requested, received and used compensatory time for extra hours worked. Although Ms. Miller claims to have worked extra hours for which she was not compensated, she also testified that her supervisor would not know she was working the extra hours and she did not request prior approval. Therefore, the extra hours she worked were not "suffered and permitted" by the Agency. Because no employees in the Baltimore Field Office have individual claims that the Agency suffered and permitted them to work overtime without compensation, none can be representative of a class claim.

Richmond

Brinda George is an Investigator in Richmond who testified on behalf of the Union. She testified that she was told not to work extra hours by the Local Office Director Patricia Glisson and the Charlotte District Director Ruben Daniels. She was even threatened with discipline if she worked extra hours without authorization. She testified that she worked extra hours without pre-approval. (T. 1030-1031) She had a flexible "slide and glide" schedule even though she was on a 5/4/9 schedule (T. 1023) Although she claims to have worked extra time, Ms. Glisson was not aware of it. (T. 1030-1031) Union Exhibit 18 showed nothing. Any extra time worked by this witness was not approved and her supervisor did not have prior knowledge of it.

Kathleen Harmon, a retired investigator and former union representative, testified that she knew there was no authorization for overtime pay. She worked extra hours and was agreeable to getting compensatory time. (T. 1044) Ms. Harmon testified that she had

alternatives for working extra hours while doing on-sites. She planned them. She knew she could limit her work to nine hours, but she worked the extra time anyway. (Union Exhibit 19) She knew she would get compensatory time for the extra time worked. She believed she was treated fairly by Ms. Glisson. Union Exhibits 17 and 19 reflect extra time worked while on on-sites. (T. 1052-1055) She planned the on-sites and knew her options not to work extra hours, although Ms. Glisson was aware that she might work beyond her tour. (T. 1057-1058) It was her choice to work the extra hours for comp time. It is not clear from Ms. Harmon's testimony how much, if any, of that time her supervisor knew about before or while it was being worked.

Patricia Glisson, Director of the Agency's Richmond Local Office, testified that when employees wanted to work extra time, they usually requested it by e-mail and she responded either in person or by e-mail. (T. 2069) Ms. Glisson could not remember the last time anyone asked or told her they were staying over for intake. (T. 2111-2113) If an investigator goes past his or her scheduled departure time, she testified that it is rare that she is told beforehand. (T. 2073) The investigator has the choice of stopping the intake interview or voluntarily continuing it with the expectation of receiving compensatory time. Similarly, investigators out on on-sites have options to avoid working extra hours but know they will receive compensatory time if they choose to work the extra time. (T. 2089-2091; 2151-2153) They are not required to work the extra time, but they choose to do it in exchange for compensatory time for their own convenience. (T. 2074-2082) Ms. Glisson leaves the decision as to when the compensatory leave is used to the investigator as a matter of the investigator's convenience. Ms. Glisson testified that when Ms. George asked to work extra hours, she specifically asked to work for compensatory time. According to Ms. Glisson, investigators volunteer to do outreach after hours for compensatory time. (T. 2087-2089) Ms. Glisson testified that she granted Ms. Harmon

extensive flexibility in her schedule. (T. 2092-2093) She explained that Ms. Harmon, if she worked extra time, would notify her after the time was worked and request compensatory time. (T. 2095-2096) Ms. Glisson testified that she is also flexible in allowing employees to leave early if she finds that they skipped lunch. (T. 2101) She does not consider the sign-in, sign-out sheets reliable. (T. 2101-2103)

There is no evidence that the Agency suffered and permitted any employee in the Richmond Area Office to work overtime hours or failed to properly compensate them for extra hours worked. Some employees were on flexible schedules and earned and used credit hours. Supervisors made clear employees were not to work extra hours and threatened one employee with discipline if she worked extra hours without authorization. One employee testified that while she worked extra hours, she understood this was not required, but she planned to work extra hours on some days in exchange for compensatory time or credit hours to use on other days. Some employees expressly requested to be allowed to work extra hours for compensatory time.

NEW YORK

Christopher Kwok is a Mediator employed with the Agency in the New York District Office. He testified that some days he does work beyond his scheduled hours, which were eight hours a day, five days a week. But he also testified that he would then adjust his schedule to even out the time to forty hours in a week. (T. 1073; 1079-1080) He cited an instance where he attended an affair involving the Commission on Asian American Affairs and told his supervisor Ms. Electra Yourke about it afterwards. She told him to give her the amount of time and he would receive compensatory time for it. (T. 1080- 081) Mr. Kwok claimed that he did not usually tell his supervisor, Mr. Michael Bertty, of any extra hours. Mr. Kwok testified that one

time he believed he told Mr. Bertty that he worked the night before until 9:00 PM. (T. 1085) Mr. Bertty did not recall that conversation. Mr. Kwok stated that he knew overtime pay was not available and he did his work with that understanding. (T. 1086) He recalled only that one time informing his supervisor and Mr. Bertty is out of the office two or three days per week. Mr. Kwok is on a slide and glide schedule. (T. 1095-1096) There was no evidence of "suffered and permitted" overtime presented by this witness because his supervisor was notified, if at all, of the alleged extra time worked after the fact. In addition, this mediator was on a flexible schedule, earning credit hours.

Elizabeth Marcus, a Mediator in Boston, testified that she could successfully perform her duties in forty hours per week. (T. 2349-2350) She occasionally mediates beyond her scheduled hours and then makes up for it by not working as many hours the following day. Ms. Marcus does not necessarily notify her supervisor, Mr. Bertty in New York, that she is modifying her schedule. Ms. Marcus adjusts her lunch around the mediation because she does not want to break for lunch during it. (T. 2351) She testified that she has a lot of flexibility in her hours of work and how she performs her mediation duties within forty hours a week or eighty hours a pay period. (T. 2353) When she fills out the cost accounting sheets, she puts the tour of duty rather that the actual work time. (T. 2354) Ms. Marcus gets outstanding performance evaluations.

Michael Bertty, ADR Coordinator and supervisor of mediators in the New York District, testified that he supervises Agency mediators and oversees thirty-seven contract mediators in areas covered by Agency offices in New York, Boston, Buffalo and Newark. He also does mediations himself. He testified that he is out to the office two to three days a week (T. 2244-2245) and is not in a position to observe schedules kept by his Agency mediators: three in the New York District Office, one in Boston, one in Buffalo (who was reassigned to enforcement)

and also one in Philadelphia. He testified that he did not recall being aware that his mediators worked after hours, but if he knew, he would give them compensatory time off. (T. 2193 and 2194-2195) Mediators are in total control of when or whether to mediate through lunch and when to discontinue mediations. Mr. Bertty gives his mediators extensive freedom to decide how to handle their mediations. If they choose to mediate through lunch, they are free to leave early. If they choose to mediate beyond five o'clock, they can adjust their schedule the following day. (T. 2192-2197) Mr. Bertty described the flexibility given to his mediators consistent with the practice of schedule modification testified to by Elizabeth Marcus, his mediator in Boston. He has instructed his mediators to work forty hours a week or eighty hours a pay period and believes the mediators work can be accomplished within that time period. (T. 2199) Mr. Bertty did not recall that Mr. Kwok informed him that he (Kwok) mediated until nine o'clock one night. (T. 2240) He does not review sign-in/sign-out sheets.

Esther Gutierrez of the New York District Office also testified on behalf of the Union. She is a bilingual Investigator. She worked a 5/4/9 compressed schedule. Ms. Gutierrez testified that when she worked for Ms. Yourke, she entered extra hours worked and compensatory time taken on sign in/sign out sheets. She had the understanding that paid overtime was not available. In fact, Ms. Gutierrez rode with her husband to and from work and was tied to her regular hours of work. Although Ms. Gutierrez claimed to take lunch only rarely, her testimony did not establish that her supervisors knew she was not taking lunch when she didn't take it.

Ms.Gutierrez was supervised by Ms. Yourke from 1999 to October 2006. Ms. Rosemary Wilkes was her supervisor at the time of her testimony. Although Ms. Gutierrez testified that she signed in and out on sign-in/sign-out sheets, she did not always fill them out completely. Ms. Gutierrez testified that she worked extra hours sometime in 2006 in a fact-finding conference

that went until 9:00 PM. Her supervisor, Ms. Yourke, was not with her at the time and she did not get prior approval from the supervisor to work the extra time. Union Exhibit 45 is incomplete because Ms. Gutierrez did not fill in times on the forms consistently. She received compensatory time for the extra hours. (T. 1116) She testified she had another fact-finding conference that went to 9:00 PM in 2007. Ms. Willkes was her supervisor and did not know she would be working extra hours. Ms. Gutierrez testified she asked Ms. Wilkes to approve extra time for compensatory time and was granted the compensatory time, even though she had the option of coming into work later that morning so she could make the telephone calls without working extra hours. (T. 1118-1119) She could not remember when that occurred. On other occasions, Ms. Gutierrez testified she chose to complete phone calls after hours and received compensatory time for them. Otherwise, Ms. Gutierrez kept a regular schedule because she commuted to work with her husband who did not work for the Agency. (T. 1120)

Ms. Gutierrez also did not recall being caught by Deputy Director Nancy Boyd and her supervisor, Ms. Rosemary Wilkes, traveling in Pennsylvania when she was supposed to be working at home on a flexi-place day. Ms. Wilkes testimony placed Ms. Gutierrez's credibility in question. (T. 2610-2613) The idea that Ms. Gutierrez did not remember an incident where she was caught being dishonest is incredible. Yet Ms. Gutierrez expected us to believe that her supervisors knew she did not take lunch based on her testimony that Ms. Yourke and Ms. Wilkes might see her in her office sometime between Noon and 2:00 PM, the time set aside for people to have lunch. (T. 1128-1130) There was no evidence of "suffered and permitted" overtime presented by this witness because the supervisors were notified of the alleged extra time worked after the fact.

Electra Yourke, an Enforcement Manager in the New York District Office, testified that she supervised both Esther Gutierrez and Christopher Kwok in their Investigator positions. Contrary to Ms. Gutierrez's testimony, she did not supervise Ms. Gutierrez consistently from 1999 to 2006. Ms. Gutierrez was supervised by Mr. William Lai from sometime in 2004 to the beginning of 2006 when she returned to Ms. Yourke's supervision. (T. 2526) Ms. Yourke supervised Mr. Kwok until he became a Mediator in 2006. She testified that everyone in the office knew that prior approval was required in order to work extra hours. But if someone took work home and told her afterwards, she would take their word for it and give them comp time. (T. 2528) She testified that Mr. Kwok tended to have an erratic work schedule because of his difficult commute to work and he taught requiring him to leave an hour or an hour and a half early one or two days a week. (T. 2529-2530) She would sometimes learn that he worked extra hours when he told her he wanted to take the compensatory time off. (T. 2530-2531) Ms. Yourke never required her investigators to work extra hours. (T. 2535) Ms. Gutierrez worked from 6:30 AM to 3:00 PM because that was her husband's schedule. When 3:00 PM came, she left no matter what was happening. (T. 2536-2537) When Ms. Yourke's investigators work an extra hour one day, she encourages them to use that hour comp the next day. (T. 2540-2541) Ms. Yourke testified that she was not familiar with the term "credit hours." (T. 2552) Her understanding was there was no paid overtime. (T. 2553) And she communicated that to her investigators. (T. 2554) Ms.Yourke never approved paid overtime. They never worked more than 40 hours a week or 80 hours a pay period. If they worked a longer day one day, they worked a shorter day later. (T. 2555) She certified her Investigators' time, but there were no records to show what hours they worked. She accepted what they recorded as accurate. (T. 2559-2560) Ms. Yourke testified that time sheets for Mr. Kwok were not complete and not in

his handwriting. She testified that she certified that he worked 40 hours a week so that he would be paid. She was certifying to duty hours and did not depend on time sheets. (T. 2562-2572; 2581-2589)

Rosemary Wilkes, another Supervisory Investigator in the New York District Office, testified that she supervised Esther Gutierrez. The first time she learned that Ms. Gutierrez worked extra hours was in November 2006 when Ms. Gutierrez did a fact-finding conference. Ms. Wilkes learned about the extra hours worked the next day, and Ms. Gutierrez went home early the following day. (T. 2599) During that same pay period, Ms. Gutierrez asked for approval to work one hour extra and was given the hour off the following day. (T. 2600) Ms. Wilkes testified that employees in New York are not required to work beyond their normal schedule. If they choose to work extra time, they need to get prior approval. When they work beyond their tour of duty, they do it voluntarily and inform her after the fact. (T. 2602-2604) Ms. Wilkes testified that she records comp time only if it is approved in advance. If someone tells her afterwards, she allows them to take the time within the pay period. (T. 2614) Ms. Wilkes could recall on one time that an investigator worked extra time on a witness interview. She was informed of it the following day. (T. 2613) Also, contrary to Ms. Gutierrez's testimony, Ms. Wilkes did not recall ever denying her comp time. (T. 2615) When they used time sheets and she saw that someone reported working extra hours, she would counsel them and she would make a note of it on the time sheet. (T. 2624-2625) Ms. Wilkes explained the office policy regarding the handling of late intake arrivals, giving the options for avoiding investigators working extra time. (T. 2645-2647)

Only two employees from the New York District Office testified that they worked extra hours, but those extra hours were not suffered and permitted by the Agency. Mr. Kwok was on a

flexible schedule earning credit hours, and he does not claim his supervisor ordered him to work extra hours in advance. In fact, Kwok admitted he did not even notify his supervisor in advance he was working extra hours. Ms Gutierrez also did not seek authorization in advance to work extra hours. Her supervisors did not know or have reason to know she was working the extra hours. Supervisors from New York testified that employees are given wide latitude as to when and how to get their work done within a 40 hour a week or 80 hour pay period. When supervisors learn after the fact employees have worked extra hours, they give them compensatory time or allow them to take time off the next day. There was no testimony given in New York representative of a class claim that the Agency illegally failed to pay employees for overtime hours worked.

Newark

Eris Yarborough was the only witness from Newark who testified on behalf of the Union. He was on an 8:30 AM to 5:00 PM, five days a week, work schedule during the relevant time period. Mr. Yarborough testified he put extra hours on his sign in sheet and informed his supervisor, Mr. Jose Rosenberg, of the extra hours after they were worked, knowing he would get compensatory time. (Union Exhibits 53-62) In each instance that Mr. Yarborough listed comp time earned because he worked extra time. He testified that his supervisor did not know he would be working the extra time and he knew he had the option of working the extra time for compensatory leave, or not working the extra time at all. Mr. Yarborough testified that in the long run, he did not work, on the average, more than 40 hours a week or 80 hours a pay period. If he worked through lunch, his supervisor did not have prior knowledge of that either. (T. 1178-1195) Union Exhibits 63 and 64 are notification to Mr. Yarborough's supervisor, after the fact, that extra time was worked. There was no "suffered and permitted" overtime alleged here. The

witness informed his supervisor after the fact that he worked extra time. He did it voluntarily and received compensatory time for it.

Jose Rosenberg, former Supervisory Investigator in Newark, testified that employees, on occasion, would ask approval to work extra hours for compensatory time because they did not have sick or annual leave available. (T. 2254) He testified that intake hours were structured so that interviews would not go beyond investigators' tours of duty. (T. 2257) Investigators occasionally informed him after the fact that on-sites ran late and he would allow them compensatory time off. (T. 2258 and 2289) He was also flexible with investigators coming and going and time spent for lunch. (T. 2260) When investigators asked to work extra hours, it was for compensatory time. The work did not have to be done that day. The investigators wanted compensatory time and voluntarily chose to work extra time to get it for use on other days. (T. 2263-2266) Outreach after hours or on weekends was done by investigators who volunteered to do it for compensatory time. If no one volunteered, Mr. Rosenberg or the Director covered the Outreach. He explained that Ms. Yarborough, who was a Union official, requested permission to work extra time for compensatory time because she was short on sick and annual leave. He knew Ms. Yarborough knew her rights and wanted compensatory time, which she took within the same or the next pay period. (T. 2271-2273) When Ms. Yarborough skipped lunch, it was with the intention of leaving early that same day. (T. 2275) Mr. Rosenberg also recalled training on overtime by the Agency's Office of Human Resources. (T. 2307-2308) Compensatory time was kept by the Director's secretary and not placed in the FPPS. (T. 2273-2274 and 2317)

Buffalo

The Union offered two investigators employed in the Buffalo Local Office, **Jennifer Carlo** and **Nelida Sanchez**.

The Union failed to show that Ms. Carlo worked any extra hours. The alleged compensatory time was actually award time given to her. (T. 509)

Ms. Sanchez testified that she chose to work extra hours to travel home from one on-site visit a year. She would call back around 5:00 PM to leave a message for her Director that she would be late and would receive compensatory time for the extra time taken. She knew that overtime pay was not available and she chose to work the extra time for compensatory time rather than make another trip or stay overnight. It was her preference to take the extra time to travel home (T. 598-600), although she did tell of one trip where she felt obligated to stay because the attorney representing the company flew in for the day. The time spent beyond her regular work time was in travel to return home after the on-site. Union Exhibit 47 showed nothing and Union Exhibits 48 and 49 were incomplete. Union Exhibits 50 and 52 showed no extra time. There was thus no evidence of "suffered and permitted" overtime presented by this witness because the supervisor was notified, if at all, of the alleged extra time worked after the fact.

Elizabeth Cadle, Local Director in Buffalo, testified that the only time that extra hours of work might arise is when an investigator does an on-site. Her investigators are in total control of what they do during on-sites. (T. 1967-1968) She testified that the investigator knows that if he or she chooses to work extra, it is worked for compensatory time. The investigator also has the option of changing hours (T. 1946) or staying overnight, which she encourages (T. 1966-1967; 1980-1981), so the extra hours represent travel time and do not need to be worked that same day. Ms. Cadle testified that she might get an email from Nelida Sanchez saying: I worked X amount of time over. Then Ms. Cadle approves compensatory time for her. (T. 1951) Ms. Sanchez, according to Ms. Cadle, knows that she can stay overnight and travel during

normal business hours or drive back that same day. She knows she has the option of working extra hours that evening for compensatory time or not working that evening at all. (T. 1955) Ms. Cadle allows the investigators to decide what is convenient for them. She is very flexible in allowing deviations from scheduled hours. Ms. Cadle testified that when Ms. Sanchez earns compensatory time, she uses it almost immediately, within the same pay period. (T. 1965-1966) Ms. Cadle also explained that Union Exhibit 48 showed two hours of award leave and ten hours of sick leave for Ms. Sanchez. Also, the record for October 23, 2005 showed eight hours of award time and two hours of comp time for Ms. Sanchez. (T. 1978) Finally, an examination of the resolution reports for Ms. Sanchez indicated that she conducts no more than five or six on-sites in any given year, which might have been only two or three actual trips because if multiple charges are investigated during a single trip, that trip is counted as two or three on-sites. (T. 1995-1996; 2034-2035)

CHICAGO

Nanisa Pereles is an Investigator in the Chicago District Office. She testified that there were no sign in/sign out sheets used in Chicago. Ms. Pereles works a 5/4/9 schedule. Extra hours were kept informally when she reported to Supervisory Investigator Eileen Sotak. Compensatory time earned and used was kept by email exchange. (T. 1688-1689) Scheduled hours were recorded on cost accounting sheets. There was no paid overtime. Her current supervisor, Supervisory Investigator Tyrone Irvin, told them not to work overtime, only their scheduled hours, and she does not work extra hours. Outreach has been mandatory since 2007 and it is available during the workday. Outreach after regular business hours is voluntary and is done for compensatory time. (T. 1691-1692) Ms. Pereles testified she has the option of volunteering for outreach after hours for compensatory time or not doing outreach after hours at

all. She received the compensatory time under Ms. Sotak. (T. 1692) She also testified that at times she could not finish assignments within the time frames given and had to work extra hours. She did not complain to the Union or grieve the fact that she was getting compensatory time. Ms. Pereles testified there was no way she could gauge how much extra time she worked under Ms. Sotak. (T. 1695)

Janel Smith is another investigator in Chicago who testified for the Union. She testified that leave was tracked by email and leave forms. (T. 1706) Extra hours were not placed on cost accounting sheets. Ms. Smith admitted she was told there was no paid overtime. She was also told that if she worked outreach after hours, she could do it for compensatory time. (T. 1711) She and her supervisor kept track of compensatory time earned and used by email. (T. 1713) She was never required to work overtime, but she claimed extra hours were needed to get the job done. Ms. Smith tried to use the comp time within the same pay period. (T. 1714-1715) She took the comp time another day for the extra time worked. Therefore, overall, she did not need extra hours to get the job done.

"Representative" witnesses from the Chicago District Office knew that paid overtime was not available and would not be approved. Prior approval of extra work time, if given, was at the request of the employee to be permitted to voluntarily perform the work during that time period rather than during regularly scheduled hours of work. Ms. Pereles admits she was told by her current supervisor not to work extra hours. While Smith claims extra hours were needed to complete her work which could potentially support an individual suffered and permitted claim, this cannot be accurate since she admits she took compensatory time within the same pay period to make up for the extra hours worked. There is also testimony by supervisors, described below,

that everyone in Chicago works a flexible schedule so would earn credit hours, and not overtime pay, for extra hours worked, not officially ordered in advance.

Sarronda Harris, an investigator in Chicago, testified on behalf of the Union. She began as an investigator in August 2004. She testified that if she wanted to work extra time to finish something up, she would ask her supervisor if it was okay, then after she finished she would email her supervisor and report the amount of extra time worked. (T. 1920) Ms. Harris testified that when she worked extra, it was for her own convenience, she did it voluntarily knowing she would work the extra hours one day for compensatory time off on another or not work it then at all. (T. 1928-1929) She tried to use the compensatory time within the same pay period.

Tyrone Irvin was called as a witness by and for the Union. He was an investigator until April 1, 2006 (T. 1890) when he was promoted to Supervisory Investigator. Mr. Irvin always knew that paid overtime was not available. If he worked beyond his normal schedule, he could get compensatory time. (T. 1868-1869) As a supervisor, he keeps a log of extra hours, which is a collection of emails and a daily calendar. Mr. Irvin testified, (T. 1877 and 1883), that he records any extra time by any staff member that is reported to him and he gives them the time off. (T. 1869-1870) He believes that his records of leave taken by his subordinates are very accurate, probably more accurate than the cost accounting sheets. (T. 1911) Mr. Irvin tries to ensure that earned compensatory time is used in the same pay period. (T. 1879) In February of 2008, Mr. Irvin supervised six individuals and four of them were on a compressed schedule, but everybody is on a flexible schedule. (T. 1872) They may come in late and work later in the day. They merge the compressed and flexible schedules to maxiflex schedules. (T. 1873-1874)

Mr. Irvin acknowledged that Ms. Sarronda Harris, an investigator reporting to him, worked extra hours. He did not require her to work those extra hours. When she worked extra hours, she knew she could work them for compensatory time or not work them at all. It is purely voluntary on her part. (T. 1903-1904) She has worked extra maybe twice between April 1, 2006 and February 2008. (T. 1906) The Chicago office is very flexible in permitting employees to come and go as they desire. (T. 1905) Mr. Irvin testified that Chicago employees are consistently told that overtime money is not available.

Eileen Sotak, a supervisor in the Chicago District Office, testified that she has never required anyone to work extra hours and the investigators can do the work within 40 hours per week. (T. 2756-2758) Working extra hours for outreach is completely voluntary and investigators are always given compensatory time for the extra hours. (T. 2759-2760) Ms. Sotak testified that she does not know when an investigator works through lunch, but if she finds out that they did, she gives them compensatory time off for it. (T. 2760-2762) She asks investigators to email her when they report they have worked extra hours at home and they receive compensatory time off. She takes her employees' word that the time was worked at home. Employees let her know by email when he or she wishes to take the time. She keeps the emails in the employee's personnel file until the time is used. (T. 2763) She testified that employees in the Chicago office are given great flexibility in when they come and go. Nobody monitors their activities. (T. 2764) If the employee arrives an hour late, they can work an hour later or take leave. Investigators are given compensatory time if they are out on on-sites beyond their tour of duty and she becomes aware of it. (T. 2766) Ms. Sotak described options open to investigators to avoid working extra hours on on-sites. (T. 2767-2768)

Ms. Sotak testified that she never required Nanisa Pereles to work beyond her tour of duty and did not recall Ms. Pereles working extra hours other than for outreach or on-sites. (T. 2772-2773) She denies ever requiring Ms. Pereles to work extra hours to cover someone else's cases, and has never denied compensatory leave to anyone for extra hours worked. (T. 2778) Janel Smith, on occasion, requests permission to work extra time so that she can accumulate some compensatory time. (T. 2773-2775) Ms. Smith has worked extra time on on-sites, and normally does not know when she schedules them that they will go beyond her tour of duty. Ms. Smith schedules her on-sites and has the option of avoiding having to work extra hours. (T. 2776-2778) Ms. Sotak testified that she allows compensatory time for extra time worked regardless of whether she knew about it prior to it being worked. (T. 2797-2798) In Chicago, there are core hours and there are flexible hours when employees can stagger their arrival and departure times. (T. 2801-2802)

In the cross-examination of Ms. Sotak (T. 2810-2816), the differences in the positions of the Union and Agency are made clear. The Union Representative, in effect, argues that where an investigator voluntarily decides he or she wishes to work extra hours, which are not required by Agency supervisors or managers - and the work did not require that those extra hours had to be worked outside of the employee's tour of duty at all - that approval of the request for compensatory time is illegal unless the investigator is given the option of being paid overtime for those voluntary extra hours because the employee is proposing to do Agency work. It is the Agency's position that the employee knows that the supervisor will not approve paid overtime unless the management proposes and approves paid overtime beforehand. The employee still seeks approval to work the extra hours with the understanding that he will receive compensatory time off. Under these circumstances, the employee knows she has the option of working the

extra hours in return for compensatory time or she does not have to work beyond her tour of duty at all. Decisions of the Federal Labor Relations Authority support that conclusion that there is nothing illegal about giving employees this choice. Agencies are only required to give employees a choice between overtime pay and compensatory time when the Agency requires the employee to put in the extra time.

Regina Husar, a former Supervisory Investigator in the Chicago District Office who is now a Mediator, testified she was a supervisor for about five years, from August 2001 until becoming a mediator in April 2006. During that period, she supervised Janel Smith and Sarronda Harris. She does not recall Ms. Smith or Ms. Harris working extra hours on on-sites. (T. 2820) She did not recall either Ms. Smith or Ms. Harris doing outreach when she supervised them. (T. 2821) She never required any investigator to work outside their regular schedule. Ms. Husar does not remember anyone under her supervision working excess hours on intake. (T. 2822) And she never failed to allow compensatory time when she knew an investigator had worked extra hours. She testified that employees know they need to seek approval to work extra hours. She knew it when she was an investigator. (T. 2823) As a supervisor, investigators would ask for approval to work through lunch so they could leave early or come in late the next day. She allowed that flexibility. Employees were granted flexibility in coming to work and leaving also. (T. 2824) As a mediator, Ms. Husar testified that she is in control of her work schedule. If she works through lunch or beyond her tour of duty, she takes off the next day or within the next couple of days. (T. 2828-2829; 2830-2831) Ms. Husar, as a supervisor, had a leave file to keep track of compensatory time earned and used, usually written on sticky notes for the file. (T. 2829-2830) Time would be communicated to her verbally or by email. When she was a supervisor, Ms. Husar testified that Outreach was voluntary and investigators received

time off the following day if they worked beyond regular hours. (T. 2838-2839) Ms. Husar testified that she was told by the Director and Deputy Director that there was no money for overtime. (T. 2846-2847)

Milwaukee

Pamela Bloomer is an investigator in Milwaukee. She has worked part-time since 2000. (T. 1778-1779) She was told there were no overtime funds available. (T. 1776) Even though she works less than 40 hours per week, she receives compensatory time if she chooses to work extra hours. (T. 1790-1791) There was no evidence that Ms. Bloomer worked more than 40 hours in any workweek.

Lili Llanas is another investigator in Milwaukee. She testified that she heard there were no overtime funds available periodically while in Milwaukee. Ms. Llanas could not recall working extra hours. (T. 1807) She testified that she went on an Outreach on a Sunday to Iowa to meet meat packing workers with Maria Flores, Program Analyst. She assumed that she received overtime pay for the Outreach. (T. 1810) Ms. Llanas testified that when she does Outreach, it is during regularly scheduled hours of work. (T. 1815-1816) She did not work extra hours. On cross-examination, the Agency's demonstrative exhibit from the Department of Interior CD showed “OVT” of eight hours in the relevant pay period indicating that Ms. Llanas received eight hours of overtime pay for that Sunday Outreach in Iowa. Ms. Llanas could not recall whether or not she worked more than the authorized eight hours that Sunday.

The Union's only two "representative" witnesses from the Milwaukee Field Office failed to provide any evidence supporting a violation of the Fair Labor Standards Act.

INDIANAPOLIS

John E. Davis, a mediator in the Indianapolis District Office, testified that he works on a different floor from his supervisor, Karen Bellinger, although they are both in Indianapolis. (T.4164) He agreed that his time and attendance was essentially an "honor system" since Bellinger is not in a position to monitor him. (T. 4170) The only evidence that Davis gave relating to overtime was generalized testimony that he on occasion worked beyond his scheduled time. (T. 4163) He quickly admitted that he is instructed to and does in fact make up the time as he sees fit, usually shortly after working outside of his schedule. (T. 4163; 4166) Davis testified he would simply adjust his schedule and let his supervisor know, usually by email. He described, for example, changing his AWS[33] day – normally a Monday – to some other day during the pay period if he decided to schedule a mediation that day. (T. 4166) On cross-examination, Davis freely admitted that he was treated "fairly" in compensation in terms of his time that he has spent doing Agency work. (T. 4171) He testified that Ms. Karen Bellinger, his supervisor, told the mediators to "keep up with your time, and then you need to adjust your time if necessary." (T. 4175) On re-cross-examination, Mr. Davis testified that when he switches his AWS day, "the practice is to do it as soon as possible within the same pay period." (T. 4180)

Joseph Tedesco testified by telephone at Union request. He is an Investigator in the Indianapolis District Office. Tedesco was at the time of his testimony an acting supervisor, but regularly worked under the supervision of Mr. Larry Sanner. Mr. Tedesco currently works a straight eight, five days a week, schedule. (T. 4676) During the period he was testifying about, however, he worked a 4/10 schedule, and he admitted that he occasionally changed his starting and ending times while he was on that schedule. (T. 4676-4677) He also admitted that he

occasionally switched his AWS day off. (T. 4676) He stated that he sometimes worked past his normal quitting time, but because Mr. Sanner left the office at 4:30 PM and so did he, Mr. Sanner could have gone home and not known that he (Tedesco) was working past his normal time. (T. 4678) Union Exhibit 86 shows only that on three occasions in 2005 Mr. Tedsco earned a total of 7.5 comp time hours. Mr. Tedesco confirmed that Union Exhibit 86C showed that he used 10 comp time hours April 4, 2005. (T. 4685) Mr. Tedesco was unable to recall the circumstances under which he earned the comp time. (T. 4677) He also admitted that he couldn't estimate the number of times he earned comp time in any given year (T. 4680-4681), but that it wouldn't exceed 40 hours per year (T. 4680), and he was "more likely than not" to use any he earned. Id.

Karen Bellinger, the Indianapolis ADR Coordinator, supervises the mediation programs in the following offices: Detroit Field Office, Louisville Area Office, Cincinnati Area Office and the Indianapolis District Office. (T. 5611) She was supervising 10 mediators at the time of her testimony, but had had 11 until the previous week. She also oversaw the contract mediation program. Id. In addition, she did Outreach and federal sector mediations. (T. 5612) She gave a detailed account of how her mediators work, including describing explicitly that mediators make their own work schedule determinations: "It's their discretion. They set their own calendar as far as when they do the mediations." (T. 5614) Ms. Bellinger noted that because her mediators are geographically separated from her and even the Indianapolis mediators are on a different floor, she is thus not in a position to know their comings and goings, even if she wanted carefully to monitor their time and attendance. Hence they are on an "honor system." (T. 5615) One of her current mediators, Mr. Brian Ntukogu, is on an 8 hours a day schedule; the

[33] Various terms were used by individual witnesses to describe the same thing. For our purposes, the term AWS (for Alternate Work Schedule) will be used to denote the day off employees enjoy working a compressed

remainder are on compressed schedules. (T. 5618) Ms. Bellinger certifies the time only of the Indianapolis mediators. The remainder are certified by someone in the field office in which the mediator is stationed, but that is for technical reasons. The local certifier is handling only an administrative function. Responsibility for time and attendance is Ms. Bellinger's. (T. 5620-5621)

Mediators working for Ms. Bellinger vary their start and finish times, depending upon their needs and their desires. She gave an example of a mediator who might normally begin work in the morning starting as late as 2:00 PM because the mediation could not begin until that time. (T. 5623) She said that she does not monitor where her mediators are; she said "I trust them." (T. 5624) She testified that mediators have essentially carte blanche to come and go as they please, as long as they put in their time. If they have to work more hours than their schedule, she testified that "if something goes later than expected, then they have my permission to take off an equivalent amount of time, you know, as soon as they can after that." (T. 5626) She made it clear that in fact they are expected not to work extra hours for the government, and that she knows of no mediator since 2003 who has put in more than 80 hours in a pay period. (T. 5627) She later clarified that sometimes the extra time worked happens at the very end of the pay period, and in that situation, the mediator would have to take it at the beginning of the next pay period. (T. 5628) Bellinger has never been asked by a mediator for overtime pay. (T. 5629)

As to Outreach, some mediators do it, but it is not in their performance plan. One mediator who works for Ms. Bellinger has been regularly evaluated as outstanding but has never done any Outreach. (T. 5629-30) Another, Ms. Sharon Baker, loves to do Outreach and does a lot of it. Id. The majority of outreach events are within normal business hours. (T. 5631) However, none of the mediators are ever required to do an Outreach event that is not within their

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schedule. Some witnesses referred to this as their Scheduled Day Off or as their Compressed Work Day.

normal business hours. "It's a volunteer process." (T. 5632) Any mediator who opts to work an outreach event outside of their normal hours does so for comp time, "the next day or the following day, you know, at their convenience." (T. 5633) Ms. Bellinger addressed all three union mediation witnesses that she supervises: Ms. Baker, Mr. Davis and Ms. McNeil. She said she was personally unaware of any time when any of them worked in excess of 80 hours in any pay period. (T. 5642-5643) Further, Ms. Bellinger specifically testified that Ms. Baker loves doing outreach and that she is an active volunteer for it. (T. 5649).

There is no evidence the Agency failed to pay employees in the Indianapolis District Office for overtime work. Most, if not all employees are on a flexible schedule earning and using credit hours. Any extra hours worked are done so voluntarily and employees usually take time off within the same period to make up for the extra hours worked. Employees in this office have no individual claims and cannot be representative of a class claim.

Detroit

Patricia McNeil, a Mediator in the Detroit Field Office, has been a mediator in Detroit since 1999. (T. 4750) She has been supervised by Ms. Bellinger from Indianapolis since repositioning. Prior to that, she worked under James Neely. Because Ms. Bellinger is in Indianapolis, Ms. Gail Cober, the Detroit Director acts as her supervisor also. (T. 4752) McNeil works a 5/4/9 schedule. (T. 4773) There were two sets of documents introduced regarding Ms. McNeil – Union Exhibits 89 and 90. Neither one showed anything relating to compensatory or credit time. In fact, the only anomaly in these exhibits was the generosity of management in giving McNeil two special days off with pay, denoted as "Mr. Neely Day[s]." (T. 4761; Union Exhibit 89-3). Ms. McNeil testified that she put in hours over her schedule and that they were all compensated in the form of comp time: "[i] was just like on an honor system. You know, if you

worked over, we just took comp time for it." (T. 4762) However, she gave no testimony that management knew about it at the time it was being done, nor anything concerning how frequent the occurrences were. Further, she did not testify to anything from which one could conclude that this was not at her own option, rather than scheduling it to avoid working over her schedule. On cross-examination, she admitted the "it happened quite a bit" that she would switch her AWS day to accommodate her schedule. (T. 4773) She also admitted varying her starting time during the day because "[w]e have flex time" stating that she was, in effect, on a maxiflex schedule. (T. 4773) She admitted that normally her supervisor would find out after the fact about working beyond her schedule, and that she'd take the time "[m]aybe not the next day, but within reason, a couple of weeks of it." (T. 4775) She admitted that when she took the time was up to her. (T. 4775) Ms. McNeil's own words place her on a maxiflex schedule which she could and did adjust as needed, earning and using credit hours.

Gail Cober, Director of the Detroit Field Office, testified that she was the Enforcement Supervisor until the Agency repositioned in January 2006 when she became the Field Office Director. Under her general supervision in Detroit are 17 investigators and two mediators, but the number has vacillated greatly since 2000, going from a high of 24 investigators to a low of about 13-14. (T. 4445) There is one paralegal. (T. 4446) She testified that she has been told over time by her previous director, James Neely, that there is no overtime money available. (T. 4454) Ms. Cober testified that when employees work unexpectedly over their normal work time, and they inform management, they are given "unofficial comp time." (T. 4460) The time is kept unofficially between the supervisor and the employee. (T. 4464). It is not kept on the CAS. (T. 4467). The Union Representative took Ms. Cober page by page through the CASs of a Mediator McNeil. The Union presented Union Exhibit 90, 19 pages in length, all dealing with

Ms. McNeil – with not a single indication that Ms. McNeil worked any hours beyond her schedule.[34] Further, Ms. Cober testified that Ms. McNeil didn't work "any overtime or anytime beyond her tour of duty." (T. 4534)

Ms. Cober on Agency cross-examination testified that "Outreach" in Detroit is voluntary. (T. 4530) And that doing it is not "required," although doing it would result in credit and praise. She made clear that no one is penalized for not performing it. Id. She also noted that there have been investigators rated as outstanding who did no Outreach at all. She further explicated that on-sites sometimes result in investigators working over their schedules, but that the investigators could limit or eliminate that by scheduling them to avoid working over or by staying overnight at a far away location. She testified that some investigators who could avoid working beyond their schedule prefer to travel after their normal work hours to be home. (T. 4532-4533).

Ms. Cober testified that of the 17 investigators, the "majority" are on compressed schedules (T. 4534), but they all select their own start and finish times and "frequently" almost all of them vary their start time

Louisville

Sharon Baker, a Mediator in the Louisville Area Office, testified that she is also the President of the Local 3599 of AFGE. She is nominally supervised by Ms. Marcia Hall Craig, the Louisville Area Office Director. Ms. Baker testified that she has been an Investigator since 1991 and became a mediator in 2002. She reports to ADR Coordinator Karen Bellinger who is based in the Indianapolis District Office. Ms. Bellinger is not in a position to know Ms. Baker's comings and goings on a daily basis. Ms. Baker communicates with Ms. Bellinger via emails and

[34] The Union's questioning of Ms. Cober suggested something sinister in the way in which one of the CASs was completed. It pointed out that two of the days of week showed no hours of work for Ms. McNeil. (T. 4493, referring to Union Exhibit 90 B-18) Although Ms. Cober seemed confused about why Monday and Friday of that

telephone. Ms. Baker's schedule is a 4/10 with Mondays off. Ms. Baker is and has been for the past 4 years President of Local 3599 which involves 8 states and 14 EEOC offices. Ms. Baker testified essentially that she makes her own hours and frequently works more than her official schedule. She testified that she has an understanding with Ms. Bellinger that she is to make up her extra time by coming in late or taking off subsequent to working beyond her schedule. While Ms. Bellinger is her supervisor, the local director in Louisville, currently Ms. Hall-Craig, administratively signs off on her time. Ms. Baker has worked Outreach. One exhibit, showing extra time (Union Exhibit 153 with subparts) involved an Expo Event where Ms. Baker apparently put in from four to 10 extra hours on a weekend (October 30-31, 2004). Ms. Baker admitted on cross that she wasn't forced to attend this Outreach (T. 4074) and that she and the others attending it were "volunteers." Id. Ms. Baker freely admitted that she has never been denied any comp time or accommodation for working beyond her scheduled work schedule, (T. 4077), and she admitted that Ms. Bellinger has told her that she (Ms. Bellinger) never wants her to work where she doesn't get compensated, by comp time or otherwise, for the time Baker puts in. (T. 4077)

Douglas Cave is an OAA timekeeper in the Louisville Area Office which is a part of the Indianapolis District. He was the payroll clerk responsible for entering the time into the FPPS for investigators, but not mediators. (T. 4088-4089). Louisville based investigators complete their own Cost Accounting Sheets (CASs) and forward them to Mr. Cave. Mr. Cave testified to his system of keeping time that included explaining documents introduced by the Union marked as Union Exhibit 91. They consisted mostly of Mr. Cave's personal forms which showed, for the 14 or so employees for whom he kept time, the number of hours per day each employee

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week on the CAS was blank, the answer should have been obvious: Monday was September 5, 2005, Labor Day that year, and hence while not worked would have been compensated, and Friday was Ms. McNeil's AWS day.

worked, when their Scheduled Day Off was (for those on compressed schedules), hours and type of leave taken on any given day, and any day that the employee telecommuted. The exhibit only showed five pay periods, three in 2005 and two in 2006. Of the fourteen names, Mr. Cave identified nine to be Investigators (T. 4095); the remaining five employees were not class members. Of the nine, two (Darrick Anderson and Joyce Andries) worked 8 hour days (T. 4095), and presumably were flexible schedule employees. In fact, Anderson later testified and confirmed that his schedule was 6:30 AM to 3:00 PM, obviously a flexible schedule since the Agency did not dictate a 6:30 AM starting time for him. (T. 4196-4197) While it is true that some of the time entered showed a notation for compensatory time used (e.g., Darrick Anderson's time showed an entry for "00.30CTU", which Cave explained meant "comp time used" (T. 4097)). Mr. Cave was not, however, in a position to know the circumstances behind any of the time entries. He didn't know, for example, that as a flexible schedule employee, Mr. Anderson was actually earning and using "credit hours." Further, Mr. Cave could not know whether the employee in question had requested comp time in lieu of overtime pay or in lieu of not performing any work at all, or whether the supervisor knew in advance that work outside of the work schedule was being performed. (There were occasions when Mr. Cave could have known the latter, such as where an advance request and approval for compensatory time work was filled out).

Mr. Cave also testified regarding Union Exhibit 153. This exhibit showed some comp time for the Outreach event on the weekend ending October 31, 2004, the one mentioned above in Ms. Baker's summary. All this evidence showed is that some investigators worked on the weekend. Ms. Cave also described as an "Expo Volunteer" on Union Exhibit 153 an

Investigator named Bagley (who did not himself testify) (T. 4123), thus underscoring the Agency's point that Outreach worked on non-work days or after normal work hours was optional

All in all, Mr. Cave supplied no evidence that any investigators worked outside of their schedule and were not compensated. He had no evidence to supply concerning the nature of any of the compensatory time worked, earned or used, except that it happened on infrequent occasions in the small snapshot of time about which he testified.

Darrick Anderson, an Investigator in Louisville, works for Ms. Susan Ryan, the Supervisory Investigator in Louisville. (T. 4183) Anderson testified to Union Exhibit 91B-2. He stated that it showed that he worked on a Saturday doing an Outreach event. (T. 4186) He noted that the extra hours would show up on his pay and leave statement. (T. 4189), so they were formally kept. (He also claimed, inconsistently, that he could not put his extra hours down on the CAS because "there's nowhere to put them.)" (T. 4193) He may have been distinguishing between pre-approved comp time and situations where he simply worked extra hours and received unofficial compensatory or credit time. There is no testimony however that he ever worked extra hours for which he received no compensation. (T. 4155) As to Outreach, Anderson agreed that as to the one event involved in Union Exhibit 91, that he volunteered for the event, and that he was not "forced" to do it. (T. 4198) Although Mr. Anderson maintained that Outreach was required for an outstanding evaluation and that there was Outreach available during his normal workday (T. 4102), he unconvincingly maintained that there wasn't enough to rely upon. (T. 4204) Also note that Mr. Anderson testified that he worked 8 hour days, from 6:30 AM to 3:00 PM, and was therefore on a flexible schedule. Any work he did over his schedule, and there is no testimony or proof that he put in any significant time beyond his schedule, would have been credit hours, not overtime hours. The time shown in Union Exhibits

91 and 156, involving the Louisville Office, for Mr. Anderson totaled only six hours. The documents show him earning and using a few hours here and there. This time should all be considered credit hours, not overtime hours, because of Mr. Anderson's flexible schedule.

Susan Ryan is a Supervisory Investigator in Louisville. She supervises 6 investigators at present, although there are 7 in all. One of the investigators (Mr. Alan Anderson) reports directly to the Area Director. (T. 5881) Two of the 6 are on flexible schedules: (Darrick Anderson and Ms. Joyce Andries). (T. 5882) Ms. Ryan doesn't supervise time and attendance closely and trusts her supervisees. Id. She permits those who work for her to vary their schedules as they see fit and on a fairly regular basis those on compressed schedules, like Ms. Ryan herself, will switch their AWS day. (T. 5884) Ms. Ryan certifies time, after it is supplied by Mr. Cave, the timekeeper, who in turn relies upon information on the CAS given to him by the investigators. (T. 5885-5886) Investigators select their own start times and on occasion vary those times. (T. 5889) Investigators have not been given an instruction that they are not to put all of the time they work on the CAS. (T. 5890) Ms. Ryan has informed investigators that they are not to work past their schedule without advanced approval. Some have over the years, but it hasn't been frequent, and varies investigator to investigator. Some have "almost none" and others have more. (T. 5891) One way in which Louisville Area Office investigators work outside of their scheduled hours is by doing certain Outreach events. They volunteer and ask if they can do it for comp time, and as a general rule, will be permitted to do so. (T. 5892) Ms. Ryan testified that she has never "forced or required" an investigator to work beyond their schedule. (T. 5893) Employees can opt to work or not work beyond their schedule. They can decide to adjust their starting time in order to work later or can make it up for another time later in the week, or can opt not to work at all. (T. 5895)

Asked about various situations, Ms. Ryan testified about them one at a time. As to intake, she explained that, while intake is open between 8:00 AM and 4:30 PM, callers about it are told to get to the office no later than 2:00 or 2:30 PM. The only investigator whose schedule ends before 4:30 PM is Darrick Anderson. He has been asked to either change his schedule during intake week assignment, or to secure a replacement if he has intake assignments past his normal 3:30 PM quitting time. Ms. Ryan testified Mr. Anderson has never been required to work past his normal quitting time, and that if he couldn't find another investigator to finish up for him, he could ask the ISA or even Ms. Ryan herself to conclude the intake. (T. 5896-5897) In fact, it only happens once every couple of months that a charging party comes in late in the day.

As for on-sites, these on occasion result in investigators working past their normal quitting time, but no investigator is required to stay if they don't opt to do so. (T. 5899) Investigators do their own scheduling of on-sites. (Id.)

Outreach also sometimes results in weekend or evening work, but only about a couple times a year. Most Outreach events occur during the normal work hours. And all outreach outside of such hours is on a volunteer basis. Usually, the office would put up a sign-up sheet, but volunteering is "total (sic) their option." (T. 5901) Events referred to in Union Exhibit 153 resulting in work outside of the normal business hours in which Mr. Bagley (T. 5904), Ms. Baker (T. 5905) and Mr. Calvin (T. 5906) participated were all the result of electing to volunteer for comp time for the events.

Although Ms. Ryan didn't recall the facts leading to a few hours of compensatory time earned by Mr. Darrick Anderson, she testified in general that he would never have been required to work beyond his schedule and that he had options to avoid it or to do work for comp time.

Lastly, with respect to Investigator Becky Goode,[35] referred to in Union Exhibit 91A as having earned four hours of compensatory time, Ms. Ryan testified that Ms. Goode was never able to accumulate very much leave and thus liked to work for compensatory time in order to be able to get paid for time away from work when she wanted to, as opposed to having to take leave without pay. Ms. Ryan explained that Ms. Goode liked to travel with her husband every year, and needed the leave to do so. (T. 5913-5914)

Cincinnati

Thomas Feiertag, an investigator in the Cincinnati Area Office, is a union steward. (T. 4618) At the time of the hearing, he was an acting supervisor working directly under the supervision of Ms. Wilma Javey, the Area Director. (T. 4604) He had been and will be working under a series of Acting Supervisors, since his regular supervisor had become a mediator. As an investigator, Mr. Feiertag worked a flexible schedule, from 7:00 AM to 3:30 PM. (T. 4609) Thus, if he ever worked any hours over his schedule, they would properly be considered credit hours and not overtime hours. Mr. Feirertag testified that the way credit time operates in his office is that when an employee earns it "you tell your supervisor where you are with those extra hours, and you take the time off." (T. 4610). Even on direct, Mr. Feiertag admitted that "I have to say that I haven't myself done a whole lot of overtime." (T. 4614) He testified to not one single specific instance in which he worked beyond his schedule, nor was there any documentary evidence of any time beyond his schedule. He claimed he had recently worked over his schedule, but that clearly was while he was acting as a supervisor. As to extra hours worked, he testified to perhaps working "an extra 15 minutes," but couldn't "say for sure" if any supervisor knew of it. (T. 4616-4617) Further, he testified that "If I have credit time, I keep track of it. But I haven't had any credit time recently." (T. 4620) He clarified that that meant he personally had

[35] Goode was listed as a witness but was never called.

not worked overtime. (Id.)

Investigator **Maria Saldivar,** stationed in the Cincinnati Area Office, is a recent EEOC employee, having been hired in only in 2006. She is a bilingual investigator. (T. 4726-4727) Ms. Wilma Javey, the director, has been her immediate supervisor. She is on a 5/4/9 schedule. She testified that if she has to work over to complete an on-site or intake, she will request permission from her supervisor by email. The supervisor will okay the request for compensatory time by reply email, but she claimed that she was instructed that the time is not to be recorded on the CAS. (T. 4731-4732) Ms. Saldivar admitted that she routinely varies her starting time for any given day (T. 4733-4734) and "many times" has varied her AWS day. (T. 4735) Her testimony about working beyond her schedule was generalized. There were no exhibits listed or introduced through her. She admitted that "[w]e're not supposed to work overtime…." (T. 4747) She also admitted that, on-sites being one of the mentioned tasks that on occasion result in overtime work, she was permitted to stay overnight where the on-sites involved long distances (T. 4744-4745) She admitted that when she earns what she called "credit time," she uses it. (T. 4747)

Wilma L. Javey has been Area Director in Cincinnati since Dec. 1998. Currently she directly supervises three investigators, and has administrative control over the whole office. (T. 5722) There are a total of 6 investigators in Cincinnati; there were 7 until one retired effective the day of testimony. Of the six, four are flexible schedule employees, including Mr. Fieretag. (T. 5723-24) While there is a time and attendance sheet kept, the office director doesn't regularly consult it, unless there appears to be a problem. (T. 5725-5726) Ms. Javey and/or the supervisor (when the office has one) certifies time by utilizing the CAS, which is submitted by the individual investigator. There has not been much overtime worked either in connection with

intake, on-sites or outreach. (T. 5729) Of all employees in Cincinnati, Ms. Javey is aware of only one investigator since 2003 who has worked more hours than her schedule where Ms. Javey knew about it in advance. That person was Maria Saldivar. (T. 5730) She did it on her own and wasn't required. And in fact, Ms. Javey told Ms. Saldivar "five, six, or seven" times (T. 5732) not to work over her schedule. The one time that Ms. Javey specifically remembered, Ms. Saldivar requested and was given comp time. (T. 5733) Ms. Javey has tried to prevent Ms. Saldivar from working past her schedule, and in fact has asked the union steward to speak with her about it and has told Ms. Saldivar that if she continued to violate instructions and to put in extra time that Ms. Javey was "going to have to get" her. (T. 5733-5734) Ms. Javey was unaware of Mr. Feirertag ever working any overtime. (T. 5737) On cross-examination, she was shown a series of emails that showed that Ms. Saldivar had informed Ms. Javey on numerous occasions unknown to the Agency prior to the Union producing the emails at the hearing. (Union Exhibits 163 and 164) Ms. Javey did testify that, when it came to an Outreach event mentioned in the union exhibits, that investigators are volunteers (T. 5793) and that no investigator is required to participate in an event outside of business hours. (T. 5800) With respect to the events represented by the new union exhibits, Ms. Javey didn't know about most of them prior to their occurrence, although she did in the exhibits approve comp time after the fact. (T. 5797-5801) Specifically, Ms. Javey asserted that she didn't know until after the fact the events mentioned in Union Exhibits 163-1 through 4, 164-1, 164-2, 164-5 though 9. (T. 5797-5802) With respect to Union Exhibit 164-3 and 4, Ms. Saldivar was not required to stay ("we told her she didn't have to stay if she didn't wish to, she could go, but she chose to stay" (T. 5799) and thus volunteered to stay for compensatory time. In addition, Union Exhibit 164-9 related to Outreach, which was voluntary.

1**St. Louis**

The Commission's St. Louis District Office was the site of the second phase of the hearing in this matter which began on March 25, 2008 and concluded April 4, 2008. During those 9 days of testimony only one witness from the St. Louis District was called by the Union.[36] Ms. Penny Horne, a paralegal employed in the Kansas City Area Office was that witness. Not a single investigator or mediator from the St. Louis District was called as a witness by the Union; this despite the fact that 25 investigators and at least 3 mediators are employed with the Commission in the St. Louis District. (T. 5809-5813)[37]

Penny Horne testified that she is a Paralegal who has worked in the Kansas City Area Office for 14 years. She testified to a single occasion memorialized in Union Exhibit 92 on which she worked time beyond her schedule in connection with a trial. (T. 3023-2030; Union Exhibit 92) No testimony or documentary proof as to any other occasion was offered.

On cross-examination Ms. Horne explained that she completed Union Exhibit 92 in anticipation of a trial in Kansas City in which she was involved. She testified that trials in the Kansas City Area Office are comparatively rare events occurring only "every couple of years or so." (T. 3034)

Moreover, Union Exhibit 92 recites that:

> The undersigned employee has submitted the attached request for compensatory time for work performed beyond the regular work week. Overtime pay is not available. The undersigned employee will not seek

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[36] One witness from the Commission's Oklahoma Area Office (Investigator Robert Hill) appeared at the request of the Union and one supervisor (Area Director Donald Stevens) from that office appeared for the Commission. The Oklahoma Area Office is currently a part of the St. Louis District. However, that has only been so since January 2006. (T. 5809) And, all of the testimony offered through Mr. Hill related to time prior to January 2006 when the Oklahoma Area Office was part of the Dallas District Office. The testimony of Messrs. Hill and Stevens will thus be addressed separately, infra, from both St. Louis and Dallas.

[37] These numbers do not include the 11 investigators and 2 mediators employed in the Oklahoma Area Office. (T. 5813)

> overtime pay for this work and is requesting only compensatory time. In return, the undersigned District Director or her designee will allow the requested extra work and will provide compensatory time for it.

Ms. Horne admitted that her work as a paralegal required her to work with legal documents and that she understood the importance of such documents. (T. 3036-3037) She also admitted that she understood when she signed Union Exhibit 92 that she was signing an agreement to work the extra time only for compensatory time. (T. 3037-3038)

To place Ms. Horne's testimony in further context, St. Louis District Director James Neely testified that Union Exhibit 92 was the form used by St. Louis District employees to request permission to work beyond their scheduled hours of work. (T. 5821-5823) He testified that in the two and one-half years that he had been the Director in St. Louis he had signed forms identical to Union Exhibit 92 on perhaps a dozen occasions and that most were for attorneys. (T. 5823-5824) He testified that he could not recall signing a single such form for either an investigator or a mediator. (T. 5824)

Mr. Neely also explained why it was not necessary for St. Louis District investigators and mediators to work beyond their scheduled hours. He testified that the majority of the outreach in the St. Louis District (including both the Kansas City Area Office as well as the Oklahoma Area Office) is conducted during regular business hours. (T. 5818-5819) He explained that outreach events outside regular business hours are handled by managers, supervisors and trial attorneys. (T. 5819) Mr. Neely also testified to the manner that intake is handled in the St. Louis District. He explained that intake closes at 3:00 PM so that investigators on inake duty can usually complete intake prior to the end of their regular hours of duty. (T. 5814-5815) He stated that if a matter cannot be completed by the end of an investigator's regular hours a supervisor will handle

the matter. (T. 5815) Together with these procedures, the St. Louis District supervisors ensure employees in the District work only their scheduled hours. (T. 5820-5821)

Mr. Neely's testimony thus explains why the Union called not a single witness from the St. Louis District Office despite the fact that we were all in that office taking testimony for two weeks.

DALLAS

The Union called Dallas District Deputy Director Janet Elizondo to testify. The Union also called Investigators Melva Best and Azella Dykman and Mediators Craig Kempf, LaVerne Morrison and Gloria Smith. The Commission called Enforcement Manager Alma Anderson and ADR Coordinators Katherine Perez and Deborah Urbanski to testify.

Janet Elizondo testified that she has been employed in the Commission's Dallas District Office since January 15, 1981 and has served as a manager in that Office since 1991. (T. 4237, 4240-4241) Ms. Elizondo served as the Acting Director of the Dallas District from July 2001 to December 2003, as an Enforcement Manager in the Dallas District Office from January 2004 to March 2004 and as the Deputy Director of the Dallas District from March 2004 to the time of the hearing. (T. 4239-4241) She explained that the Dallas District included the Oklahoma Area Office until January 2006 when responsibility for that office was transferred. (T. 4245) Since that time, the Dallas District has included the San Antonio Field Office and the El Paso Local Office. (T. 4243-4244)

On examination by the Union, Ms. Elizondo was repeatedly quizzed regarding the practice in the Dallas District as to how employee requests to work hours beyond) schedule were handled. (T. 4279; 4286; 4289-4290; 4292; 4303-4305; 4311-4314; 4333; and 4353) Again and again she testified, on 16 different occasions, that if an employee wished to work hours beyond

schedule he or she had to ask to do so, agree to waive overtime and agree to work for compensatory time. (Id.) Ms. Elizondo's testimony was consistent with and corroborated by Union Exhibit 71 which included multiple copies of forms by which Dallas District employees who wished to work beyond schedule did so and by which they agreed to "waive overtime." Although the Union repeatedly pressed Ms. Elizondo for different testimony, Ms. Elizondo never deviated from her prior answers or the plain words appearing in the Union sponsored documents.[38]

Ms. Elizondo also addressed the handling of outreach in the Dallas District. She first testified that the "vast majority" of outreach opportunities are for events held during regular business hours. (T. 4399) Ms. Elizondo testified that outreach opportunities on evenings or weekends only arose "[e]very once in a while." (Id.) She testified that all outreach events, regardless of when they occur, are covered by volunteers. (T. 4269-4272; 4398-4399) Ms. Elizondo testified that volunteers are solicited by email. (T. 4398-4399; 4416) She also explained that when employees do volunteer to cover outreach events on evenings or weekends that the practice in the Dallas District is to request the employee to waive overtime and accept two hours of compensatory time for each hour devoted to the outreach event. (T. 4399-4400; 4616) She testified that if an employee does not want to accept compensatory time for doing an outreach event, a volunteer who is willing to accept compensatory time will cover the event or it will be covered by a manager. (T. 4439-4440) There is thus no coercion to work for double compensatory time. Ms. Elizondo testified that during the entire time period covered by this

[38] On examination by the Union, Ms. Elizondo acknowledged that there are some "unique, not regular types of situations" where employees might use their "professional judgment" to complete work beyond regular hours without advance approval. (T. 4408-4409, 4435-4436) In those situations, she explained, the employees are offered compensatory time to cover that time. (T. 4408-4409)

proceeding she never forced or compelled any investigator or mediator to work beyond their scheduled hours. (T. 4410-4411)

Melva Best was the Union's first witness from the Dallas District. She testified that she had been employed by the Commission since 1968 and that she had been stationed in the Dallas District Office since 1971. (T. 3171-3173) During that time, Ms. Best testified, she has had a number of supervisors the most recent being Deputy Director Elizondo. (T. 3173)

On direct examination, Ms. Best was questioned about Agency Exhibit 20 (Dallas) at 14 which is an email from Deputy Director Elizondo to Ms. Best regarding a July 30, 2003 request by Ms. Best to work some compensatory time. (T. 3175-3176) Ms. Best, however, could not recall whether she actually requested the compensatory time referenced in Agency Exhibit 20 (Dallas) at 14 by filling out the forms to request that time. (T. 3177-3178)[39] She elaborated stating that she didn't "recall receiving very much comp time" and that she requested it only "rarely." (T. 3178-3179)[40] Significantly, the Union introduced no documents similar to Agency Exhibit 20 (Dallas) at 14.

Although Ms. Best twice admitted that she knew she was required to get permission in advance before working beyond her schedule, intake being the only exception to this requirement (T. 3186 and 3191), the Union offered no evidence that Ms. Best had ever done so.

Finally, Ms. Best testified on cross-examination she has worked a 4/10 schedule for many years and that her hours of work begin at 8:00 AM and end at 6:30 PM Tuesdays through

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[39] Dallas Deputy Director Elizondo was asked by the Union whether Ms. Best had actually worked this time, and like Ms. Best, could not recall. (T. 4317) Ms. Elizondo did point out, however, that Ms. Best was specifically inquiring about "compensatory time." (T. 4322)

[40] Ms. Best's use of the word "rarely" to describe the frequency of her work beyond schedule to complete intake assignments is significant. It is so because it is the same word used by CRTIU (Intake) Supervisor Alma Anderson to describe the frequency that intake required investigators to work beyond the regular 8:00 AM to 4:30 PM hours for intake. Compare T. 3187-3179 with T. 4798. Ms. Anderson has been the CRTIU Supervisor from October 2005 to the present. (T. 4780-4781)

Fridays. (T. 3185-3186) Ms. Best testified that intake closes at 4:30 PM and admitted that intake required her to stay beyond 6:30 PM only "occasionally." (T. 3187) Ms. Best explained in testimony elicited by the Union that during the time period covered by this proceeding she worked intake only once every five weeks which testimony further dilutes her testimony that intake "occasionally" required work beyond her regular departure time by minimizing it. (T. 3190)

Considered as a whole, Ms. Best's testimony refutes any claim that she actually worked for compensatory time and showed, at best, that she worked minimal time beyond her schedule. Moreover, there is no documentation to show that Ms. Best actually worked any time beyond her schedule at all.

Azella Dykman testified that she has been employed by the Commission for 31 years in the Dallas District Office. (T. 3116) Ms. Dykman was requested by the Union to identify Union Exhibit 71 which includes a series of documents by which Ms. Dykman testified she requested "credit time." (T. 3120-3121) See also Union Exhibit 71 at 1-2, 4, 7, 10-11, 13, 15, 17 and 20. The "credit time" requests are all dated between February and October 2005. Each of the "credit time" requests contain a line labeled "WAIVE OVERTIME" on which Ms. Dykman affixed her signature. See Union Exhibit 71 at 1-2, 4, 7, 10-11, 13, 15, 17 and 20. Pages 3, 5-6, 8-9, 12, 14, 16, and 18-19 of Union Exhibit 71 match Ms. Dykman's requests for "credit time" each reflecting the days and hours she actually earned the "credit time." (T. at 3127-3129) Compare Union Exhibit 71 at 1-2, 4, 7, 10-11, 13, 15, 17 and 20 with 3, 5-6, 8-9, 12, 14, 16, and 18-19.

Ms. Dykman testified that during the time period covered by the documents included in Union Exhibit 71 was a period of time when she was required to perform intake work for a week once every five weeks and that all of the documents included in Union Exhibit 71 related to

weeks during which Ms. Dykman performed intake duty. (T. 3131-3132). On cross-examination, Ms. Dykman explained that on the weeks from February to October 2005 she was required to perform intake, the schedule for intake did not match her hours of work. (T. 3134) Her regular schedule, she explained, began at 7:30 AM and ended at 4:00 PM while the intake schedule began at 8:00 AM but did not end until 4:30 PM. She testified that she made an agreement with her supervisor, Ms. Lilly Wilson, and Deputy Director Janet Elizondo, to continue to arrive at 7:30 AM but to stay until 4:30 PM when intake closed thus earning one-half hour of "credit time" each day that she worked in intake. (T. 3136-3137) Because she chose her arrival and departure times, she worked a flexible schedule and she earned credit hours for the extra time she worked at the end of the day doing intake work. Her supervisor did not officially order in advance that she work extra hours, but merely approved her request to do so to meet her personal scheduling needs.

Deputy Director Elizondo testified, on direct examination by the Union, that she agreed to allow Ms. Dykman to earn "credit time" during this period of time from February to October of 2005 but only if she agreed to "waive overtime." (T. 4379-4381) She explained that had Ms. Dykman been unwilling to "waive overtime" that she would have had to report to work at 8:00 AM rather than 7:30 AM. (T. 4380-4381)[41]

Ms. Dykman also reviewed her time records for the February to October 2005 time period and agreed that they reflected that she used the "credit time" she earned while on intake either later in the same pay period, or shortly thereafter. (T. 3139-3158) See also Agency Exhibits 26-34. She admitted that she always got to use her "credit time." (T. 3158)

[41] Deputy Director Elizondo testified that Ms. Dykman wished to continue to report for work at 7:30 am even though her Intake duties did not begin until 8:00 am because of "some transportation issue." (T. 4393)

This arrangement ended in October 2005, Ms. Dykman stated, because she was transferred to the mail unit and mail unit investigators were not required to serve but once very five week rotation in the intake unit. (T. 3158-3159) From October 2005 through February 2008, Ms. Dykman was assigned to the mail unit. (T. 4393, 4793-4794) While assigned to the mail unit, Ms. Dykman's regular hours of work were from 7:30 AM to 4:00 PM and she admitted she was able "to work every week" on her "regular schedule." (T. 3159-3160)

The "credit time" Ms. Dykman earned from February to November 2005 was not overtime for which Ms. Dykman was entitled as a matter of law to overtime pay. It was "credit time" which we have demonstrated above is statutorily excluded from the definition of overtime. Moreover, even were that not the case, Ms. Dykman waived overtime in writing and, as Deputy Director Elizondo testified, she would not have been allowed to work outside her schedule absent that waiver.

Mediator **Gloria Smith** has been employed with the Commission as a Mediator in the Dallas District Office since April 1999. (T. 3041-3042) During the time relevant to this proceeding she has been supervised by ADR Coordinators Carla Vogel,[42] Deborah Urbanski and, since January 2006, Katherine Perez. (T. 3042-3044) Ms. Urbanski is stationed in the Commission's Houston District Office and Ms. Perez is in the San Antonio District Office. (T. 5104; 5004-5005)

Although Ms. Smith was apparently called by the Union to testify concerning Union Exhibit 70, she appeared to be wholly unprepared to do so. She began her testimony discussing a September 26, 2003 trip from Abilene, Texas to Dallas, Texas for which she requested

[42] Although Ms. Smith testified that Ms. Vogel ceased being her supervisor sometime in 2001, she signed documents included in Union Exhibit 70 dated in September 2003. Compare T. 3043 with Union Exhibit 70A and B. Ms. Smith then testified that "I don't know when Ms. Vogel stopped being my supervisor. I have no idea to tell

compensatory time in lieu of overtime for travel. (T. 3046; Union Exhibit 70A at 1) ("Request comp in lieu of overtime"). She then testified about a September 19, 2003 trip from Amarillo, Texas to Dallas, Texas for which she also requested compensatory time in lieu of overtime for travel. (T. 3049 and Union Exhibit 70B at 1) ("Request comp in lieu of overtime"). Ms. Smith testified that she prepared and signed both Union Exhibit 70A and 70B. (T. 3046; 3049).

On cross-examination Ms. Smith first evolved her claim (made in writing in Union Exhibit 70A) that September 26, 2003 was a travel day to return from Abilene to Dallas. She testified that she mediated in Abilene on Friday, September 26, 2003, which ordinarily would be a day off for her on her 4/10 schedule, because the parties were available on that day.[43] She claimed that she also drove back home to Dallas on that day, presumably following the mediation. (T. 3081-3082)

Next she changed her story regarding September 19, 2003. After claiming that on September 19, 2003 she traveled, by air, from Amarillo to Dallas (T. 3083-3084), she denied that she traveled on September 19, 2003 claiming that she was in Amarillo from September 15, 2003 all the way through to September 26, 2003. (T. 3084-3085) By making this claim she contradicted the plain words written in her own hand on Union Exhibit 70B that she traveled "from Amarillo, Texas to Dallas. 9/19/03," and her own earlier testimony that "I traveled on that day." (T. 3084) After repudiating both her own writing and her earlier testimony, Ms. Smith then reversed herself again claiming that "I traveled on the 19th" (T. 3085) before shifting to a claim that her trip was actually a triangular one from Dallas to Amarillo to Abilene and then back to Dallas, all by air. (T. 3104-3105) This switch not only contradicted her earlier testimony that she flew from Dallas to Amarillo and back (T. 3084), but it was inconsistent with

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you the truth." (T. 3062) The inconsistency between Ms. Smith's testimony on this point and the written record is just the first of many indications that her testimony is unreliable.

her earlier testimony that she had driven home to Dallas from Abilene on September 26, 2003. (T. 3081-3082) Unable to explain how she had driven from Abilene to Dallas, she claimed that she must have flown from Abilene to Dallas rather than driving. (T. 3108)[44] Ms. Smith resorted to revising her prior testimony because she was otherwise unable to explain how she could have driven home to Dallas from Abilene if she traveled to both Abilene and Amarillo by air. (T. 3107-3109) Her earlier testimony, that she drove, required there to be an automobile available in Abilene for the trip. Ms. Smith eliminated the only other logical possibility by testifying that she did not rent an automobile in Abilene to drive home to Dallas. (T. 3106)

Ensnared in the web of her own conflicting testimony about her travels in September 2003, Ms. Smith ultimately abandoned all of her various concoctions by admitting that she didn't really remember what had happened. (T. 3108-3109) That was undoubtedly the truth.

Unchastened by the difficulties her circumlocutions regarding her travel had created, Ms. Smith plunged into fiction yet again testifying on redirect-examination that she conducted approximately 20 mediations per month. (T. 3100-3100) Approximately twenty mediations per month would lead to a total of approximately 240 per year. Ms. Deborah Urbanski, who supervised Ms. Smith from March 2004 to January 2006, testified that Ms. Smith mediated approximately 110 cases per year or about nine per month. (T. 5126)[45] Ms. Katherine Perez, Ms. Smith's current supervisor, testified that during the first six months of this year, she

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[43] Ms. Smith later admitted that she was not required to offer parties her day off as a day to mediate.

[44] Ms. Smith changed her story when she was unable to explain how her automobile had gotten to Abilene for her to drive home if she had flown first to Amarillo and then to Abilene. (T. 3104-3108)

[45] Ms. Urbanski's testimony is fully consistent with that of Dallas ADR Corodinator Katherine Perez.

mediated 45 cases or seven or eight per month. (T. at 5035) Seven, eight and none are a long way short of twenty. Plainly, Ms. Smith was exaggerating.[46]

Ms. Smith's endless evolution of her explanations of Union Exhibit 70 together with her exaggeration of her workload so thoroughly undermine her credibility that all of her testimony must be rejected as inherently unreliable.

San Antonio

Marie Minks, an investigator in San Antonio, testified she began as an investigator in October 1999. (T. 4687) Mr. Austin Jaycox has been her supervisor for the last two years. Mr. Travis Hicks supervised her for the two years prior to that. (T. 4689-4690) Her schedule was from 7:30 AM to 4:00 PM and she could run beyond that time if on intake, which is shown on Union Exhibit 72 at 1. (T. 4692-4693) Her supervisors usually gave them time off if they ran late. She could call her supervisor if she was running late. (T. 4713) The other leave used indicated on the cost accounting sheet in Union Exhibit 72 represents holidays. (T. 4696) She also notes that other entries of "other leave used" could be ice storm related. Ms. Minks testified that Union Exhibit 72 reflects her in and out times and telecommuting days. (T. 4700) She was asked to but refused to conform her schedule (7:30 AM to 4 PM) to the office intake hours (8:30 AM to 5:00 PM and later 8:30 AM to 4:00 PM). (T. 4717) When they did work late, Mr. Hicks preferred that they treat it like a sliding schedule and make up the time ASAP. (T. 4721) Employees were repeatedly told not to work late. Management always accepted her representations regarding extra time and never denied her the make up time - credit time in her case. (T. 4722) Ms. Minks testified that late intake was unanticipated. Instead of staying late,

[46] Deputy Director Elizondo, who supervised the Dallas District ADR unit for many years, testified that Ms. Smith (as well as the other Mediators assigned to the Dallas District Mediation unit) could accomplish the tasks assigned within a 40 hour work week. (T. 4400-4405; 4430 and 4432-4434)

she could have finished by phone or mail or Mr. Hicks could have and did help out. (T. 4720) She takes an hour for lunch. (T. 4705; 4721) She was told several times and in several ways that there was no money for overtime pay available. (T. 4716) Ms. Minks received Agency Exhibit 20 (Dallas) at 19, but was not sure she saw pages 8 to 11. She did allow, though, that supervisors reminded them again not to work overtime. (T. 4714-4715) She testified there was a stack of sign in sheets in the "distribution room" (T. 4709), but she is not aware that the supervisors reviewed the sign in sheets. (T. 4724) Ms. Minks has a flexible schedule and chooses her own starting and departing times. She has a long commute that causes her to frequently shift her start times with management's support and management also approved her to telecommute. (T. 4718)

She has a 5/8 flexible schedule and is permitted to shift starting and quitting times around and telecommute to accommodate a long commute. She gets the time – credit time in her case – and is asked not to hoard it but is permitted to use it when she pleases. She testified that they were repeatedly told not to work over their schedule; and she contradicts other Union witnesses who suggest that management reviewed the sign-in/sign-out sheets.

Cynthia Schneider, an ADR program assistant in San Antonio, testified that she kept time for Mediator Craig Kempf. She testified that Mr. Kempf works 8 hour days which militates against any suggestion of working over that he may have made and suggests he doesn't go over but left unclear whether he flexes. (T. 3278) See the discussion of Mr. Kempf, infra.

Diane Webb, an investigator in San Antonio since August 1999, testified that she was supervised by Mr. Guillarmo Zamora beginning in 2000, and by Mr. Austin Jaycox before that. (T. 3392) Later she suggests Mr. Zamora has supervised her since 2005. (T. 3400) She testified that she works 7:00 AM -3:30 PM five days a weeks but a some point worked a 4/10. (T. 3394,

3402 and 3424) She suggests she worked 5/8 since 2001. Ms. Webb acknowledges her signature on Union Exhibit 76; and offers that this form was not a formal timekeeping document but rather just indicated whether someone was in or not. (T. 3394) She testified that she'd frequently forget to sign in or out. (T. 3400 and 3433) She also erroneously offered that the CAS have been in use since 1999, 2000, 2001. (T. 3395) The Union Representative drew Ms. Webb's attention to Union Exhibit 76 which appears to indicate that Ms. Webb worked a 4/10 from 6:45 AM to 5:00 PM. Ms. Webb was unable to clarify her testimony. (T. 3397) She undermined the accuracy of the sign in sheets. Although Ms. Webb was supposed to work 8:30 AM to 5:00 PM while on intake, she actually worked a 7:00 AM to 3:30 PM schedule because of traffic. She stated that if she didn't leave early then there was bad traffic. (T. 3403) She chose to stick to that reporting time for her convenience. Union Exhibits 77A and B show some overages, but also some times when she owes time or doesn't sign in at all. (T. 3406) According to Ms. Webb, if you worked late you came in late or left early as informal compensation. (T. 3406) She testified that she is supposed to get approval for overtime in advance, but since all her overage came up in intake and was unanticipated, she couldn't do that. She was told to take informal comp during the pay period instead. (T. 3417 and 3438) Her schedule was also flexible since she was allowed to pick a 7:00 AM start time for personal convenience. She was permitted to telecommute as much as two days a week. (T. 3424) She admitted that Mr. Zamora was extremely flexible with her start and finish time. (T. 3425) She works when she feels like it. There appears to be a very casual give and take on time between her and Mr. Zamora. (T. 3426) Intake was open from 8:30 AM to 4:00 PM since Mr. Michael Fetzer became the Director responsible for San Antionio, which she estimated occurred in October 2006. (T. 3428)

Ms. Webb grudgingly acknowledged that she was told to stick to her schedule. (T. 3436) She testified that San Antonio doesn't have a gliding schedule; but she earlier testified that she often varied her start time with management's acquiescence because of traffic, etc. She then testified that she picked her schedule. (T. 3445)

In summary, this witness was all over the board, but was on a flexible schedule 5/8. She was allowed to come in late without recourse and wouldn't even have to work late if she came in late. She was never denied time that she told management about and was told to use the time – credit time here – as soon as possible. Her sign in sheets are a good example of the unreliability of those sheets generally.

Mediator **Craig Kempf** has been employed with the Commission as a Mediator in the San Antonio District (now Field) Office since April 1999. (T. 3292-3293)[47]

On direct examination by the Union Mr. Kempf identified Union Exhibit 75 which consists largely of sign-in sheets from the Mediation Unit in the San Antonio office for a three week period from July 19, 2005 to August 5, 2005.[48] Mr. Kempf testified that his regular hours of work during this time period were from 8:30 AM to 5:00 PM with an hour for lunch.[49] (T. 3301-3302) Mr. Kempf testified that he picked these as his regular hours of work himself; they were not selected for him by Commission management. (T. 3330)

Union Exhibit 75 indicates that Mr. Kempf deviated from his regular schedule on eight of the fifteen days covered by that exhibit. He worked time in excess of his regular schedule on six

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47 The San Antonio office was a District Office until the repositioning of January 2006. Since that time it has been a Field Office reporting to the Director of the Dallas District Office.

48 These sheets were selected by the Union for introduction into evidence at the hearing from a significantly larger document production.

49 Mr. Kempf testified that he combined his two 15 minute breaks with his 30 minute lunch period to expand his lunch time to one hour. (T. 3302)

days and less time than his regular schedule on two days.[50] Mr. Kempf had a flexible schedule at that time. In the aggregate Union Exhibit 75B-D, G, L-N reflect that he worked a total of 4 hours and 14 minutes more than his scheduled hours but then claimed and took 4 hours of "credit time" on August 5, 2005 by leaving for the day at 12:30 PM. (T. 3326-3327 and Union Exhibit 75O)

On cross-examination Mr. Kempf testified that his supervisor since 2003 has been ADR Coordinator Katherine Perez. (T. 3325) He testified that Ms. Perez's regular hours of work were from 8:00 AM to 4:30 PM and that she routinely left the office before he did. (T. 3329-3330, 3335-3338) Mr. Kempf explained that on those occasions on which he did stay beyond his regular work hours he would report that fact to Ms. Perez the following morning because she was typically gone from the office before he was. (T. 3329-3330) He admitted that Ms. Perez always gave him credit time or compensatory time for that time and that he has always been allowed to use that time. (T. 3330-3331)

John Ahlstrom, an investigator in San Antonio, was supervised by Mr. Zamora for the last couple of years, and Mr. Hicks before that for perhaps two years. (T. 3460) Mr. Hicks might have supervised him back to 2002 or 2003. (T. 3496) He testified that they were instructed that any extra hours work had to be approved in advance and that overtime would be compensated as comp time. (T. 3462, 3474) At the time shown in Union Exhibit 72, his schedule was 7:00 AM to 5:30 PM. (T. 3467) Mr. Ahlstrom relies on his time and attendance clerk to fill in the hours on the cost accounting sheet, suggesting that he rarely deviates from his 4/10. The 10 hours "other leave used" on Union Exhibit 72A is the Martin Luther King holiday.

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[50] It is impossible to know how many hours Mr. Kempf worked on August 1, 2005 because although he signed in at 8:30 AM he did not sign out. See Union Exhibit 75K.

(T. 3470, 3494) Union Exhibit 74A-F only showed where he worked an extra five minutes a couple of days. (T. 3472) Union Exhibit 73A-J, except for one instance of 45 minutes of extra time, showed only five or ten minutes extra time. (T. 3484) Apart from the few times mentioned on direct, he stuck to his schedule of 7:00 AM to 5:30 PM and this schedule covered even the time that he was assigned to intake. (T. 3497) He goes home for lunch and takes an hour. (T. 3498) In regards to Union Exhibit 73A, Mr. Hicks worked to 5:00 PM so it is possible he didn't know Mr. Ahlstrom went over that day (or any day). (T. 3498) Mr. Ahlstrom stated he was never denied comp time when he informed his supervisors that he worked over. (T. 3499) They were told to stick to their schedule "whenever possible;" overages from intake or an on-site were uncommon. (T. 3502)

This investigator worked primarily a 4/10 schedule from 7:00 AM to 5:30 PM so even when intake ran until 5:00 PM he had time to finish it up. According to Mr. Hicks and Mr. Zamora, he was pretty dogged about keeping to his schedule. The sheets that the Union selected for him to testify about show very minor overages and this was arguably cherry-picked.

Tonya Shiver has been an investigator in San Antonio since August 1999 supervised by Mr. Zamora for the last three or four years, and by Mr. Hicks before that. (T. 3341) On cross-examination, Ms. Shiver concedes that Mr. Zamora may have been her supervisor back to 2002. (T. 3370) She works 4/10s with Fridays off; from 6:30 AM to 5:00 PM. (T. 3355) When she was on intake, she chose to come in at 6:30 anyway, instead of adjusting her schedule to come in at 8:30 so that she would be available to complete intake. Ms. Shiver identified Union Exhibit 76 and explained that page 3, February 24, 2005, did not have anything for her because it was a Friday. But, in fact, it was a Thursday. The exhibit shows she worked an hour and fifteen minutes extra that week on a Friday. (T. 3344) She does not testify that Mr. Zamora was aware

that she was working late and was in a position to prevent it. She concedes that Mr. Zamora wouldn't know if she was working late in intake. (T. 3375) She testified that they were offered comp time if they worked over but she had to keep up with it because management didn't. (T. 3365) She acknowledges that she was told to only work 40 hours a week, (T. 3366-3367), and that was done periodically. (T. 3374) Ms. Shiver claims she puts in 10 hours on the cost accounting sheet because she works 10 hours; if she works beyond that "it's a freebie." (T. 3364) But, because she agrees she would get compensatory time if she chose to work extra hours, it was a "freebie" only because she failed to report it to Mr. Zamora. Mr. Zamora testified that he repeatedly told her to go home. She stayed longer anyway. She denies that Mr. Zamora ever told her to go home or that he counseled her about working over; the most she'll say is that he would say "are you wrapping up." (T. 3374) And she does admit that Mr. Zamora instructed her her to "work her hours." (T. 3377) She conceded that when she worked over that it was contrary to management's instructions and that the cases would be there tomorrow. (T. 3378) And she only worked over for late intake and on-sites. (T. 3379) Ms. Shiver agreed that she was never disciplined regarding productivity; she received an excellent appraisal; and she was never denied comp time. (T. 3379) She takes an hour for lunch, even during intake. (T. 3388) Her testimony establishes that she purposely worked extra hours without informing her supervisor whose office was on the other side of the building. (T. 3369) She even claims that she would sign out then continue to work. (T. 3378)

Katherine Perez has been stationed in the Commission's San Antonio Office since 1994. (T. 5003-5005)[51] After initially serving as an Investigator, Ms. Perez became a Mediator in 1999 and the ADR Coordinator in April 2004 for the San Antonio Office. (T. 5003-5004) From April

[51] The San Antonio Office was a District Office until January 2006 when it was re-labeled as a Field Office.

2004 until January 2006, Ms. Perez supervised just one Mediator, Mr. Craig Kempf. (T. 5005-5006) In January 2006 Ms. Perez assumed responsibility for the supervision of the Dallas District Office mediation program (including the lone Mediator stationed in the El Paso Local Office) although she remained stationed in San Antonio. (T. 5003-5008)

Ms. Perez testified that as a long-distance supervisor she has little opportunity to observe the day-to-day comings and goings of the Mediators she supervises in Dallas and El Paso. (T. 5009-5010; 5013-5014) Ms. Perez testified that she was able to travel to Dallas for a day or two approximately every other month and that she had only been to El Paso twice since January 2006. (T. 5009)

Ms. Perez testified that she has never required or instructed any employee under her supervision since April 2004 to work hours beyond schedule. (T. 5016; 5025-5028) Asked about the frequency of such occurrences, Ms. Perez testified that it was not a regular practice: Mediator John Ross-Dallas, for example, "once every two months" or Mediator Jacqueline Levermore-Dallas "maybe once a month." (T. 5026)

Ms. Perez testified that on those occasions when Mediators she supervises do work beyond schedule it is their own decision to do that. (T. 5025-5026, 5031) Ms. Perez testified that she is rarely aware of such decisions until after the fact because Mediators Kempf and Escobedo work later than she does and because the other Mediators she supervises are stationed in other cities (Dallas and El Paso). (T. 5094-5095)

Ms. Perez concluded her testimony by stating, based on her experience as a supervisor since April 2004, that the Mediators under her supervision can accomplish their work within a 40 hour work week and an 80 hour pay period. (T. 5098-5099)

Guillarmo Zamora, a supervisor in San Antonio, supervises Ms. Webb and Ms. Shiver. He testified that Ms. Webb works from 7:00 AM to 4:30 PM (T. 5181) Shiver works from 6:30 AM to 5:00 PM. (T. 5182), and Ahlstrom works from 7:00 AM to 4:30 PM. These are different from the testimony of Ms. Webb and Mr. Ahlstrom regarding their schedules. Mr. Zamora works 8:30 AM to 5:00 PM, so none of his subordinates have schedules that go past his scheduled time off. (T. 5182) He doesn't worry about people coming in late if its under 45 minutes; he's flexible with respect to their start times. He just wants them to get their work done. (T. 5183) He testified that he's aware of his employees whereabouts as he does rounds several times daily. (T. 5185) They did away with the sign in sheets in early 2006. When they existed, Mr. Zamora checked them, but only to see if people are in and to conform with leave slips. (T. 5193) Employees were instructed and reminded to work their regular schedule because there was no money for overtime. Mr. Zamora's only awareness of people going over their scheduled time was with late intake appointments. Intake interviews can take 90 minutes to 2 hours and intake used to be open until 5:00 PM but they could short form the intake process. But, it could still take until 5:30 or 6:00 PM to complete the process. (T. 5194)

Ms. Shiver was never required to work late. Her office is right next to Mr. Zamora's. He would occasionally see her there past 5:00 PM and would tell her to go home. She would say she was finishing a letter; and he would tell her to finish it tomorrow; the mail is not going out anyway. She might stay 20 minutes late. Mr. Zamora testifies that he told both Ms. Webb and Ms. Shiver to go home when he found them working late. (T. 5235) He didn't remember more than that. (T. 5196)

He recalls a couple of occasions with Ms. Shiver going over on on-sites. He testified that he told her to take the time the next day or within the next two weeks. (T. 5197) Mr. Zamora

explains that they rarely did on-sites; that the lack of use caused the government to take back two of our four government vehicles. On-sites were both rare and rarely went past regular hours. They could be planned and scheduled to last within the work day. Nevertheless, if they told him they went over he gave them the time and told them to take it the next day or within the next two weeks. (T. 5198) He wanted them to take any overage right away to stick to an 80 hour pay period. (T. 5255) He understood that there was no money for overtime so he required people to work their regular schedules. (T. 5199) Investigators were asked to conform their schedules to the intake hours when they were in intake. (T. 5202) They did intake for one week every fourth week; six employees in intake at a time. Recently a potential charging party, who came at 3:55 PM, elected to come back another day after Zamora talked to her. Mr. Pedro Esquivel, a Director in San Antonio, required them to see everyone who came in, but talking to them did not mean taking the charge and could mean rescheduling them for another day. (T. 5204) A late arrival might cause an after hours intake once a month – and there were other ways to handle it. (T. 5205) He was flexible with Ms. Webb's late arrivals; she only worked late in intake or an out of town on-site but those are rare. He actively managed employee's time to avoid extra hours. (T. 5208) When they were in use, employees were expected to put actual times on sign-in sheets. (T. 5218) The sheets are nowhere near the supervisors' offices so the supervisors could not monitor their accuracy. (T. 5220) Mr. Zamora stated picked up the sign in sheets weekly then retained them for about three months. (T. 5223-5224) He indicated that he only looked them over quickly, cursorily. When asked how he could let employees work overtime when there was no money available, Mr. Zamora stated that he didn't think employees actually did work overtime. (T. 5227) Mr. Zamora reiterates that other than a late intake, there was no reason for anyone to arrive early or stay late and that he expected them to heed his instructions.

(T. 5238) He would only know after the fact if an on-site went over and they were reminded to plan the on-site so it could be completed during normal hours. (T. 5254) On-sites to South Padre Island (5 hours) occurred maybe once every two years. (T. 5255)

Travis Hicks has been an enforcement manager in San Antonio since early July 2006. He was a supervisor from 2000 to July 2006. (T. 5260) He testified that sign-in/sign-out sheets were not really considered in the mix when he certified time. (T. 5266) He used the sheets just to check on people's whereabouts but not the actual hours worked. (T. 5267; 5336) He stated he was not really cognizant of the hours worked by his people and the sign-in sheets were located in a different area of the office. (T. 5269) He explained that the sign-in clip boards were located at the other end of the office, (T. 5290) and that his office location was not close to the offices of his subordinates. (T. 5271)[52] He knew if his people were in and out but he did not monitor the specific times of their arrival and departure. (T. 5274) They were supposed to work their regular hours. (T. 5275) He testified that they all understood that they weren't supposed to work past their regular duty hours. He stated that what he told his employees was that if you have to work past your normal duty hours, you need to come to me and let me or the intake supervisor know. And you should adjust your schedule and make sure that you come in late the next day or you leave early under those infrequent circumstances. But they all understood they were supposed to work a regular work week according to their schedule. (T. 5276) Everybody in the office was aware of that. (T. 5277)

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[52] 52 Mr. Hicks explained that there might be as many as a three months worth of sheets in the clipboard or as few as seven to ten. (T. 5291) He stated he might pick up the used sign in sheets as often as every week or two and store them in a file cabinet in his office. He only looked them over to make sure they were in order. (T. 5292; 5321; 5323) Although Union Exhibits 73 and 74 have notations in his handwriting, that does not indicate they were made on the day shown on the sheet. Contrary to testimony of union witnesses, the composition of the enforcement units was only switched one time in 2003. (T. 5295)

Investigators came to him if an intake was going to run late and he handled it or someone else handled it. (T. 5278) Other alternatives to a late intake appointment included asking the person to come back another day or take the charge quickly and complete the interview another time or by mail. (T. 5283) Mr. Hicks stated that often he did not find out until after the fact that an employee had worked beyond schedule and he would then remind the employee that they were supposed to get his approval in advance and adjust their schedule accordingly. (T. 5279) He testified that the job can be done in a 40 hour week. (T. 5283) He had no involvement with CAS but never told anyone not to list all their hours. (T. 5281) He never had anyone request paid overtime and he never requested overtime money. (T. 5282) Mr. Hicks testified that Mr. Tony Price worked a strict 7:00 AM to 3:30 PM schedule and he picked his start time, Mr. Ahlstrom worked 7:00 AM to 5:30 PM; Ms. Minks worked 7:30 AM to 4:00 PM when he supervised her; Mr. Ramirez worked a 5/4/9 and started at 7:00 or 7:30 AM. (T. 5287) Mr. Hicks worked 8:30 AM to 5:00 PM. (T. 5289)

Five employees testified for the union in San Antonio. Three of these employees, Ms. Minks, Ms. Webb, and Mr. Kempf were on flexible schedules. On the rare occasions they worked extra hours, they earned and then used credit hours and are not entitled to overtime pay. Mr. Ahlstrom admits he was told to stick to his schedule and while on rare occasions he went over, there is no evidence this extra time was "suffered and permitted" by the Agency. Instead, it appears he informed his supervisor after the fact, and was given comp time or credit hours for the extra time. Ms. Shiver put in extra hours, but they were not "suffered and permitted." She admitted she was told to only work 40 hours a week, and her supervisor testified she repeatedly told Ms. Shiver to go home when she caught her working late. Ms. Shiver also admits she continued working sometimes after signing out and that her supervisor worked on the other side

of the building. Ms. Shiver also admitted she knew she could request compensatory time if she worked over her schedule.

El Paso

Arturo Carrion has been an Investigator in El Paso since 1994. Ms. Teresa Anchondo has been his supervisor for ten years. (T. 3578) Mr. Roberto Calderon was the director in El Paso until sometime in 2005. (T. 3580) Sign-in/sign-out sheets were formerly used and, according to Mr. Carrion, collected weekly in El Paso and delivered to Mr. Calderon, then to Ms. Anchondo. (T. 3581-3582) Mr. Carrion stated that the sign-in/sign-out sheets were no longer in use. He works a 5/4/9 schedule, 8:30 AM to 6:00 PM, and has been on this schedule for several years. (T. 3589) He stated he can put whatever hours he wants on his CAS. (T. 3584, 3586) Carrion claimed he works extra hours "all the time." (T. 3586) If intake comes in at 4:45 PM, you just keep on working. (T. 3586) He is supposed to work from 8:30 AM to 6:00 PM. (T. 3587) He says he is on intake "all the time." He claims to be on intake two or three weeks out of the month. (T. 3590) Intakes were taken until 5:00 PM until recently. Now they end at 4:00 PM. (T. 3591) Mr. Carrion testified that he has heard from other investigators that they are supposed to stop intakes at 5:00 PM, but for a guy like him who is interested in customer service it's just not practical because he is interested in customer service. (T. 3593) He admits even when intake closed at 5:00 PM, he still had an hour before the end of his shift to finish and he could also finish up by mail or phone. (T. 3606)

Mr. Carrion admitted he has been told that overtime and compensatory time must be requested in advance. (T. 3594) He also admitted that Ms. Anchondo has told him there is no overtime money. He stated that because he never knew if extra time would be needed for intake until you get to the time, he couldn't notify a supervisor in advance to obtain approval. (T.

3594) He testified that he did not get compensatory time for extra hours if he didn't ask in advance; but then admits that he didn't always tell Ms. Anchando that he had worked over his schedule, "but it was obvious" even though she leaves well before him at 5:00 PM, but "not always." (T. 3608) He testified that Mr. Calderon never observed him working beyond his scheduled hours. (T. 3621)

Mr. Carrion testified that he agreed to go to Roswell on a weekend to do an Outreach. He admitted he was not required to do the weekend Outreach in Roswell. (T. 3614) He was offered compensatory time at time and a half if he agreed to do the Outreach. (T. 3603) The time did not go on the CAS. (T. 3605)

Mr. Carrion also denied that the Agency's call-in intake center had diminished the number of intakes but conceded that most calls go to call center. (T. 3606)

Mr. Carrion testified that he usually takes an hour for lunch. (T. 3615) He acknowledges that the schedule is flexible and that he comes late some days but that as long as he makes the time up everything is cool. He admitted that both Mr. Calderon and Mr. Fetzer have told him to stick to his work schedule. (T. 3616-3617)

Roland Wickendon is an Investigator in the El Paso Local Office. Ms. Anchondo has been his supervisor for 2 ½ years, and Mr. Gurany for about 5 or 6 years before that. He testified that until recently, the instructions in El Paso were that investigators on intake were supposed to interview anybody who came in. Mr. Wickendon claimed: "I don't know if we were ever told by Anchondo or Gurany but it was understood that we would continue to interview as long as there were clients to interview." (T. 3644) Only in the last month, he stated have they have been allowed to tell a prospective charging party to come back another day if they come after 4:00 PM. (T. 3443) But compare this with the testimony of Ms. Sandra Cox, infra, the most coherent

of the El Paso investigators, who offered no such testimony about having to take people who came in late.

Mr. Wickendon didn't usually work late, even on intake. (T. 3659) He also stated that on 5/8 schedule that it was more difficult for him to finish intake because his day ends at 4:30 PM rather than 5:30 PM. But, as he stated, he has only been on 5/8 schedule since October 2007 and the intake hours have been shortened recently. It is thus unclear when he claims to work beyond schedule on intake. (T. 3647) He wasn't instructed on what to do about these alleged extra hours unless they were reported ahead of time. (T. 3648) All he remembers is that the Agency couldn't pay overtime, and if you wanted compensatory time you had to request it in advance. But in intake, he complained, you didn't have an opportunity to request it in advance. (T. 3652)

Mr. Wickendon couldn't remember Mr. Gurany observing him working late nor did he remember talking to Mr. Gurany about excess work hours. (T. 3656) He also doesn't remember Ms. Anchondo witnessing him working extra hours nor does he recall ever mentioning it to her either. Mr. Gurany told him prior approval was required to work overtime. He doesn't recall telling Mr. Gurany after the fact, nor did he work over in intake (T. 3659) He took an hour for lunch but no breaks. (T. 3660)

Mr. Wickendon can't say if either Mr. Gurany or Ms. Anchondo – his two supervisors – ever witnessed him working past his schedule, nor did he ever talk to them about it. Didn't raise the topic or have a discussion about extra hours with Director Calderon either. Equally unclear is the supposed direction that he had to interview late witnesses as he could not attribute that instruction to any supervisor.

Mary Christine Bobadillo, an investigator in El Paso since 1982, testified that her supervisor was Mr. Calderon until 2005 when Ms. Anchondo became her supervisor. She started with the Agency as a clerk typist. (T. 3529) Ms. Bobadillo was very confused as to when the El Paso office became a part of the Dallas District. (T. 3531, 3536) She initially stated that sign-in sheets were located in the front of the office and that employees completed them on a "weekly" basis (T. 3542) and then they were given to the Director, who verified them, and then the payroll was based on them. On cross-examination, she clarified that the sign-in sheets were filled them out daily. (T. 3548) She testified she had no discussions with either Mr. Calderon or Ms. Anchondo about excess work hours. (T. 3543) Then Ms. Bobadillo testified that Ms. Anchondo doesn't like to give compensatory time unless it is requested in advance, but that is sometimes hard so she believes some employees just do the work and don't submit the form. (T. 3545)

Ms. Bobadillo claimed they are constantly on intake in El Paso. (T. 3549) She then stated intake rotations are twice a month for a week at a time. Ms. Bobadillo testified that her regular tour is 8:00 AM to 5:30 PM, but she sometimes works until 6:00 or 6:30 PM. She testified she was never told not to work over, then concedes she was told not to work over "but that was impossible." (T.3550) She also acknowledges communications from Mr. Esquivel directing them not to work over. And, that Ms. Anchondo has told her not to work over. (T. 3552) She testified that she "tries" to take an hour for lunch. (T. 3556) She stated that both Mr. Calderon and Ms. Anchondo observed her doing intake after hours and did not send her home or offer her overtime pay. (T. 3558, 3559) She stated that recently Director Michael Fetzer agreed to stop intake at 4:00 PM. (T. 3561) After a lengthy discussion, she admitted that it is possible to deal with people arriving in intake around 5:00 PM by getting essential information from them

and getting out by her departure time at 6:00 PM. (T. 3569-3574) It is also apparent that what she refers to as intake often amounts to telephone contacts that can be planned and her schedule modified.

With nine investigators in the El Paso office, her testimony that she is forced to work on intake two weeks out of a month, and frequently handle intake after 5 PM is incredible.

Jose Gurany is a Mediator in the El Paso Local Office. From 1998 to April 2006, he was an enforcement supervisor, and an investigator from 1991 to 1998. He testified that between 2003 and 2006, at one time or another, he supervised Investigators Frede, Hernandez, Bobadillo, Carrion, Wickendon, Cox. (T. 5345-5346) He admitted he was lenient regarding time and attendance. He didn't monitor the clock on people. (T. 5346, 5394) When he reviewed time he stated he was basically checking whether people were in or were in a leave status. He did not check on the number of hours they reported. The only way he would know that is if he checked the sign-in sheets, which he didn't do. (T. 5354) But he did check them for sick and annual leave purposes. (T. 5392-5393) He considered sign-in sheets only as reliable as what the people put on them. (T. 5355)

Mr. Gurany testified that Ms. Bobadillo worked 9:00 AM – 6:30 PM. This conflicts with her testimony that she worked 8:00 AM – 5:30 PM and would give her more time to complete intake. Union Exhibits 160-162 show Investigator Bobadillo often worked less than her 9 hours per day. Interestingly, Ms. Bobadillo often wrote "traffic" in the comment area, which is not hours of work.

Employees couldn't work over unless pre-approved which was something that Mr. Gurany learned from former Director Esquivel. (T. 5356) This information was, he stated, communicated to employees via email 2 or 3 times a year. (T. 5357) Overtime would not be

approved because there was no money for it in the budget. (T. 5357) He is unaware of his investigators working beyond their schedules; he wouldn't have allowed it if he had known. (T. 5358) He stated that maybe twice a quarter someone would notify him that they had worked over; they were asked to take the time off, within the pay period. (T. 5359) They liked to take the time off at the end of the week or beginning of the next week; Friday afternoon or Monday morning. (T. 5360) He never required one of his investigators to work over. (T. 5363)

He testified that he keeps a loose schedule as a Mediator, he flexes his 8:30 AM to 5:00 PM day. When he goes over (maybe once a month); he generally takes that time the next morning or some other time that is convenient to him. (T. 5361) He stated that Katherine Perez, his supervisor, is more worried than him that he take the time off. (T. 5362)

According to Mr. Gurany and contrary to the testimony of Mr. Carrion and Ms. Bobadillo, two investigators per week were assigned to work intake. (T. 5363-5364) Currently, he explained, there are eight investigators who work intake for one week per month. It is possible but not required or necessary for an investigator to stay late on intake. If you are approaching the end of your day, you are to ask the person to come back, or finish by mail or phone. (T. 5364-5365) All you need to do is get an intake questionnaire filled out; that was the understanding about what was needed for a minimally sufficient charge; that took 15 minutes. (T. 5365-5366; 5447) He reiterates that intake closed at 5:00 PM, and Ms. Bobadillo worked until 6:30 PM. (T. 5366)

Even if Mr. Gurany is mistaken about Ms. Bobadillo's quitting time, if she actually worked from 8:00 AM – 5:30 PM, she would still have enough time to finish if the minimum could be accomplished in 15 minutes. Also late handling of intake would only be necessary if statute of limitations was approaching for the charging party. As Mr Gurany explained, the job

of an investigator can be done within regular schedule. (T. 5370) He testified that an average day in intake is 3 to 4 people (this is close to Investigator Sandra Cox's estimate 20 to 25 per week) and he bases this on his recall of the intake logs. (T. 5373)

Mr. Gurany stated that there is no pattern to the time of day when intakes arrive. Friday afternoons may seem worse because people are anxious for the weekend. (T. 5372) He was also unaware of any instruction from Mr. Esquivel that late intake arrivals must be processed, contrary to the testimony of Ms. Bobadillo and Mr. Carrion. (T. 5376)

Investigators set up the on-sites and did them during business hours; then he describes the "task force" onsites when the whole office traveled together and worked on-sites within an 8-hour day. (T. 5368) Investigators were not required to do Outreach, or they had the option to decline; and 90 to 95% are accomplished during normal business hours. (T. 5371) Mr. Gurany stated that Director Calderon met with the investigators and agreed with them that they would not be required to do Outreach and could avoid it without negative consequences. (T. 5372, 5440) Mr. Calderon was Director from 2000 to 2007.

Regarding the class action lawsuit by six of the El Paso investigators, the finding of the judge was that this was a set of investigators who would complain about any and everything, and that they had no basis for any of the complaints. No discrimination was found. (T. 5459)

Like the U. S. District Judge, Mr. Gurany had a low opinion of the employees he supervised. He stated that Investigator Carl Frede had a poor work ethic. (T. 5352) Investigators Bobadillo and Carrion were, he stated, "completely disloyal."

Sandra Cox has been an investigator in El Paso since 2002. Her first supervisor was Mr. Gurany. She was not sure how long Ms. Anchondo has been her supervisor. It was since Calderon left. (T. 3662) She stated that Ms. Anchondo told her to put only her scheduled hours

on the sign in sheets. (T. 3667) She claims Ms. Anchondo told her that rather than putting irregular hours, just put your correct times; e.g. if she arrived five minutes early and left five minutes late, just put the regular time. (T. 3668) She gave further clarification of the instructions received from Ms. Anchondo by testifying they were told not to vary their work schedule and, rather than confuse the issue, just put their regular times if its just a small variance. (T. 3670) Her hours were 8:30 AM to 6:00 PM. (T. 3669) Ms. Cox said she had no discussions of excess hours with Mr. Gurany or Ms. Anchondo. (T. 3671) But she testified that investigators were told not to work over schedules, but if they did, it would be for compensatory time and not overtime. She is not sure when she heard that. (T. 3672) She doesn't put extra hours on the cost accounting sheet because "technically" they are not supposed to work over 40 hours unless we get it approved in advance. (T. 3675) She does intake every day; there are several forms of intake. (T. 3675) She testified that one week out of every four or five weeks they do walk-in intake. (T. 3676-3677) This contradicts the exaggerated claims of Mr. Carrion and Ms. Bobadillo that they do intake for two weeks per month, and is consistent with that of Mr. Gurany.

Ms. Cox stated she has not received any instructions about what to do with intakes that come at the end of the day. (T. 3678) Again, this is a contradiction to the testimony of Mr. Carrion and Ms. Bobadillo, who claimed they were told they had to take people late. She admits that her supervisors probably have not observed her doing intake beyond her scheduled hours. (T. 3678) Intake until recently ended at 5:00 PM, and she worked until 6:00 PM, so she didn't usually have trouble finishing intake by the end of her work day. (T. 3679)

Ms. Cox testified was not surprised by the email from Director Fetzer saying work only your 40 hours, but she is not sure that she saw it. (T. 3679) After a series of improper and

leading questions from the Union Representative, Ms. Cox testified that if they got emails they would have said something like work your 40 hours because overtime is not permitted. (T. 3680) She testified that she was assigned maybe 10 or 12 cases per month (T. 3681), which is far fewer than the workload estimated by Mr. Carrion and Ms. Bobadillo. Ms. Cox estimated that they take 20 to 25 charges during the weeks they are on intake. (T. 3682) She stated that sometimes she takes no lunch, sometimes a half hour, sometimes an hour. (T. 3683) She did not say whether her supervisors knew about working through lunch.

Ms. Cox is a significant witness in evaluating what has happened in El Paso because, coupled with Mr. Gurany, she contradicts wild exaggerations of her colleagues. As to the question of credibility, the question is whether to accept the testimony of Ms. Cox and Mr. Gurany (and the U. S. District Judge who adjudicated the complaints of Mr. Carrion and Ms. Bobadillo) or are their plainly overblown claims to be accepted.

Mr. Carrion's testimony appears not to be credible on its face, but even if accepted, because he testified he was on a flexible schedule, the extra hours he worked were credit hours. Because he indisputably admits his extra hours were not officially ordered in advance (he never even discussed the issue with his supervisors), he cannot have a claim for overtime pay.

HOUSTON

Elaine Weintritt, an Investigator in the Houston District Office, testified she worked extra hours to store so that she could take time off to spend with her coming granddaughter. (T. 3874-3875) This was in reference to Union Exhibit 83. Joseph de Leon, her supervisor at the time, knew what she was doing and approved it. She worked for the comp time for when the baby arrived. (T. 3876) She didn't use the comp time request forms often (Union Exhibit 83 at A2, A3, B2 and B3) and she got them from Ms. Janet Saindon. (T. 3884) Ms. Weintritt took an

hour for lunch. (T. 3890) She was trying to get the work done by the end of the fiscal year and contribute to office goals. This also contributed more compensatory time for when her granddaughter was born. (T. 3885, 3890-3893)

Joseph de Leon, a supervisor in the Houston District Office since 1994, was a long time investigator and union steward before becoming a supervisor. In Houston, time and attendance is an honor system. No time sheets have been used for quite some time and he doesn't monitor his employees hours of work. (T. 5463, 5465) He was supervising Investigators Almaguer, Bautista, Chan, Casteneda, Ellis, McElroy, Heen, Vigil, Wilkerson and Gomez. (T. 5466) Investigators Almaguer, Ellis, Gomez (in part) and Wilkerson worked 5/8 schedules. (T. 5475) Mr. de Leon testified he never told employees not to report or record extra hours; and he has never seen any extra hours recorded. (T. 5473) If investigators were going to work over, he stated they would have to apply for compensatory time. They do this very rarely because it only takes 40 hours to do the job. (T. 5474) He would move cases around to balance investigator inventories and he could not recall any employee telling him they lacked the time to get their work done. (T. 5481) He is also unaware of investigators working beyond their hours without his authorization. If an investigator told him that she or he worked late, e.g., calling a witness, he would tell the investigator to come in late or leave early the next day. (T. 5482, 5484) The investigators work varying schedules and they determine their start time. He stated he is flexible, if they vary it. (T. 5478) In Houston walk-ins intakes are accepted in the morning until 10 AM and after that it's by appointment. There are appointments at 1:00 PM and 3:00 PM. Mr. de Leon tries to get investigators on intake to take lunch between Noon and 1:00 PM. (T. 5485) It is very rare for intake to require an investigator to work late. (T. 5486) Investigators work 5/8 when on intake. There are no walk-ins taken after 10 AM, just the appointments. (T. 5487)

Only a few investigators reporting to him like to do Outreach. They are not required to do it. Investigator Olga Casteneda got rated outstanding and she didn't do any Outreach. (T. 5488) Investigator Sharon McElroy also got an outstanding without doing Outreach. (T. 5497) Mr. de Leon explained that Mr. Joseph Bontke, the program analyst, asks for Outreach volunteers via email. (T. 5490) He also stated that he supervised Investigator Samantha Chan for the last couple of years. She was specifically assigned to do Outreach for 6 months with little other inventory. (T. 5495)

Mr. de Leon testified he is particularly flexible with Investigator Ray Bautista's schedule because of his impairment. (T. 5492-5494) Mr. Bautista specifically requested compensatory time because he was trying to accumulate extra hours of leave. (T. 5525-5528) The Director was allowing Mr. Bautista to accumulate extra time because he was going to New York to pick up a seeing eye dog. It was also related to his transportation schedule and intake. Houston has had times when overtime money was available. They let employees know when money was available. (T. 5535) When they would let people know money was available, they could put in for the overtime work. (T. 5480) Employees are given compensatory time, he explained, because they ask for comp time. (T. 5537)

Nick Alwine became a supervisor in the Houston District Office in October 2006. He was an investigator for a long time and also a union steward. In 1999-2000 he supervised the intake function. (T. 5558) When he looks at CAS, he is looking to see that there is a leave slip for any time not worked. (T. 5560, 5570) He testified that he supervises the following investigators: Investigator Roland Castex who works 5/8 slide and glide; Investigator Steven Damiani who works a 4/10 from 7:00 AM to 5:30 PM; Investigator Gabriel Cervantes, a 5/8 who works from 7:00 AM to 3:30 PM; Investigator Ronnie Ramirez who also works a 5/8 but from

9:00 AM to 5:30 PM; Investigator Deanna Brooks-Torres works a 5/4/9 from 8:00 AM to 5:30 PM; Investigator David Liggins works a 5/4/9 from 7:00 AM to 4:30 PM; Investigator Katherine Jager works a 5/8 from 8:00 AM to 4:30 PM; and Investigator Marina Guerra works a 5/4/9 schedule from 7:00 AM to 4:30 PM. (T. 5561, 5589) Investigators Castex, Cervantes and Ramirez are on slide and glide. (T. 5594)

Mr. Alwine testified that employees are allowed to come in with 15 minutes variance; slide and glides can vary their start times; they pick their schedules and start times. (T. 5568) Mr. Alwine works from 6:20 AM to 4:30 PM every day; and takes public transportation. He is cognizant of how closely people keep to their schedules because he can see and hear them all from his office. (T. 5572) He is only aware of people working outside their schedules with an onsite or Outreach. (T. 5572)

If they volunteer for an Outreach outside their working schedules, he tries to get them to take compensatory time within the pay period. (T. 5572) Most Outreach is done during business hours; maybe a half dozen for all his subordinates in the year and a half that he has been a supervisor were outside the work hours. (T. 5573) Outreach Manager, Joe Bonke would send around an email looking for volunteers and only a small percentage were outside working hours. (T. 5575) Investigator Roland Castex was rated outstanding without doing any outreach. (T. 5583)

Since he has been a supervisor, Mr. Alwine has had no occasions where his employees have recorded or worked more than 40 hours in a work week or 80 hours in a pay period. (T. 5575) Overtime has to be approved in advance; he's conveyed this to his investigators and it has been brought up in staff meetings by current Houston Director R. J. Ruff. (T. 5576) Investigators can get the job done in 40 hour work week; nobody has ever complained to him

about workload. (T. 5577) Mr. Alwine doesn't recall any instances of his subordinates working beyond their schedules, but concedes that it could happen on intake; but it's unlikely since the last appointments are taken at 3:00 PM. (T. 5579)

Investigators do intake in Houston for a week every seven weeks and there are five investigators on intake at any given time. (T. 5584) Intake is from 8:00 AM to 5:00 PM and they don't do any other work; walk-ins from 8:00 AM to 10:30 AM and appointments in the afternoon at 1:00 and 3:00 PM. (T. 5587) They would take the charge if a person came in late but was at the jurisdictional time limit; completing the charge intake form is sufficient for meeting the time limit for filing a charge. (T. 5590) But he is unaware of any such situations since he has been a supervisor. (T. 5604)

Samantha Chan has been an investigator in the Houston District Office since 1999. Her current supervisor is Mr. de Leon. Ms. Mona Read was her previous supervisor, and Ms. Ethel Bush was before her. (T. 3801) Ms. Chan testified, incorrectly, that the cost accounting sheet was used since she was hired. (T. 3606) She stated that Ms. Lucia Pan filled out Union Exhibit 79B for her stated that it is not in her handwriting. (T. 3809) After a leading question and after she was shown Union Exhibit 82B, she claims to remember that Union Exhibit 79B relates to a conference which was held outside of regular hours. (T. 3813-3814) Ms. Chan testified that they normally don't register compensatory time on the cost accounting sheet; but it is reflected on the earnings and leave statement. (T. 3817); it is the same for any extra hours. (T. 3818) She stated that management told them there was no money for overtime. (T. 3820) Ms. Chan did not have to do that particular Outreach. (T. 3822) It was voluntary. She then testified that most of the Outreach was done after hours and on weekends. (T. 3823) Not only was that contradictory to testimony of others, but she offered only a single example of one Outreach on a Sunday

lasting two hours. Ms. Chan admitted there is Outreach during the workday. (T. 3825) And she admitted that any Outreach work or other work outside regular schedule had to be approved in advance. (T. 3825)

Laverne Morrison testified that she has been employed with the Commission in its Houston District Office since September 1978. (T. 3829-3830) She testified that she has been a mediator since March of 1999. (T. 3830-3831) Ms. Morrison was called by the Union to testify as to Union Exhibit 81.

Ms. Morrison testified that on August 20, 2004 she attended mediator training in Austin, Texas. (T. 3838) She testified that she located this training on her own, she drove herself to the training, she registered and paid for the training herself and made all of the arrangements herself. (T. 3847-3848) She also admitted that the Commission did not reimburse her for the course or pay for her travel. (T. 3848) When she asked her supervisor, Ms. Urbanski, whether she could take another day off because she would be doing this training on her day off, Ms. Urbanski agreed. (T. 3849-3850)[53] Ms. Morrison also testified, though, that whether Ms. Urbanski had agreed or not, she was going to attend the training on that day. (T. 3860-3861) There was nothing that Ms. Urbanski could have done to prevent that because it was Ms. Morrison's day off. (T. 5173-5174) As the Union's representative indicated on recross-examination of Ms. Urbanski: it was Ms. Morrison's day off and she can do whatever she wants with her day off. (T. 5122)

[53] Ms. Morrison testified that she "most likely" asked Ms. Urbanski for another day off prior to attending this training. (T. 3855, 3861) Ms. Urbanski testified that Ms. Morrison only asked her for another day off after she had attended the training. (T. 5123) Union Exhibit 81 doesn't help resolve this controversy because it appears that Ms. Urbanski signed it before Ms. Morrison did and it is not evident that the document included Ms. Morrison's handwritten portion relating to the training at the time at the time that Ms. Urbanski signed the form the day before Ms. Morrison. Ms. Urbanski testified that Ms. Morrison only asked her for another day off after she had attended the training. (T. 5123) But the controversy is of no consequence because, whether Ms. Urbanski agreed to provide Ms. Morrison an extra day off the day before the training or, as she recalls, only after the training, does not convert Ms. Morrison's private initiative to "work" for the Commission.

The Union apparently will contend that Ms. Urbanski's decision to provide Ms. Morrison with another day off operates to convert what otherwise was an entirely private set of decisions by Ms. Morrison into "work" for which she had to be compensated. This argument falls under the heading of "no good deed goes unpunished." Ms. Morrison admitted she made all of the arrangements for this training herself, paid for it herself and traveled for the training at her own expense. (T. 3847-3850) Ms. Morrison's unilateral decisions to attend, pay for and travel to this training were not ordered or directed in any way by the Commission. And, as Ms. Morrison herself admitted, the Commission was powerless to prevent her from following through on her plan whether it gave her another day off or not. (T. 3858-3859) Ms. Urbanski's beneficence in awarding Ms. Morrison an extra day off does not operate to convert Ms. Morrison's purely personal plan to attend training to "work" for the Commission.

Ms. Morrison, like Ms. Smith, also exaggerated her workload claiming that she mediated over 200 cases per year. This is significantly more than the 100 cases per year that Ms. Urbanski testified that Houston District Mediators typically mediate. (T. 5035) Ms. Morrison's significant exaggeration of her workload significantly undermines Ms. Morrison's credibility.

Deborah Urbanski has been employed with the Commission in its Houston District Office since March 1, 1999. (T. 5104) She has been the ADR Coordinator for the Houston District since that date. (T. 5107) Between March 2004 and January 2006 repositioning Ms. Urbanski also served as the ADR Coordinator for the Dallas District including the Oklahoma Area Office. (Id.) Ms. Urbanski has supervised the mediation program in the New Orleans Field Office since January 2006 repositioning. (T. 5106-5107)[54]

Ms. Urbanski testified that all of the Houston-based Mediators she supervised worked slide-and-glide schedules until sometime Mediator LaVerne Morrison switched to a 5/4/9 compressed

schedule. (T. 5114-5116)[55] Ms. Urbanski testified that she never had occasion to observe Mediators in the Houston District work beyond their regularly scheduled hours but that she had learned, after the fact, that some did so on occasion. (T. 5119-5120) She stated that she had been told of such occurrences on "the next day a couple of times. Rarely." (T. 5119-5120)

Ms. Urbanski testified that these rare decisions to stay beyond scheduled hours were the Mediators decisions to try and complete a mediation. (T. 5120-5121, 5124-5125) She also indicated that she had had similar experiences during the time she supervised the Dallas Mediators. (T. 5121-5122) When asked to quantify how frequently the Dallas-based Mediators reported to her, after the fact, that they had worked beyond schedule, Ms. Urbanski responded:

> Probably under five times. Never with John Ross, a couple of times with Gloria [Smith], and maybe two or three times with Jackie Levermore.

(T. 5122) Ms. Urbanski, on cross-examination, was asked again how frequently Mediators under her supervision worked beyond their schedules and she responded:

> I never know when its going to happen, and the mediators never know when its going to happen. You know, they work over schedule. It's very rare and I always give them time the next day.

(T. 5149-5150) Mr. Urbanski repeated that characterization of these occurrences saying again that "it's very rare" just two questions later. (T. 5150) Further, she explained that mediators have the option to continue a mediation to another day rather than working beyond schedule. (T. 5124-5125)

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54 No Mediators from New Orleans were called as witnesses by the Union at the hearing.

55 Ms. Urbanski dated Ms. Morrison's switch to the 5/4/9 schedule to some time after Michael Fetzer arrived (which was in January 2004) or "about 2005." (T. 5114-515) It would appear, however, from Union Exhibit 81 that Ms. Morrison had changed her schedule by August 2004. Ms. Urbanski admitted as much on cross-examination. (T. 5156-5157)

There is little evidence employees in the Houston District Office work extra hours and on the rare occasion they did, they took time off with pay the next day. Further, any extra hours worked would be credit hours, not paid overtime, since they are all on flexible schedules. There is also no evidence that supervisors in the Houston District Office permitted employees to work extra hours without compensation.

CHARLOTTE

Sandra Chavez, an investigator in Charlotte for the last three years, testified that Mr. Melvin Hardy was her supervisor for most of the time, although Ms. Gloria Barnett supervised her initial and briefly. (T. 6134-6135) Ms. Chavez worked a 5/8 schedule until the Spring of 2006 (T. 6154) and then went to a 5/4/9 schedule. (T. 6136) She testified that she was on intake every fourth or fifth week. They take charges from 8:30 AM to 3:00 PM. If the potential charging party arrives at the office after 3:00 PM (T. 6139), he is told to fill out the questionnaire, leave it, and come back the next day, and then they resume again. (T. 6138-6139 and 6156-6157) They have two hours to finish up any charges after the doors close and before the intake day ends. She stated that Ms. Barnett told her to put compensatory time under other leave since there was not block of it. (T. 6143) In testimony regarding Union Exhibit 107, Ms. Chavez explained that the numbers under other leave where 10 hours is shown, refer to federal holidays. (T. 6158-6162) She first says she keeps track of compensatory time in her head or with notes (T. 6143), but then talks about e-mails later. (T. 6163) It is unclear from her testimony whether the two Outreach events she attended where outside of her tour of duty or not. (T. 6151-6152) They do Outreach during the day too; TAPS is during the day; they have a

choice regarding the Outreach that they do; and she agrees that she could accomplish the outreach goals during normal business hours. (T. 6165-6166)

Ms. Chavez testified she rarely takes lunch but never required to work through lunch; she never reported to her managers that she worked thru lunch and they were not aware of it. (T. 6155) Mr. Hardy and Ms. Barnett worked on the other side of the office. (T. 6174) When employees worked extra time, they were told that they had to get approval in advance if they were going to work over; they were also asked to take it within the week or pay period, and they got all the time back. (T. 6164) Mr. Hardy and Ms. Barnett have both reminded her to work her regular hours. (T. 6166) Ms. Chavez testified she was not offered money for extra hours reflected on Union Exhibit 107 but was given compensatory time. (T. 6169, 6171) As to Union Exhibit 107 at 1 Ms. Chavez testified that she was working a 5/8 schedule so 12/30/05, where she indicates compensatory time, was a normal day of work for her. (T. 6177)

There is no evidence of "suffered and permitted" overtime here. Ms. Chavez's supervisors were unaware because she didn't tell them and if she did it wasn't much time. She was told to take it right away. She's a 5/8 until the last page of Union Exhibit 107. There is no showing that the "other leave used" was from compensatory time and, indeed, most of these days are federal holidays. In other instances, she could not authenticate comments on the documents.

Melvin Hardy, is a Supervisory Investigator in the Charlotte District Office. Mr. Hardy testified that he has been a supervisor since April 2006. Prior to that, he was an Investigator for twenty-five years. (T. 7127) His official hours are 8:30 AM to 5:00 PM, but he stays until 6:00 or 7:00 PM. He testified that only the cleaning people are around when he leaves in the evening. (T. 7132, 7174) Mr. Hardy testified that he supervises Investigator Vicky Mackey (5/8; 7:30 AM to 4:00 PM), Investigator Tansell Ezell (5/8; 8:30 AM to 5:00 PM), Investigator Orma Buie

(5/8; 7:30 AM to 4:00 PM), Investigator Melinda Carabello (5/4/9; 7:30 AM to 5:00 PM), Investigator Sandra Chavez (5/4/9; 7:30 AM to 5:00 PM), Investigator Clarence Manual (5/8; 7:30 AM to 4:00 PM), and Jose Sanchez (new employee). (T. 7128) Employees picked their schedules and they are permitted to alter their start and finish times, but rarely do. (T. 7131) Mr. Hardy testified that his only role concerning time and attendance is signing leave slips. He does nothing else. (T. 7133) Mr. Hardy knows the time his employees keep because he circulates in the morning and the evening; Ms. Carabello and Ms. Chavez say goodbye on their way out in the evening. (T. 7133-7134) He stated he is unaware of his employees working outside their schedule; Ezell sometimes tells him she is running late and Ms. Chavez once told him she missed lunch and she took that time the same day.

When he was an investigator from 2000 to 2006 he did not work outside his scheduled hours except the rare circumstance of a late call about which he would tell his supervisor and get the compensatory time. (T. 7137) Investigators can do their job within their regular schedules, and they have been told by Charlotte Director Reuben Daniels not to work overtime. (T. 7138) An on-site might run over by 30 minutes or an hour; that has happened maybe once since he's been a supervisor. Investigators do an on-site plan that contemplates getting the job done in their regular day, which he reviews and approves in advance. (T. 7139) Mr. Hardy he is unaware of any outreach by his investigators outside work hours. He has never required anyone to work overtime. (T. 7141) Mr. Hardy explained that if someone arrived late in the day for intake, they were asked to come back the next day, and he never had the situation where someone showed up late for intake on the last day for filing. (T. 7164, 7166) Mr. Hardy reiterated that he is unaware of Charlotte investigators working beyond their scheduled hours; and that he was unaware of any compensatory leave balance existing for Chavez. (T. 7173)

Greensboro

Peggy Saunders (by telephone) is an IT Specialist and union steward in Greensboro. She has kept time in Greensboro for investigators since 1992. Ms. Saunders testified that before the CAS came into effect, if anyone worked "excess hours" beyond their normal schedule, it would be done "off the books." (T. 6230) She said she'd keep a slip of paper with extra hours and if an employee who had earned comp time took off, she'd change the number on the paper. She said that after CAS came into effect, it would be kept there, in FPPS. (T. 6234) She testified inconsistently that extra time would be kept in the FPPS, but also testified that she does not recall any instance where more than the tour of duty was ever given to her on the CAS. (T. 6240) This testimony is consistent with the later testimony of both Jannes James and David Kingsberry that they rarely if ever reported working any time over their schedules. She also testified that if an employee worked their usual AWS day, she would not record it into FPPS because it was understood that that employee would substitute another day of the week for that AWS day. (T. 6246)

David Kingsberry, an investigator in Greensboro, testified that he has been an investigator since the time that office opened. Mr. Kingsberry's was apparently summoned to testify regarding Union Exhibit 117. It showed a completely regular 5/4/9 schedule for the entirety of the period covered by the exhibit: 10/16/04 through 4/29/06. The only irregularities, if they can be called that, is in "other leave used." An examination of those few instances shows that they were mostly federal holidays. (MLK day, New Year's, Christmas, Columbus Day, etc.) Investigator Kingsberry indicated vaguely in response to questioning about "excess hours of

work outside of" his scheduled work hours, that they are to be recorded on a separate sheet, but that he had no discussion with his supervisors about any excess hours. (T.6375) There is no proof that Kingsberry ever worked overtime where his supervisors knew about it. His testimony was so sparse as to working any overtime that there was no cross-examination.

Jannes James is an investigator in Greensboro. She has been an investigator in Greensboro since 1996. She testified that she works for Mr. Jose Rosenberg now, but prior to that worked for Ms. Gloria Barnett, Mr. Thomas Colclough, and that Mr. David Kingsberry on occasion was acting supervisor. (T. 6389) Ms. Barnett worked physically in Charlotte. (T. 6391) At the time of testimony, there were five investigators in Greensboro, but there were times when there were only two. Although in response to a question about extra hours over her schedule, Ms. James responded that she indeed worked such hours, she provided no detail on that, or on how many or how often. One Exhibit was introduced to support her claim. That was Union Exhibit 116, consisting of CASs for the period of pay periods ending 10/16/04 through pay periods ending 4/29/06. During the early part of that period, Ms. James supervisor was not regularly present in the office and thus wasn't in a position to know if she worked extra hours. (T. 6403). For her part, Exhibit 116 showed only that three times, twice in PP ending 3/18/06 (two hours and one hour), and once in PP ending 4/1/06 (two hours), in which Ms. James reflected additional time over her work schedule. While she testified that she had at some point been told not to reflect additional time on her CAS, she also stated that she did in fact do it. (T. 6405) Further, she admitted that she never complained about not being compensated for overtime to any of her supervisors. Further, she agreed that her schedule ended at 5:00 PM, whereas one supervisor's, Mr. Colclough's, ended between 4:00 and 4:30 PM, and that if she worked past her normal work schedule, Mr. Colclough would be gone before she worked over,

(T. 6409), and hence, presumably wouldn't know about it. In short, there was no evidence that Ms. James put in anything over a de minimis amount of extra time over her schedule, if any at all, that would have been known to her supervisors in advance.

Thomas Colclough is currently the Director in Raleigh, but was the acting director in Greensboro from February 2005 through August 2005. He then became the permanent Director until September 2006. (T. 6437) He was physically present in the office during that time. While in Greensboro, he reported to District Director Reuben Daniels first and then to Ms. Gloria Barnett. (T. 6441-42). Greensboro is subordinate to Charlotte, the District Office. Mr. Colclough identified Union Exhibit 154 as "documents our office [Raleigh] uses when someone requests compensatory time." (T. 6450) He testified specifically that he gave one investigator who worked extra time during an on-site compensatory time because "the individual requested compensatory time." (T. 6455) Although Mr. Colclough admitted that he did not offer overtime money to investigators whose names were on Union Exhibit 154, he maintained that they each requested compensatory time. (e.g., T. 6467) Union Exhibit 154 shows "credit time" for Investigators Johnnie Barrett (7 hours, 1 ½ hours), Evelyn Lewis (1 ½ hours), J. Morales – amount not clear from documentation – appears to be 1, 2, and 3earned, and .5 and 5 used). Mr. Colclough also testified regarding Union Exhibit 116 involving Jannes James, mentioned above. Mr. Colclough testified that if Ms. James were to work "hours over an above her scheduled tour of duty" (T. 6481) that she should have recorded them on FPPS. (Id.) He also testified that in all the time he supervised James he was aware that she worked only two hours beyond her schedule and for that she would have received comp time. (T. 6485)

On the Agency's cross-examination, Colclough clarified that when he was in Greensboro, Union witness David Kingsberry to his knowledge worked only one time – for three hours –

outside of his normal work schedule. (T. 6504) That one occasion was a voluntary Outreach event called Eliminating Racism in the Workplace and Mr. Kingsberry's participation was completely voluntary – he had no obligation to do it, and he did it when the staff was informed generally of that opportunity. (T. 6504-6505) Mr. Kingsberry received compensatory time for it. He never requested overtime pay. (Id.) Mr. Colclough's normal workday ended at 3:30 PM, while both Ms. James's and Mr. Kingsberry's ended later, so he (Mr. Colclough) would not have known, unless he was informed, that either one worked late. (T. 6506) Furthermore, Colclough made it clear at staff meetings that everyone was expected to "work their normal time." (Id.) Neither Ms. Peggy Saunders (the Union steward), Ms. James, nor Mr. Kingsberry ever complained about not getting overtime pay. (T. 6509) Mr. Colclough also said that, in Raleigh, the practice of one of the directors, Mr. Walls, was to give time-and-a-half comp time when an employee put in more than that person's normal work time. (T. 6526)[56] Further, Colclough testified that as to a lot of the Outreach referenced in Raleigh, it was completely voluntary. (T. 6527)

MEMPHIS

Linda Hudson, an OAA and Timekeeper in Memphis, testified telephonically at the Union's request. She was unable to authenticate Union Exhibit 119 although that was the apparent purpose for her testimony. With respect to Union Exhibit 120, Ms. Hudson would only admit that she recognized the form of the document and to dealing with the individuals named in the document. She could not verify the information contained in the document. Throughout her testimony, she claimed a lack of memory. (T. 6325-6333) Her testimony thus establishing nothing at all.

[56] In hindsight, this point came at some cost, as it involved using a thick union exhibit, U-112 not at that point introduced. This Exhibit showed that there were extensive compensatory leave records in Raleigh.

Irma Boyce, Mediator in the Memphis District Office testified that Robert Stevenson was her first supervisor in Memphis when she became a Mediator in 1999. (T. 6251) She stated that Memphis Director Kathi Kores was her supervisor for about six months during 2007. Following Ms. Kores, Mr. Ted Lamb became, and remains now, her supervisor. (T. 6272) Ms. Boyce was summoned by the Union to testify regarding records, Union Exhibit 118, applicable only to March 2003 which is not within the time period covered by the this proceeding. Ms. Boyce was even unclear as to her hours during the period covered by the exhibit. (T. 6270) She testified:

> "Q. And putting aside Union 118, since that time, you haven't had much cause to work outside your schedule; isn't that right? A. Well, usually we just don't -- we work through lunch most of the time, you know, and we might take it later, or sometimes we don't take it. Q. And when you do work through lunch, Mr. Lamb has told you that you should leave an hour early, hasn't he? A. Yes."

(T. 6276)

Ms. Boyce testified that most mediations take less than three hours, (T. 6275), and to her view that closing 8 to 10 mediations is a lot. (T. 6274) But she also explained that because Mr. Lamb, her supervisor is in Little Rock (T. 6282), he would not know she was working extra hours unless she told him, and that hasn't happened. (T. 6272) Ms. Kores was on another floor (T. 6282); and Ms. Boyce did not inform her of extra hours worked. (T. 6273)

Ms. Boyce testified that at times she worked extra time, it was for compensatory time, and she was told to use it in the same pay period.

This Mediator plainly has not had occasion to work significant extra time, if any, and her testimony makes it quite clear that if she did, it was not with the prior knowledge or approval of her supervisors. Further, because she used the compensatory time earned in the same pay period,

she would not have worked more than 80 hours in the pay period so would not be entitled to compensation for suffered and permitted work.

Audrey Bonner, an Enforcement Manager and former enforcement supervisor in Memphis, testified that she supervises Investigators Paul Earnst, Edmond Sims, Eloise Freeman, Margie Toson, Dwight Johnson and Brenda Johnson. (T. 7501) Ms. Bonner stated that her regular hours are 7:00 AM to 3:30 PM but she frequently works as late as 6:00 PM. (T. 7503) She testified that Mr. Earnst and Mr. Sims work 7:00 AM -5:30 PM; Ms. Freeman and Ms. Brenda Johnson work from 6:00 AM - 4:30 PM; Ms. Toson from 7:00 AM -3:30 PM; and Mr. Dwight Johnson works a 9:00 AM -5:30 PM schedule. (T. 7504, 7546-50) However, she also explained that they vary their start times and that time and attendance is on the honor system. (T. 7505, 7544)

Ms. Bonner stated that she is unaware of her subordinates daily comings and goings because she does not sit near them. (T. 7508, 7538) She stated that she is unaware that any employees arrive early and only knows if they stay late when they tell her after the fact. In such cases she gives them "credit time." (T. 7508-7509) The term "credit time" is generally used in Memphis whether or not employees are on flexible schedules. (T. 7560) But, as indicated above, most of Ms. Bonner's investigators are on flexible or maxiflex schedules. (T. 7504; 7546-50) When her investigators do earn "credit time" they are expected to use the time in the same pay period. But earning of "credit time" hasn't happened in the last year and, before that, less than once a month for anyone she supervised. (T. 7512) She explained that if an employee says: "I need to work late," I will tell them, "No, you can't work late," or something to that effect. (T. 7552) She stated that investigators in Memphis don't work extra hours and they adhere assiduously to their schedules.

Ms. Bonner did acknowledge that she has had to tell Ms. Freeman – a new and conscientious investigator – to go home on three or four occasions recently. (T. 7510)

Intake in the Memphis District Office is open between the hours of 8:00 AM and 2:30 PM. They have a posting that tells the prospective charging parties that the Intake Office breaks for lunch, so the investigators know that they're responsible for taking their lunch. Intake stops interviewing walk-in charging parties at 2:30 PM. (T. 7513) There are three investigators in intake at a time and they rotate into intake about once every four or five weeks. Intake can last anywhere from 5 minutes to an hour or two but an hour is the average. (T. 7515, 7569) Ms. Bonner also offered alternatives to taking a charge in person to avoid having to work extra time. (T. 7517) But, the hours of intake operation, combined with the typical length of time needed and the investigators' schedules indicate that working extra time on intake is just not a problem in Memphis.

Ms. Bonner also explained that some investigators do on-sites, while others don't. She estimated that her investigators conducted approximately six or eight on-sites per year. On-sites take a half to a whole day including travel time. Ms. Bonner could not recall her employees doing an on-site that went beyond their schedule. (T. 7519 7520)

Ms. Bonner testified that the Job Corps Outreach conducted in November 2007 was conducted during business hours – less than the whole day – and some of the newer investigators participated. Investigator Brenda Johnson did two other outreaches. Ms, Bonner stated that Ms. Johnson initiated these outreach events and specifically asked for compensatory or credit time. (T. 7522-7524)

No Memphis investigators were summoned by the Union to testify.

Little Rock

Wanda Milton is the Director in Little Rock. She was appointed Director in December 1996 and presently she works under the supervision of Memphis District Director Kores. (T. 6588-6589) During the time she has been a supervisor, Ms. Milton has supervised employees who have worked outside of their normal business hours. (T. 6597) She testified that she offered investigators the opportunity to request overtime pay. (T. 6597-6598) She testified that investigators each complete a CAS each pay period and are to put the hours they work in the appropriate row. In response to the Union's question, she testified "yes" when asked if extra hours worked beyond the schedule are to be recorded. (T. 6600) She also said that prior to using the CAS form, the hours were kept "informally." (Id.) The Union sought testimony from Ms. Milton regarding Union Exhibit 121 (T. 6606-6629). That document reflected credit or compensatory hours earned and used by employees in Little Rock. Specifically, the Union referred Ms. Milton to Investigators Jordan, Myers, and De Quiroga. (T. 6629)[57] Union Exhibit 121 reflects seven instances over a month and a half in 2003 where Investigator De Quiroga worked for compensatory time, totaling 9 hours and 45 minutes. It also reflects that she used this time shortly after earning it. (Union Exhibit 121C) As to Investigator Myers, the instances of extra time reflected were largely prior to the relevant time period in this proceeding and Investigator Myers was, like many in Little Rock, on a flexible schedule so would have earned "credit hours" and not overtime pay for any extra time which was proven to be "suffered and permitted." (T. 6616) Union Exhibit 121 shows only that Investigator Myers claimed credit time on seven occasions over a seven month period starting January 2003 (prior to the relevant time period) which totaled approximately 26 hours. She also used it regularly. (Union Exhibit 121B) Lastly, Union Exhibit 121 indicates that Investigator Gloria Jordan earned credit time

on nine occasions over four month period in 2003 totaling 27 hours, and that she also regularly used these hours. (Union Exhibit 121A)

The Union Representative also referred Ms. Milton to Union Exhibit 123, a sign-in/sign-out sheet for 20 days in 2005. In addition to the sign-in/sign-out times, it also shows the schedules of the Little Rock employees. Of the twelve employees listed, seven were on flexible schedules: Investigators DeGuire, Dudash, Fier, Glover, Lennox, Mitchem and Myers. Union Exhibit 123 indicates that there were occasional days when investigators worked over and some where they worked under their schedules. The most that is shown is 3 hours, 25 minutes over for Investigator Riley on 4/9/05. On the other hand, the exhibit also reflects that Investigator Riley worked 1 hour 25 minutes short on 4/8/05. Most of the discrepancies with the schedules are no more than a half-hour over. The Union Representative referred next to Union Exhibit 125, a collection of sign-in/sign-out sheets for nine days in 2004 for 13 investigators. Seven are flexible schedule employees. Like Union Exhibit 123, Union Exhibit 125 reflects minor discrepancies with the official schedules of the employees. It also shows all using minor amounts of "CT" to shorten the length of their workdays, e.g., Investigator Riley apparently left several hours early on 2/3 and then again on 2/4, noting "CT."[58]

For her part, Ms. Milton testified in effect that she didn't rely upon the sign-in/sign-out sheets to do time and attendance. (T. 6668-6671) She stated: "The investigators I supervised were professional employees. If they worked less than their time, they brought me a leave slip. If they worked more than their scheduled hours, they brought me a comp/credit sheet." (T. 6647) Director Milton, in effect, said she relied upon self-reporting by the investigators about

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[57] All of the hours are outside of the relevant time periods.

[58] As to these sign-in/sign-out sheets, there is a place for the signature of the AM supervisor (Milton in most cases) and a PM supervisor. A few are signed by both, most are signed by one or the other, and some are not signed at all by a supervisor.

their entitlement to comp time. Milton also testified that she had herself developed a form that actually gave the investigator who filled it out an opportunity to choose between paid overtime and compensatory time. (T. 6650) She said that she instituted the form during the time she was an enforcement supervisor (T. 6651), so that puts the beginning of the use of the form at a point in time prior to 2003.

Ms. Milton testified generally as to the reasons listed on Exhibit U-121 for compensatory time. As to working on case processing, Ms. Milton testified that there were alternatives for investigators working beyond or over schedule. They could ask to have work reassigned or put it off until the next day or later. She testified that she "never" required any individuals to stay late to work on their cases. (T. 6673)

As for Outreach, Ms. Milton testified that Outreach outside of work hours is "purely voluntary. (T. 6674, 6676) She also testified that Outreach in 2003 had no effect on an investigator's evaluation. (T. 6675) and that thereafter "[i]t's never impacted their evaluation negatively." (Id.)

Nashville

Sarah L. Smith has been Nashville Area Office Director since 1998. Between 2003 and 2006, she directly supervised investigators in her office and now only supervises two supervisors. (T. 7585) She stated that there were 14 investigators in Nashville at the time of the testimony. Of the 14, 12 are on flexible schedules. (T. 7586) She stated that an investigator's time for pay purposes is the result of investigator's completing a CAS. (T. 7588-7589) There was a time when sign-in sheets were used, but they were discontinued. When they were in use, the supervisors did not refer to them for the purpose of determining time because they were not reliable and were never intended for that purpose (T. 7592-7593) Ms. Smith testified that she

has instructed staff not to work beyond their schedule without advance approval. (T. 7593) She testified that flexible schedule employees who work over their schedule earn "credit time." (T. 7601-7602) But she also stated that such occurrences in her office are "infrequent," which she defined as three to five times a year. (T. 7602) One investigator who earned credit time was Ms. Lu Ann Hawk, who worked on a flexible schedule. (T. 7640) She would sometimes work 20 minutes or so over and would ask for and get credit time. It was informally recorded, and not put on FPPS, because it was so infrequent, and of such short duration and usually taken in a day or two. (T. 7603) Of the few investigators on a compressed schedule (only 2 out of 14 as of the time of testimony) there was only one instance of someone working beyond their schedule. That involved a recent on-site that had been postponed. Investigator Liston then asked to do it on a Saturday for compensatory time, although he could have avoided it by any number of alternatives. (T. 7607-7608) Outside of the two situations – Ms. Hawk and Mr. Liston – Director Smith didn't know any other instances since 2003 of investigators working outside of their work schedule. (T. 7608-7609). She testified that she has never directed any investigator to work beyond their work schedule, nor does she know that any of her subordinate supervisors have ever done so. (T. 7609). She then went on to explain that neither intake nor on-sites nor outreach result in time worked outside of the normal schedule. There is no reason why investigators would feel that they had to perform work outside of their schedule, given that there are ready options to avoid it, such as scheduling on-sites for work time or, requesting one of the supervisors to complete something (like an intake interview) if quitting time arrives and the activity hasn't been completed. (T. 7611) She further testified that no employee, nor the local union official, Ms. Rhonda Ellison, has ever complained regarding fairness of compensation in working beyond their schedule. (T. 7613)

On cross-examination, Ms. Smith was asked about Union Exhibit 127 which consists of sign-in/sign-out sheets for six days in 2006. She was asked about Investigators Hawk, Peterson, Smith and Albi. Ms. Smith stated all were on flexible schedules. (T. 7640). Ms. Smith was also asked about Investigator Curtis Brooks. He was also a flexible schedule employee. Union Exhibit 127 reflects, for example, that he worked, at most, only seven hours on April 6, 2006 beginning at 8:00 AM and ending at 4:00 PM, with "30 minutes off."

The sign-in/sign-out sheets also reflect that Investigator Hawk, whose schedule was 8:00 AM – 4:30 PM, may have worked a few minutes over her schedule during the week of April 3, 2006 through April 7, 2006. (:25 minutes on 4/3; :05 on 4/4; :10 on 4/5; and :25 on 4/6). However, the sheets also reflected that she worked one hour less than her schedule on 4/7. (T. 7680-81; Agency Exhibit 37) As a flexible schedule employee, of course, any extra time was not overtime hours, but "credit time" and it was used the same week it was earned.

BIRMINGHAM

Glenda Bryan-Brooks, an investigator in Birmingham, testified that her supervisor until two years ago, was Supervisory Investigator Booker T. Lewis and she was on a 4/10 schedule. (T. 6788) She testified about her sign in/out sheets, Union Exhibit 99, claiming that she had to work her days off because of the deadlines that had to be met on her cases. (T. 6788) She stated supervisors allowed employees to switch their days off to meet their deadlines (T. 6790) Union Exhibit 99 shows entries for her working her "off day" 11/15 and 11/22 in 2004 and 3/20 and 3/27 in 2006. Ms. Bryan-Brooks testified that when she worked her off day she made it up in a later pay period. (T. 6804) She stated she usually took them within one to two pay periods. (T. 6816) She claimed that supervisors continually emphasized that there are "numbers to be met"

and stated that because investigators had to be out of the office by 6:30 PM, it was impossible to meet the deadlines without taking work home. (T. 6809)

She admitted that she also switched her days off for her own personal needs and that her requests to do so were always approved. (T. 6812) Ms. Bryan-Brooks admitted that when she took work home, she didn't ask for permission to do so. (T. 6814) She claims that on those occasions when she tells her supervisor that she plans to do work at home, he doesn't give her credit for doing it (T. 6814) Testifying regarding Union Exhibit 99A at 6-10, Investigator Bryan-Brooks stated that in one week it appeared she worked all five days that week, but didn't receive payment for the extra hours (i.e., the 10 hours beyond 40) she worked (T. 6825) Her supervisor explained that when this witness took work home on the weekend, it was work for her telework day on Monday. It was not work for overtime.

Ms. Bryan-Brooks testimony that she took work home without telling her supervisor and did not ask her supervisor if she could get credit time later if she took work home indicates that any such time she may have worked beyond her schedule was not "suffered and permitted." (T. 6822)

Julie Hodge, an investigator in Birmingham, worked a compressed schedule, with a 30 minute daily slide and glide, or a maxiflex. (T. 6890) Her supervisor was Mr. Booker Lewis "on and off' for the past 5 years. (T. 6866) She claimed that during on-sites, she sometimes had to travel the first day, then interview witnesses until between 9:00 and 10:30 PM; on other occasions, she would interview witnesses who worked on "all three shifts" 7:00 AM to 3:00 PM, 3:00 to 11:00 PM and 11:00 PM to 7:00 AM and would inform her supervisor that she did so, but was not offered any monetary payment for working those hours outside her scheduled work hours. (T. 6871-2) On cross-examination, she claimed that on the first day, she'd be in the

office at 6:30 AM and, on a recent trip, interviewed witnesses until 9 PM. (T. 6893) She claimed she could not have stopped the interviews at the end of her regular hours and gone back to the hotel. She stated that she told Mr. Lewis about this. (T. 6895) Ms. Hodge stated she usually tells him that she had to stay late and he doesn't give her the time back. (T. 6897) She also claims that she works Saturdays and Sundays, and he is aware of it. (T. 6896) She doesn't ask her for credit for working the extra hours because she doesn't have time to take them since she needs "to be on the job doing the work." (T. 6897) She asserts that she does on-sites out of town twice a month for 3 days each (T. 6898) and on-sites in town twice a month two days a week (T. 6899) (for a total of 10 days per month), and that she frequently works extra hours during her on-sites. (T. 6899)

Testifying using Union Exhibit 99A at 10, Ms. Hodge asserted that she had to work her off day to "get her numbers up" and thus "had no choice but to get permission from my supervisor to work my off day." (T. 6876) She testified that she was never offered money for the extra time because she "sometimes, but not always, would take another day." (T. 6877) She claims that she was required to take such extra days off in the same pay period, and because that wasn't always possible to do, she has "lost a lot of time." (T. 6878) She asserts that her shift ends at 5:00 PM but she sometimes works until 7:00 PM to get her work done, but that she can't sign out then, because the rule is that you sign out when your shift ends, not when you stop work. (T. 6881) Regarding Union Exhibit 99B at 5, Investigator Hodge testified that on 11/4/04, she took an off day for having worked earlier on 10/20/04, and that 11/4 was in a different pay period. (T. 6884) Union Exhibit 99 reflects that Ms. Hodge switched off days four times in November 2004 and once in March 2006.

Booker T. Lewis, a Supervisory Investigator in the Birmingham District Office supervised both Investigators Bryan-Brooks and Hodge. Mr. Lewis testified that all of his investigators have a slide and glide schedule. (T. 7188) He explained that if an employee wants to work their day off, they can request it and he will let them "swap their days." H stated he has never requested that anyone work their off day. (T. 7196) He expects that they will take the earned day in the same pay period, or the next and he tries to accommodate individual employee needs. (T. 7197) He stated that no investigator has ever worked their off day and did not get to take it later. (T. 7198) He stated that Ms. Bryan-Brooks and Hodge swapped their off days on occasion, and if they were unable to take their off day during the same pay period, they did not receive pay for the extra hours worked that pay period. (T. 7320, 7339) He testified that if they worked an off day, he made sure they got credit for it. (T. 7342) He has never had an investigator ask permission to work extra hours on an investigation, and doesn't recall being told by an investigator about the number of hours that she had to work at an on-site. (T. 7202-7203). Based on his experience, he believes that investigators can get their work done in 40 hours. (T. 7205) He stated that when investigators go to on-sites, they have the discretion to schedule them for more than one day, and are not required to complete them in the same day (T. 7208), and doesn't recall ever being told that any investigator had to work beyond their normal schedule (T. 7307) He explained that investigators do not have a set number of cases that they have to produce, but that he does as supervisor (T. 7209); he stated that he doesn't assign all investigators the same number of cases because "all people are not treated equal" due to varying skill levels; instead, he assigns cases to investigators based their skill levels and the complexity of the case. (T. 7293) He testified that he has no experience with any of his employees working excess hours. (T. 7257)

Regarding Investigator Bryan-Brooks, he states that he never required her to stay late in the evening. (T. 7211) He stated that he is aware that Ms. Bryan-Brooks took work home on weekends, and explained that is because she is on a 4/10 schedule with telework (work-at-home) privileges. He explained she took work home because Friday was her day off and Monday was her telework day. (T. 7212) Thus, the work she does at home on Monday is part of her normal schedule. He stated that on occasions when Investigator Bryan-Brooks has requested that she be permitted to swap her off day for another, he has always granted it, and she has never been denied making up or taking an off day she worked. (T. 7213-7214)

As to Investigator Julia Hodge, he testified that he doesn't recall having any discussions with her about the number of hours she put in at any on-sites. (T. 7215) Further, he testified that she has always taken the off day that he approved her to swap. (T. 7216) He explained that she does take work home, but that is because she also teleworks on the same schedule as Ms. Bryan-Brooks, with Friday as her day off and her telework day on Monday. (Id.)

Directly addressing and rejecting Ms. Hodge's claim that she did on-sites every week for a total of ten days a month, he testified that in the last six months, Ms. Hodge has done no more than 12 on-sites, an average of 2 per month (T. 7218) and he doesn't recall her ever telling him she had to interview individuals "on a round the clock shift schedule." (T. 7309)

Regarding Union Exhibit 99, Ms. Hodges' sign-in/sign-out sheets, he agreed that he permitted her to swap her off days in later pay periods on many occasions at her request. Responding to Hodge's assertion that she was required to sign out at 6:30 PM but continued to work in the office, he testified that he has never seen any of his investigators in the office after 6:30 PM (T. 7205), and he regularly works until 7:30 or 8:00 PM. (T. 7290) Mr. Lewis also

testified that he is unaware of any instruction to employees not to sign out after 6:30 PM. (T. 6881)

There is a clear difference in testimony requiring a determination of credibility. Because both investigators are on flexible 4/10 schedules, if they are believed, they should have received credit hours for the extra time worked, not overtime pay, and any lost credit time would be minimal. Further, there is no evidence that their testimony is representative of anything occurring in other Agency offices. In fact, if their testimony is accepted at face value, they are the exception rather than the rule.

MIAMI

Rosemary Caddle, an investigator in Miami, testified that she was supervised by Juan Gonzalez, Enforcement Supervisor, until earlier this year. She was on a flexible schedule with hours of 7:30 AM to 4:00 PM. She testified that she signed in and out on the office's sign in sheets (Union Exhibit 128), and they showed for the time period August and September 2005 that she was present in the office longer than her regular schedule a few times. She signed out beyond her 8 hours on 8/2, 9/23 and 9/29, totaling an extra 1 hour and 45 minutes but that she signed out 1.5 hours early on 8/29 without recording any leave taken. Union Exhibit 128 at 8 showed her receiving 2 hours of compensatory time on 9/29 (T. 6844) and she testified that she had advised her supervisor that she had done so in order to continue an intake interview. She testified that if she had to work past her scheduled departure time on intake, "they would compensate me with time off later" (T. 6847), which is appropriate for an employee on a flexible schedule earning credit hours.

On cross examination, she admitted that when she stayed late, she got time off. (T. 6859) She further admitted, as indicated above, that she signed in and out on 8/29 for less than 8 hours,

and didn't record any leave. (T. 6853) She testified that although she received 2 hours of compensatory time for 9/30, her sign-in/sign-out sheet only reflects that she worked an extra 1.5 hours on that day. (T. 6855) When in intake, she testified that if she stayed less than 20 minutes over, she didn't tell her supervisor. (T. 6860) She claimed that she made calls to intake parties from home when she was unable to reach them during the day, that she took intake paperwork home to finish it, and that her supervisor knew she did so, but she wasn't compensated. (T. 6862) But, she also admitted that she didn't ask to be compensated for it. (T. 6863)

Juan Gonzales, Ms. Caddle's supervisor, testified that all 10 of his investigators are on flexible schedules (T. 7686) and that he instructs them not to work extra hours. (T. 7693) In intake, if investigators stay beyond their schedule, he stated he gives them credit time and they take the time off the next day or within a few days; he also said that this only happens once a month. (T. 7695) He only recalls one investigator attending an Outreach event on a weekend, and it was Ms. Caddle who volunteered and received credit hours for it. (T. 7697) He states that employees can finish their work in 40 hours and receive outstanding performance ratings, and he named four, including Investigator Caddle, who had done so. (T. 7700) Regarding Ms. Caddle's testimony that he was aware she worked made calls to witnesses from home beyond her duty hours, he stated that he did not recall being told that by her. (T. 7702) He stated he was not aware of any of his employees who worked extra hours and did not receive credit hours (T. 7203) or any who earned credit hours but were not allowed to take them. (T. 7752) He testified that his investigators earn credit hours less than 5 times a year (Tr. 7749) and for 30-60 minutes at a time. (T. 7751)

There is thus no credible evidence that overtime is worked and/or "suffered and permitted" in the Agency's Miami District Office.

Tampa

Doralisa Wroblewski, an investigator in Tampa, worked a CWS schedule and was supervised by Ms. Sylvia Pouncy and retired supervisor Barbara Steidman. Regarding Union Exhibit 129B at 25, she stated that when she worked her off day, 11/25/03 for example, she was not offered pay. (T. 7048) She stated that if she worked extra hours, she would tell her supervisor who would record it so that the employee could get credit time for it later. (T. 7055) In intake, if a person came to the office late and the investigator worked extra time, the employee would receive "comp time." (T. 7058) She was asked if she had the option of saying that she had to leave on time in such a situation, and she testified "I think so. I don't know." (Tr. 7058) She stated that if she worked extra hours at an on-site, she would tell her supervisor the next day and would get credit for the time. (T. 7058-7059)

Julia Diaz, an investigator in Tampa, was on a compressed schedule and was supervised by Ms. Barbara Steidman. She testified as to Union Exhibit 129, sign-in/sign-out sheets, that she occasionally received permission from the Director to work her day off and take it later. (T. 6983-6984) She took 8 hours of compensatory time on May 1, 2003 that she had earlier earned (Union Exhibit 129B at 2) and was not offered any money for it. (Tr. 7002-7003) She also claimed that she worked extra hours on many occasions (Ex. 129B for June 03), recording the extra time on the sign in sheet, but did not get credit for it. (T. 7007-7012) She claimed that in order to receive a fully successful or outstanding rating, you had to work extra hours, and that you did not receive money payment or comp time for them. (T. 7022) She admitted on cross examination that employees were told not to work extra hours without getting supervisory permission. (T. 7032)

Beverly Collins, an investigator in Tampa, was on a flexible schedule and supervised by Barbara Steidman. As to Union Exhibit 129, Ms. Collins testified that when she worked extra hours, she would record it on the sign-in/sign-out sheet as "CTE" and when she used it, she recorded "CTU;" she also stated that she let her supervisor know about the compensatory time earned so that it could be entered in her supervisor's comp time book which recorded the comp time the employees earned and took (Tr. 6941-45). She identified time sheets included in Union Exhibit 129 where she earned and used compensatory time (2 in 2/06, 2 in 3/06, 2 in 4/03, 1 in 5/03, 1 in 7/03 and 5 in 9/03). (T. 6946) She stated that she did not need to get her supervisor's permission in advance to earn the compensatory time and has never been denied credit for the extra hours worked. (T. 6969-6971)

Sylvia Pouncy, an enforcement supervisor in Tampa, supervised Investigators Collins, Diaz and Wroblewski, either directly or when she acted for enforcement supervisor Ms. Barbara Steidman when Ms. Steidman was absent. (T. 7776) She testified that her investigators can get their work done in 40 hours per week and that employees can and do receive outstanding ratings working 40 hours a week. (T. 7775) She stated that it was the practice of the office that if an employee worked extra hours, he or she received credit time and could take the time off. (T. 7777) She stated that at an on-site, the investigator has the option of stopping work at the end of the shift or continuing to work. (T. 7768) She was asked to describe situations where investigators work beyond their normal duty hours, and as an example described a situation involving an employee who had been on an overnight on-site in Pensacola and worked extra hours; she explained that he had the option of stopping at the end of his shift or continuing to work, and he decided to continue to work, earning credit time for the extra hours he worked. (T. 7767-7768) She testified that she was not aware of any instance where one of her investigators

earned extra time and was not able to take it off later, and that no investigator complained that they had received credit time instead of overtime money. (T.7780)

Julia Diaz claimed that she worked extra hours for which she was not compensated, but the other two Tampa-based investigators who testified and Tampa supervisor who testified all consistently stated that employees who worked extra hours were compensated with credit hours or compensatory time for the extra hours worked when brought to the attention of a supervisor. This undermines Ms. Diaz's claims that she did not receive credit for the extra time she worked. If her testimony is to be accepted, it must also be found that she did not receive time it was because she did not report it to her supervisor.

It is worthy of note that Ms. Diaz also admitted that she was told not to work extra hours without first seeking permission to do so. Therefore, even if she worked extra hours, these hours were not "suffered and permitted" but rather concealed from her supervisor and she is not entitled to overtime compensation for working extra hours without the permission she admitted she was required to obtain.

ATLANTA

Mildred Allen, an investigator in Atlanta, works on a 4/10 schedule starting at 6:30 AM and ending at 5:00 PM and was supervised by Mr. Charles Mitchell until 2007. She was apparently summoned by the Union to testify about Union Exhibit 93 which includes her sign-in/sign-out sheets for November 2005. They show no extra hours worked and ms. Allen made no assertion that she worked extra hours. (T. 5982-5893)

Rosalyn Williams, an investigator in Atlanta, works a 4/10 schedule, except during the summer when she went on a 5/4/9 schedule. (T. 6203-6204) She is supervised by enforcement supervisor Sandra Gill. She testified regarding Union Exhibit 95, her sign-in/sign-out sheets for

February and March 2004. She claimed that on March 24, 2004, Union Exhibit 95 at 1, the sheet shows that she worked late at an intake appointment, signing out at 8:45 PM (Tr. 6182-6183). Because she had signed in at 8:50 AM on that day, she claimed she worked 1.5 hours extra. But Union Exhibit 95 also shows that Ms. Williams rarely worked her full 10.5 hours schedule, and on most days signed out at 6:00 PM, which was at least one hour early, with no indication that she took leave. She testified that employees were instructed to sign out by 6:00 PM and to leave the building (T.6197), unless they had to stay late with a late arrival in intake. (T. 6205) Regarding Union Exhibit 95 at 10, March 17, 2004, she testified that she indicated taking one hour of compensatory time, but that her supervisor crossed out "comp" and wrote "credit time." (T. 6193) She testified that when she was assigned to intake, she was required to take a charge if the person arrived near the intake closing time of 5:00 PM and that person had traveled more than 50 miles or was on their 180th day. Further, she stated that if she worked excess hours completing that intake, she would receive "credit hours" if she provided a memo to her supervisor. (T. 6201-2) She admitted that anytime she gave her supervisor a memo saying she had worked additional hours, she would receive those hours off later. (T. 6206)

Ken Warford, a mediator in Atlanta, works a 4/10 schedule with the hours of 6:00 AM-4:30 PM. He testified regarding Union Exhibit 96, sign-in/sign-out sheets for January 2006, when his supervisor was Atlanta Deputy Director John Fitzgerald. (T. 6019) Union Exhibit 96 shows Mr. Warford signing out 30 minutes after his scheduled time on four days, but he did not testify about the significance of that. He explained that if he worked extra hours because the mediation ran "over," he would inform his supervisor after the fact and then "take an hour off the cuff." (T. 6017-8) He described "cuff" time as an arrangement where he would come in late or leave early to make up for the fact that he had worked extra hours. (T. 6018)

Helen Garrett, a paralegal in Atlanta, worked a flexible schedule during the time period about which she testified, October 2005 (Union Exhibit 96 which shows her working five days each week). She didn't recall what her hours were then, what her schedule was, or that Baltimore Regional Attorney Gerry Keil had been her supervisor at that time, until she was reminded She testified that she earned credit hours if she stayed beyond her normal work hours (T. 6560) and notified her supervisor by email that she had worked (T. 6562). She stated that her sign-in/sign-out sheet for October 3, 2005 (Union Exhibit 96 at1) showed her using credit hours. (T. 6560) Union Exhibit 96 at 4 showed her claiming to have worked 1 ½ hours on October 6, 2005, but she didn't testify about it, and on many other dates, she signed out after her normal hours, but did not claim them as credit hours. She stated that she did not always tell her supervisor when she worked additional time, but when she did, she received credit for it, and was expected to use it in the same pay period. (T. 6578)

Sandra Gill, an Atlanta Supervisory Investigator, was called as a witness by the Union. She is supervised by Enforcement Manager James Brown and Deputy Director Fitzgerald. She testified that employees were told "they could not start work before their work hours, and they could not work beyond their ending work period…that they have to sign in on time and begin on time and sign out on time and work until the end of their work period." (T. 6725-6726) She explained that if an employee "went beyond their work hours, and they notified me the next day, then I would tell them that they could make up that, that I would have to give them that time back and tell them to let me know when they wanted to take that time back." (T. 6730). Regarding intake, she testified that if an individual arrived late in the day, and had driven 50 miles or it was the 180th day (i.e., last day) for filing a charge, the investigator was expected to

complete processing the charge, and couldn't stop just because it was the end of their shift, but that she had not had many such situations. (T. 6740-6741) She explained that if employees worked in excess of their scheduled work hours, she did not offer them money, but did offer "them an opportunity to get their time back that they worked over." (T. 6744)

John Fitzgerald is the Deputy Director of the Atlanta District Office. He testified that he is the second level supervisor for a number of units, including mediation and intake, in the Atlanta Office and at various times was second level supervisor for the Director of the Savannah Local Office. (T. 7351-7352) When the Savannah office was without a director, he also directly supervised that office by having the five Savannah investigators rotate in the position he referred to as the "acting director," which he explained meant that they had "responsibility for caretaking the office" with no management authority other than signing leave slips after checking with him by email. (T. 7353-7354)

He explained that there are various scenarios under which employees are permitted to work beyond their scheduled hours – overtime for pay approved by the director with funds from headquarters; official compensatory time, which has the same perquisites as overtime for pay; credit time for employees on a flexible schedule; and "cuff time;" he explained that "cuff time" is when employees who want to work extra hours make arrangements with their supervisors to be "paid back at a later date, normally within the week or the following week." (T. 7362-7364) He stated that "cuff time" is a "very informal process" between the supervisor and employee and that it could be done verbally, by email, or on the sign in sheet. (T. 7391) "If an employee chooses to work beyond their normal work hours, they're going to get it back as cuff time." (T. 7439) He testified that he is not aware of anyone who did not get to take the cuff time they earned, and does not know about of any individual grievances, EEO complaints or law suits

concerning the cuff time arrangements in the Atlanta office. (T. 7393-7394) He declared that the Commission has always had "some type of cuff policy" in the offices in which he worked. (T. 7397, 7419)

Regarding intake, he explained that investigators who cannot finish an interview by the end of their shift have the option of terminating the interview and finishing by phone or mail, finding another investigator who works a later schedule to complete the interview, or turning the case over to a supervisor. (T. 7365) As to Outreach, investigators volunteer for the assignments, and if any are on the weekend, the employee and supervisor would work it out so that the employee takes the time off before or after the weekend. (Id.) If the Outreach involved evening hours, the employee would report to work later that day so that they wouldn't be working extended hours. (T. 7366) Regarding on- sites where the interviews cannot be completed during the employee's normal duty hours, the investigator has the options of stopping on time and completing it another day, making arrangements with the office to stay overnight, or staying to complete the interview and get cuff time for the additional time they worked. (T. 7367-7368) Further, he explained that investigators are normally in control of scheduling on-sites and can schedule them for two days if travel is involved. (T. 7368) Regarding the mediation unit, he testified that mediators have the same options as investigators regarding working extra hours, explaining that mediators can stop the mediation at the end of their duty hours and reschedule it later, or continue it and be "paid back" for the additional time they put in. He also testified that mediators can set their own schedules, and if a mediation has to start later in the day, the mediator could report to work later, so that they only put in their scheduled number of hours. (T. 7368-7369) Regarding paralegals, he explained, after a lengthy series of objections from the union attorney, that as acting director, he had responsibility for various functions of the legal

unit, including time and attendance matters for paralegals, and that the legal unit has a cuff time policy that is identical to the rest of the office. (T. 7373-7376) He testified that on many occasions, Ms. Helen Garrett earned "cuff time" working on FOIAs, and that he personally was involved with one of them. On that occasion, she could have refused to work the extra hours, and if so, he would have handled the assignment himself because it was an emergency. (T. 7379-7380) He testified that he believed that investigators and mediators can get their jobs done in 40 hours, and, the same with paralegals, although he has less experience with them. (T. 7386-7390)

Mr. Fitzgerald also explained that for many years Savannah had a "cuff" policy similar to that in Atlanta. (T. 7397). Regarding Investigator Diego Torres, he testified that Mr. Torres volunteered to do outreach and scheduled the events, and that if the event was outside his normal duty hours, he received cuff time. (T. 7399-7401). He explained that Mr. Torres would tell him in advance so he would know extra hours would be worked. (T. 7401) He denied that he ever failed to grant Mr. Torres the number of extra hours he claimed he worked. (T. 7402)

Savannah

Diego Torres, an investigator in Savannah, testified by telephone that he was on a 4/10 schedule and had been supervised by many directors over the years, and on occasion the GS 12 investigators would rotate being acting director, reporting to Atlanta Deputy Director John Fitzgerald. (T. 6051) Re: Union Exhibit 97-10, a Request for Compensatory Time," he testified that when he was acting director, he signed the form to authorize comp time for an investigator who was going on-site. (T. 6049-50) The Exhibit states "I hereby request authorization to work compensatory time in lieu of overtime…" and indicates the number of hours earned and used. He testified about Union Exhibit 97, his sign in sheets for January 2004, stating that he recorded

4 hours of comp time on the sign in sheet for January 23, 2004 (Exhibit 97-9) which he earned by working beyond his tour of duty during an on site. (Tr. 6056) He explained that comp time was "off the record" and had to be taken in the next 2 pay periods. (Tr. 6057) Regarding Union Exhibit 98, sign in sheets for February and March 2004, he verified that he signed in and out but did not provide specifics. Exhibit 98-4 shows him working a 12 hour day (an extra 1.5 hours) at an on site on February 26, 2004, and Exhibit 98-6 shows him taking 1 hour of comp time the next day, February 27. He explained that as an investigator, when he worked excess hours, he would use the comp time Request form, Exhibit 97-10, to request comp time and to record the time earned. (Tr. 6062). He explained that when he was acting director, it was unusual for him to sign off on a comp time form, Union Exhibit 97 at 10 and it was only done when an investigator had to travel to an on-site, "but that was something that didn't occur very often." (Tr. 6058) He claims that he has lost comp time, and offered an example where he did an outreach on a weekend, putting in 6 hours, and only being given credit for 4, but he offered no specifics about when it occurred. (T. 6083) He admitted that he volunteers for weekend Outreach events that require a bilingual investigator, and explained that there are only four or five a year. (T. 6091)

SAN FRANCISCO

David Skillman has been a Paralegal in San Francisco since approximately 2001. He has been the union steward since going to San Francisco. (T.L.A. 431) David Offen-Brown has been his supervisor for the last two years; and before that Jonathan Peck was his supervisor. (T.L.A. 419) He has worked past regular duty hours. He asks for approval telling his supervisor why he wants to do it. (T.L.A. 421-422) He gets comp time and is not offered money. (T.L.A. 426) He has complained about the GS-11 ceiling on Paralegals, but has never grieved the failure

to give overtime pay. (T.L.A. 432, 451) Union exhibit 143 relates to 2003. He did not maintain the form and did not regularly see it. (T.L.A. 430) Mr. Skillman never requested overtime pay. He liked to earn compensatory time. He also stated he liked to have earned money, but it was generally known that there was no money for overtime. (T.L.A. 434) He is an actor and spends a lot of time doing it. (T.L.A. 439) He travels a lot, six weeks in Europe last year. He earned 208 hours of annual leave and used at least 240 hours. (T.L.A. 442) Earning comp allows him to augment his leave balance. (T.L.A. 444) The flexible schedule also allows him to care for his ailing mother. (T.L.A. 446) Mr. Skillman claimed he never had a negative leave balance; then lies and says he has typically 160 - 200 hrs AL at the end of the year and he has use or lose every year. But Union exhibit shows an annual leave year-end balance of 135 hours. (T.L.A. 447)

There is no evidence of the amount of extra time he is claiming. Since he is on a flexible schedule, he would earn credit hours and not overtime pay for extra hours worked since there is no evidence that any of the extra hours he worked were officially ordered in advance.

Lorraine Strayhorn has been a Paralegal in San Francisco since 2002. (T.L.A. 453) Union Exhibit 145 was not authenticated. Ms. Strayhorn testified that she had never seen it. (T.L.A. 454) Union Exhibit 145 simply shows eight hours of comp time earned and used in the same pay period. Ms. Strayhorn testified that she has worked beyond her regular schedule and she includes the extra hours worked on the cost accounting sheet. (T.L.A. 455-456) This directly contradicts Mr. Skillman's testimony that they were told not to put the extra time on the cost accounting sheet. When Ms. Strayhorn wishes to work extra time, she requests the hours with a justification and gives it to her supervisor, Mr. Jon Peck. (T.L.A. 458) She was never offered money, and received no instruction regarding money payment for extra hours work.

(T.L.A. 458-459) However, she was paid overtime for one weekend day of overtime. (T.L.A. 460) She did not ask for overtime pay on any other occasion.

The showing of extra time worked is de minimus. With all the records produced, the Union was unable to show much extra time worked by paralegals in San Francisco. Approval for extra work for comp time was requested by them, and they received comp time. The Union could not show that any paralegal worked more than 40 hours in a week.

Jon Peck has been a Supervisory Trial Attorney [hereinafter "STA"] in San Francisco for twenty years. He is very flexible on time and attendance. (T.L.A. 860) David Offen-Brown became the second STA in either 2005 or 2006. (T.L.A. 862) Mr. Peck supervised Mr. Skillman until 2004 or 2005 when Mr. Offen-Brown took over. He has supervised Ms. Strayhorne since she has been there. (T.L.A. 864) Ms. Strayhorn works from 7:00 AM to 4:30 PM and has a long commute. Mr. Skillman works from 8:30 AM to 6:00 PM. Mr. Peck is aware if they are there, but not of their comings and goings because they work with their doors closed. (T.L.A. 865) Mr. Peck stated that his hours are 7:30 AM to 4:00 PM, generally. (T.L.A. 867) Because of his hours, he wouldn't know if Ms. Strayhorn came in early or Mr. Skillman stayed late. He stated that Ms. Strayhorn adheres closely to her regular schedule because she needs to get home for her children, she is a single parent with two boys so he has been flexible. (Id.) Mr. Skillman also keeps a pretty regular schedule. Mr. Peck testified that Mr. Skillman is an accomplished actor and takes time off for that; this is one of the reasons he appreciates opportunities to earn compensatory time. (T.L.A. 869)

Mr. Peck testified that he doesn't see the CAS and has given no instructions on how many hours to enter. (T.L.A. 871) But Mr. Skillman earns compensatory time very infrequently. (T.L.A. 871) Ms. Strayhorn also works compensatory time only infrequently.

(T.L.A. 873) Compensatory time is most likely needed for trial preparation. Compensatory time is what they have asked for. Ms. Strayhorn did, on one occasion, ask and receive overtime. (T.L.A. 874) Both Ms. Strayhorn and Mr. Skillman have very limited sick leave balances despite many years with the Commission. They have both told Mr. Peck that compensatory time is a benefit for them. (T.L.A. 875, 894-896) Mr. Peck explained that the last trial conducted by the San Francisco legal Unit was actually in 2002. (T.L.A. 875) Paralegals are never required to work outside their regular schedules. (T.L.A. 875)

Mr. Peck testified that Mr. Skillman and Ms. Strayhorn knew that money was available and they were aware that they could make the request. (T.L.A. 889) He is not aware of them being told that money was not available. (T.L.A. 890)

Mr. Skillman and Strayhorn rarely worked extra hours. When they did, they asked for compensatory time. While Mr. Skillman may have mused about the benefits of paid overtime, he never asked for it nor grieved its absence. Both Mr. Skillman and Ms. Strayhorn had reasons to want compensatory time.

Seattle

Rod Ustanik has been an enforcement supervisor in Seattle since 1989. He was an Investigator and Union Steward before that. He served in the Peace Corps and at the DOL Wage and Hour Division before that. (T.L.A. 905) He supervises Investigators Carrie Thompson, Mark Lofstead, Meiju Ong, Anna Lee Greer, Matthew Clemens, Omar Verduzco (all on 6:30 AM to 3:00 PM schedules), Jessica Ramquist (8:00 AM to 4:30 PM), Valerie Johnson (9:00 AM to 5:30 PM) and, partially, Karen McKosky (7:30 AM to 4:00 PM). Most are also on slide and glide flexible schedules. (T.L.A. 907; 910-913; 932-934) Mr. Ustanik works 8:00 AM-4:30 PM but adjusts for daylight because he rides his bike. (T.L.A. 909) The investigators select their

start times. (T.L.A. 938) Supervisors make it very clear that it's a 40 hour work week and that's what they are supposed to work, not more. (T.L.A. 914) Since they have slide and glide people, they do allow some employees to take advantage of "credit time" with minor adjustments to their work schedule. (T.L.A. 916) And, they are encouraged to use credit time within the pay period. (T.L.A. 917) Intake is open from 8:00 AM to 4:30 PM, but walk-ins are accepted only on Mondays and Fridays, and appointments set up on the other days. (T.L.A. 918) They cut off the walk-ins if they think they won't finish by 4:30 PM, so, if someone comes in after 3:00 PM, they may tell the potential charging party to come back later for an interview. (T.L.A. 920) Intake appointments are scheduled for only 8:00 AM, 10:30 AM and 1:30 PM. (T.L.A. 921-922) Mr. Ustanik testified that it is extremely unlikely that intake responsibilities would cause an investigator to work over their schedule and that he is not aware of it happening. (T.L.A. 922) It is very rare that investigators work over. (T.L.A. 923) The investigators adjust schedules to stay in the 40-hour week. (T.L.A. 924)

Mr. Ustanik testified that there is occasional Outreach and while it is encouraged, it is not required; investigators want to do it as a change of pace and it is good for morale; a half to two-thirds of his folks do outreach maybe once or twice a year. (T.L.A. 925) Carrie Thompson does not do Outreach and she's is rated outstanding every year. (T.L.A. 926) Outreach is not a performance standard; it's a duty; he hasn't been told to rate on outreach. (T.L.A. 943) Investigators are "almost never" involved in the yearly TAPS in a remote location. (T.L.A. 947) Investigators work 12 to 14 intake days per quarter. (T.L.A. 941) Eleventh hour charges are not assigned to the investigators – supervisors handle them. (T.L.A. 957) He doesn't recall any specific instruction from the Director since Jan 2003 on the concept of money payment for overtime. (T.L.A. 979) They have been told money is tight. (T.L.A. 980) He did not think he

had to check if money was available if the employee requested comp time rather than overtime. (T.L.A. 989)

There is no evidence that people ever worked outside their schedules in Seattle, other than the investigators on slide and glide, who were encouraged to use their credit time the same week.

The Union called no witnesses and there is no evidence that anything that may or may not happen in any other office is representative in any way of what occurs in Seattle.

PHOENIX

Chester Bailey became the Director of Phoenix District Office in 2005. Before that he was District Director in Milwaukee, with a brief stint while there as acting director in Dallas. He started in management as an enforcement manager and then became a deputy, in Seattle DO. He supervises, among others, Georgia Marchbanks, the Albuquerque Area Office Director, and Nancy Sienko, the Denver Field Office Director. (T.L.A. 20). Mediators in Denver, Phoenix and Albuquerque report to the ADR Coordinator Yvonne Gloria-Johnson. (T.L.A. 22-23) Mr. Bailey testified concerning the various memos from OHR that the union used with most management witnesses, that his practice was that "if they have a job to do that requires overtime, then I would try to get the funds. If I didn't get the funds, in all likelihood they wouldn't be able to do that job until we got some funds." (T.L.A. 44) He included compensatory time when he referred to overtime. (T.L.A. 45) Bailey gave very general testimony, but did say that, for example, he would never direct an employee to work beyond their schedule. He said that, in regards to outreach for example, that employees had the option to refuse to volunteer or to agree to do outreach on a Saturday for comp time. (T.L.A. 104) Further, he said he had never, during the time he supervised Phoenix, observed any employee working beyond his/her schedule.

(T.L.A. 105) He also said he'd never received any complaints from any employees or any union officials about the fairness of compensation for the hours that they work. (T.L.A. 106-07)

Janis Richardson has been an investigator in Phoenix since 1999, when she was promoted from the clerks' position, and has been supervised for the past two years by Mr. David Rucker, and prior to that by Ms. Berta Escheveste. (T.L.A. 604-606) She was asked whether she had worked hours in excess of her regular hours and she responded that she had; and that she reported them on the CAS. (T.L.A. 608) She was asked by union counsel whether she does outreach and she was asked about the Sanchez memo regarding the "Juneteenth" event. (T.L.A. 609-610) She stated without prompting that outreach comes to her "as an opportunity to do outreach." She stated that she gets an email from the program analyst [Mr. Sanchez] and that "you are able to volunteer for those." (T.L.A. 610) She also stated, in effect, that her understanding was that the only way she could work additional hours was to do it for comp time. (T.L.A. 611). On cross-examination, she admitted that "when comp time opportunities arose, [she] requested comp time." (T.L.A. 612). She also admitted that Mr. Rucker and Ms. Echeveste generally granted it to her when she asked for it and also that she used what she had earned. (Id.) Further, she agreed that she liked to use her leave an hour or so at a time to compensate for days when she arrives late in the office. (T.L.A. 613) Lastly, she agreed that on "[m]aybe a couple of times a year" she would do outreach on a day outside of her schedule, and that those times are voluntary. (T.L.A. 614) She testified that she's on a 5/4/9 schedule and that on occasion she changes her AWS day (Tuesday), sometimes for personal reasons (e.g., doctor's appointment) and sometimes to accommodate work demands. (T.L.A. 619)

David Bruce Rucker, a supervisor in the Phoenix District Office, testified that he is the supervisor of from six to ten investigators in Phoenix since the fall of 2002. (T. 533) At the time

of his testimony, he supervised seven investigators, of whom three are on a flexible schedule. Most of the ones on a compressed schedule will switch their AWS days off for personal reasons or business reasons. (T.L.A. 635) He stated that the practice regarding working over a person's schedule is that any employee desiring to do so must request permission in advance. He made clear that any such request must be for comp or credit time, because of the unavailability of overtime money, and that if comp time or credit time was not acceptable, then the investigator was to "not do that task, hold off on that task until their normal work schedule." (T.L.A. 639) Mr. Rucker testified that Ms. Richardson always was the one initiating the request for comp time and that there never was any requirement or necessity that the work she did outside of her normal work time be done as comp time. (T.L.A. 649-650) He said that she would have the option to do whatever work she wants to do outside of her work schedule for comp time or not to do it at all and to wait for her normal tour of duty to do it. (T.L.A. 650) Also, in contrast to Ms. Richardson's testimony, he testified that she does very little outreach, maybe one to three events a year (id.), and that "most of our outreach events though are during work hours." (T.L.A. 651) He testified that Ms. Richardson does between three and six on-sites a year, but that most of her compensatory time requests deal with simple things like reviewing files, contacting witnesses and finishing up intake duties. (T.L.A. 652) He testified that he was unaware of any instance where Ms. Richardson was required by the requirements of the job to work any comp time and that it was all avoidable. (T.L.A. 653)

Lastly, Mr. Rucker testified that no investigators ever complained to him about not getting overtime money and that no union officials did, either. The union objected to this question and asked that it be stricken, as being too broad. The arbitrator informed the union that it could cross-examine on the point and the union withdrew its objection. (T.L.A. 651-652) On

cross, the union established only that this national grievance had been filed. Rucker made clear that his testimony was simply that no one had complained that his personal overtime practices were improper. (T.L.A. 657)

On cross-examination, Mr. Rucker said again that "if [employees] are going to work beyond their schedule, it is their option as to how they want to do that, and everybody who I have talked to has always requested the compensatory time." (T.L.A. 680) Mr. Rucker also testified that he only had one or two occurrences, years ago, of employees working over their schedules without advance approval. In each case, he testified he counseled them that they could not do it, that there would be a possibility of discipline and that and in no case did he have a reoccurrence of the problem. (T.L.A. 597-598)

Albuquerque

Georgia Marchbanks is the Director of the Albuquerque Area Office. She was an enforcement manager at first and became area director in 2004. Both positions involved the same duties, however. (T.L.A. 123) Ms. Marchbanks was asked extensively about Union Exhibit 136 relating to Investigator Kathlyn Johnson. Ms. Johnson worked a 4/9/4 schedule. Union Exhibit 136 showed six instances in which Ms. Johnson earned compensatory time. Taking them in chronological order, there were the following instances: 11/19/05 (Sat.) and 11/20/05 (Sun): 2 ½ hrs. and 1 ½ hrs.; 12/15/05 (Thur.): 1:30 hrs; 1/24/06 (Thur.): :30; 3/9/06 (Thur.) through 3/11/06: 20 hours; 3/24/06 (Sat.): 3 hrs; 6/5/06 – 6/6/06 (Mon./Tues.): 1:15 hrs and 1 hr. In five of the instances, Ms. Johnson requested to work for compensatory time in advance, and it was granted. Only one, the 30 minutes on 1/24/06, was apparently not requested in advance. This is consistent with Ms. Marchbanks assertion that before employees in her

office could work outside of their regular schedule they had to get approval in advance. (T.L.A. 151, l. 17-22) All time approved would then be recorded on CAS. (T.L.A. 153)

Ms. Marchbanks was asked about whether she offered overtime money to employees and she was also asked about the existence of overtime funds in her budget. She testified that she "may have" offered overtime money to some investigators (T.L.A. 164-165) She operated on the assumption that unless she was informed by her budget analyst that there were not funds, that she had them available. (T.L.A. 165)

Ms. Marchbanks was asked about mediator Montoya, who is the subject of Union Exhibit 139. Ms. Montoya's immediate supervisor was Ms. Yvonne Johnson. (T.L.A. 166) Ms. Johnson works in Phoenix and Ms. Montoya in Albuquerque. (Id.) Although Ms. Marchbanks is not Ms. Montoya's supervisor, she is responsible for time and attendance if Johnson is absent. (Id.) The Union spent time showing an email from Mr. Albert Sanchez asking for volunteers for an outreach event. The email specifically noted that anyone interested could request comp time. It obviously was giving investigators and mediators the option to volunteer or not, and explicitly limiting compensation to anyone who volunteered to comp time. (Union Exhibit 138) Although Union Exhibit 138 is excellent proof of one of the Agency's principal defenses, the Union spent a lot of time on it as though it were evidence of illegality. (T.L.A. 169-172)

Ms. Marchbanks said that she was unaware of any investigators in Albuquerque working past their schedule without advance approval. (T.L.A. 184) As for intake, she couldn't recall anyone working past 4:30 PM to complete an intake. (T.L.A.186) As for outreach, while "most" if during business hours (id.), none of that which is outside of those hours is required, and all is voluntary with the investigator. (T.L.A. 186-187) Albuquerque only does about ten on-

sites per year (T.L.A. 187), but each on-site in within the control of the investigator, but would only work beyond their schedule because "that was the way they set it up." (Id.)

Ms. Marchbanks clarified that work done by Kathy Johnson dealing with working up a case could have been done without use of comp time, and that requesting it was Johnson's decision. (T.L.A. 191-192) Further, Ms. Johnson wanted to work for compensatory time because she didn't have any leave built up. In fact, Ms. Marchbanks had had talks with Ms. Johnson who told her she wanted to earn comp time. (T.L.A. 192-194) Another one of Ms. Johnson's comp time requests involved something called "CST" meaning customer specific training. That was a form of outreach and was voluntary. (T.L.A. 194-195) If Ms. Johnson didn't elect to do it, someone else would have. (T.L.A. 195) Ms. Marchbanks also indicated that there were alternatives available beyond working for comp time for other events on Union Exhibit 139. For example, instead of working on Friday (when she only had 4 hours of scheduled work time), she could have scheduled it for a full workday during the week (T.L.A. 197) or could have changed her schedule if it had to be done on a Saturday. (Id.) The same is true for the interview that was mentioned in Union Exhibit 137A at 14. Ms. Marchbanks described Johnson has an "infrequent" person to work outside of her schedule, but still more frequent than other investigators, because of her desire to earn comp time. (T.L.A. 200)

Ms. Marchbanks said "never" when asked whether she received any complaints from employees or from union officials within her office regarding the standards by which employees of her office are compensated for the hours they work. (T.L.A. 200-201)

Director Marchbanks also testified, in a series of questions and answers, that if an employee requested overtime funds, she would first see if that was possible, and if it were not, she would give the employee the option of working for compensatory time or of not working the

requested work at that time. She made it clear that if an employee wanted to work beyond their schedule, but only for overtime money, that the employee could refuse to work or could work if they agreed to do it for compensatory time. (T.L.A. 223-224) She also said refusing to work for comp time would have no impact on the refusing investigator's appraisal. (T.L.A. 224) Further, Ms. Marchbanks said that she was sure she had discussed with Johnson the opportunity to have overtime money. (T.L.A. 221-222)

Ms. Marchbanks agreed that "most" (T.L.A. 230) investigators on compressed work schedules have requested to switch their AWS days, and have asked to change the time they arrive at work and the times they leave work which would put them on flexible schedules. (T.L.A. 228-229)

Rita Montoya is a mediator in Albuquerque. She worked for Mr. Tom Alley in Albuquerque from 2001 through about 2005. Ms. Yvonne Johnson has been her supervisor since Alley left Albuquerque. Ms. Montoya is the only mediator there. Ms. Johnson rarely travels to Albuquerque from her office in Phoenix, maybe once a year. (T.L.A. 282) Union Exhibit 139 deals with Ms. Montoya. She testified that Union Exhibit 139A at 1 involved an event known as "Juneteenth" which was to be held on a Saturday and that she "volunteered" and "agreed to work on that Saturday." (T.L.A. 286) She made it clear that she knew that by volunteering she was agreeing to work for compensatory time, per the email from Mr. Albert Sanchez. (T.L.A. 289-290) She then testified that Union Exhibit 139A at 4 involved a mediation that had run past her normal quitting time, resulting in 45 minutes of extra time. She then said that Union Exhibit 139A at 10, a request for compensatory time, involved travel between Albuquerque and Phoenix in connection with a mediation. (T.L.A. 296) She also explained that she took the comp time she had earned and she put it onto her CAS. (T.L.A. 302; Union Exhibit 139A at 13) She then

identified Union Exhibit 139A at 14, entitled "Request to Work Compensatory Time or Credit Time." She explained that the event occurred on a day she was to work only 4 hours, and thus involved 2 extra hours over her schedule. The event was an Outreach and that she had been "invited" to attend. She also admitted that she had taken leave given to her as award leave. (T.L.A. 311; Union Exhibit 139A at 21) Ms. Montoya also testified about hours reflected on Union Exhibit 139B at 1-10. Those documents show just two brief periods of compensatory time earned: 35 minutes on 1/17/06 and 45 minutes on 5/31/06, both times requested after-the-fact when she worked past her normal quitting time. (Union Exhibit 139B at 1, 7 and 9.) On the Agency's cross-examination, Ms. Montoya acted defensively and was evasive.[59] She agreed that several of the exhibits relating to her (Union Exhibits 139A at 7, 17, 19 and B at 1, 7, 9-10) all were situations where she worked beyond her schedule which ended at 5:00 PM. (T.L.A. 327) Ms. Montoya worked a 4/10 schedule, and began her work at 6:30 AM. She testified that she routinely kept to her schedule, even on days when she had mediations scheduled, which typically began at either 9:30 AM. or 1:30 PM. (T.L.A. 326) It is obvious that Ms. Montoya could have eliminated the possibility of going past her work time if she were to change her schedule on those days when she scheduled mediations so that her day would begin at or about the same time as the mediation she had scheduled. Notwithstanding that obvious fact, Ms. Montoya maintained, beyond the pale of believability, that her supervisors (Ms. Marchbanks and Ms. Gloria-Johnson) were "pretty rigid about time and attendance" (T.L.A. 332) and would not have approved any such request to alter their work schedules. (T.L.A. 127; l 17-132) Although Ms. Montoya stated this, she admitted that she had never asked either Ms. Marchbanks or Ms. Gloria-Johnson if she could alter her schedule. (T.L.A. 331-332) In the summary of Ms. Marchbanks'

[59] For example, when asked a simple yes or no question: "And you knew because of the email from Mr. Sanchez that if you volunteered for [the Juneteenth Outreach], it would be for comp time, is that correct?" Instead,

testimony, supra, we noted that Ms. Marchbanks expressly stated that employees were free to change their schedules to avoid working time over their schedule. So too did Ms. Gloria-Johnson deny that there was any impediment to changing a work schedule for a legitimate purpose.

On the subject of Outreach, again Ms. Montoya was evasive but essentially agreed that she has not been required to perform any particular Outreach event by Ms. Gloria-Johnson. (T.L.A. 337-338) She agreed that she was invited, not ordered, to attend a TERO Outreach event that was the subject of Union Exhibit 139A at 14, for which she earned two hours of compensatory time. (T.L.A. 340)

Ms. Montoya agreed that she tends to take any comp time she earns promptly after she earns it. (T.L.A. 339) and that there was a time when she had low annual leave balances a few years back. (Id.) She agreed that someone with low leave balances might have to use LWOP if they needed to take off, and that having some comp time would come in pretty handy. (T.L.A. 339-340)

Kathlyn Johnson has been an investigator since 1992 in Albuquerque. She is currently supervised, and has been for the past 1 ½ years, by Geraldine Herrera, and prior to that by Christella Garcia. She works a 4/9/4 schedule. (T. 351, l. 12-14). Johnson went through Exhibit U-136 and verified that she had requested comp time to do various tasks. See summary of the exhibit discussed in Marchbanks' summary. Of the six events, only one involved more than 3 hours: an on-site on Friday and Saturday, 3/10/06 through 3/11/06 involving 19 or 20 hours of comp time. (Union Exhibit 136D at 16). Some of her work involved working on an "A" case cause review, one involved drive time for an on-site, one involved CST training (in the nature of Outreach). All of it, by general testimony from Ms. Marchbanks, was avoidable and resulted in

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Montoya gave a rambling response that management has always said that there is no budget for overtime, etc.

an election by Ms. Johnson to work comp time rather than use other techniques to avoid having to do so.

Ms. Johnson freely admitted that until recently, she had been in the hole on leave, and in fact, owed the government 240 hours of sick leave. Her problems with leave went back at least to 2004. She actually had to take LWOP on occasion because of her bad leave situation. She said it took her almost three years to recover to the point where she was no longer in the hole, and that, not only was comp time pretty useful to her, she testified when asked if she "actually were interested in earning comp time," she responded: "Well, if it presented itself." (T.L.A. 384-386)

Ms. Johnson said she has switched her AWS day on occasion for business reasons and that she had to ask permission of Ms. Marchbanks or Ms. Herrera to do so. (T.L.A. 386-388) Note that this testimony impeaches the statement by Ms. Montoya that Ms. Marchbanks would not allow modification of schedules.

Although Ms. Johnson was on a 5/9/4 compressed schedule at the time of her testimony, she worked a flexible schedule[60] for "quite a while" (T.L.A. 393) prior to December 2005. (T.L.A. 392) She testified that she was on that schedule probably since the time when compressed schedules came into use. (T.L.A. 394)[61] She also admitted that she tended to use comp time promptly upon earning it, certainly before using any annual leave. (T.L.A. 395-396)

Yvonne Gloria-Johnson is the ADR Coordinator in Phoenix who supervises Ms. Rita Montoya. This witness explicitly, broadly, precisely and thoroughly denied that mediators who

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[60] She testified that she worked an 8-hour a day schedule in which she chose her own starting time of 7:00 AM. (T.L.A. 393)

[61] Note that compressed schedules are mentioned in the CBA, Union Exhibit 1. That CBA was signed in 2002, so it can be inferred that Ms. Johnson was on a flexible schedule from at least 2002 through at least the end of 2005, when she switched to a 5/4/9 schedule.

work for her in general, and Ms. Montoya in particular, were not permitted to request alternation of their work schedules for business reasons. Ms. Gloria-Johnson denied that she ever said anything from which anyone could infer that management discouraged the practice, agreed that she would entertain and indeed approved any such requests, and stated that in fact mediators have requested and been permitted to alter their work schedules for various reasons, including to accommodate a mediation that was scheduled to begin later in the day than the schedule of the mediator. (T.L.A. 502-505) She noted that Montoya never requested to alter her schedule on days when her mediations were to begin at 9:00 AM. Further, she testified that mediators set their own schedules, are not required to work through lunch or at the end of their normal work day. (T.L.A. 506-507)

As to Investigator Montoya's work where she received compensatory time, as reflected in the Union's Exhibit 139A at 7, 17, 19 and B at 7, 9-10, on none of those occasions was Ms. Montoya required to work extra hours; her job didn't require her to work any of the extra time reflected; the decision to put in extra time was only that of Ms. Montoya. Ms. Montoya could have avoided late mediations by altering her schedule or simply stopping the mediation at the end of her schedule and continuing it on another day. (T.L.A. 509-511) As to outreach events, Gloria-Johnson testified that "most" are during the normal work day and there is no requirement for individuals to elect to do any outreach event that was outside of that time frame. (T.L.A. 515)

On cross, Ms. Gloria-Johnson was asked if work done on a Saturday or a Sunday would appear on a CAS. She said, in effect, if there were any, it would appear, but that she "doesn't see too many of those…." (T.L.A. 550-551)

LOS ANGELES

The Commission's Los Angeles District Office was the site of the final phase of the evidentiary hearing in this matter. The parties spent nearly two full weeks in that office. During the course of those two weeks there were several short days and two weeks days on which no testimony at all was taken. Although 14 Investigators and 2 mediations are stationed in the Los Angeles District Office, the only testimony regarding that office came from one Investigator (Ms. Deborah Lichten) who had not worked in that office since May 2006. (Agency Exhibit 7A and T.L.A. 112-113). The Los Angeles District also includes the San Diego Area Office and the Honolulu Local Office. Just one Investigator from San Diego (Deborah Kinzel Barnes) was called to testify but two of the three Investigators employed in Honolulu were called. This pattern is further evidence of how the Union has "cherry-picked" the evidence it presented at hearing rather than presenting a representative national sample.

Deborah Lichten was employed with the Commission in the Los Angeles District Office from 1999 to 2006. (T.L.A. 112-113) In May 2006 she was reassigned to the Commission's Atlanta District Office. (T.L.A. 113) On direct-examination, Ms. Lichten was asked about a single hour of compensatory time that she used on February 19 of some unspecified year.[62] All Ms. Lichten was able to recall about the hour of compensatory time reflected on Union Exhibit 133 was that "I worked an additional hour someone (sic) and received an hour of comp." (T.L.A. 115) Ms. Lichten did testify that as an Investigator in Los Angeles she was told not to work beyond her schedule. (T.L.A. 117-118) Ms. Lichten testified that on any occasion on which she did work beyond her schedule she did receive compensatory time. (T.L.A. 119-120)

[62] Ms. Lichten was never asked and never testified as to what year Union Exhibit 133 might relate to.

In sum, then, all that the evidence shows with respect to the Los Angeles District Office is that one former Investigator in that office worked a single hour of extra time (at some unknown point in time) for which she received an hour of compensatory time.

San Diego

The only witness from the Commission's San Diego Area Office was Investigator **Deborah Kinzel-Barnes**. (T.L.A. 260-261) Ms. Kinzel-Barnes testified that she had been employed with the Commission as a Secretary in the San Diego Area Office since 1999. (T.L.A. 261) She stated that she had been an Investigator since 1994. (Id.) Ms. Kinsel-Barnes testified that until December 2007 (when she converted to a 5/4/9 compressed schedule) she had been on an eight hour per day slide-and-glide flexible schedule since 1994. (T.L.A. 273-275) She explained that her hours of work varied depending on her "daughter's school schedule." (T.L.A. 274-275)

Ms. Kinzel-Barnes testified that when she did work beyond her schedule, she received "compensatory" time. (T.L.A. 266) Ms. Kinzel-Barnes identified the two documents which comprised Union Exhibit 142 as her time records for pay periods in May and October 2005. (T.L.A. 263-265) The documents which comprise Union Exhibit 142 reflect that on one occasion in May 2005 Ms. Kinzel-Barnes used 5 hours of "compensatory" time and that on another occasion in October she used 8 hours of "comp time." (Union Exhibit 142) She testified that these hours were "hours worked over and above the schedule [that] are given to us for travel, or other items." (T.L.A. 266)

This testimony proves nothing. First, hours of travel time beyond regularly scheduled hours is properly treated as compensatory time for which overtime pay is not required.[63] Second,

[63] Generally, travel must be authorized and occur during an employee's regular working hours to be compensable with pay. 5 CFR § 551.422(a).

Ms. Kinzel-Barnes was on a slide-and-glide schedule and any time she worked beyond her regularly scheduled hours should have been denominated as "credit time" which is also not overtime unless it is officially ordered in advance. Ms. Kinzel-Barnes affirmed this by testifying, on direct-examination, that any "compensatory time" she earned had to be used in the same pay period. (T.L.A. 266-267) But, in any event, the time was, according to Ms. Kinzel-Barnes, both earned and used in the same pay period so she never worked more than 80 hours in a pay period on her slide-and-glide schedule in either of the pay periods covered by Union Exhibit 142.

Honolulu

The Union summoned two of the three Investigators currently stationed in the Commission's Honolulu Local Office to testify. The Commission called Honolulu Local Office Director Timothy Riera.

The Honolulu Local Office was a part of the San Francisco District until January 2006. (T.L.A. 760) It became a part of the Los Angeles District in January 2006. (Id.)

Timothy Riera has served as the Director of the Commission's Honolulu Local Office since November 1997. (T.L.A. 740) Prior to becoming the Director in Honolulu Mr. Riera served in the Commission's San Francisco District Office and in Oakland and San Jose Local Offices. (T.L.A. 740-742)

Mr. Riera testified that he currently had three Investigator stationed in the Honolulu Local Office, Raymond Griffin, Glory Gervacio and James Yao. (T.L.A. 742) Investigators Griffin and Gervacio have been employed with the Commission since September 1991 while Investigator Yao joined the Commission more recently in December 2004. (T.L.A. 742-743)

Mr. Rier testified that all three work an eight hour per day slide-and-glide schedule. (T.L.A. 743-745)

Mr. Riera explained that outreach events attended by employees of the Honolulu Local Office typically occur during regular business hours and that outreach events on weekends are "pretty rare" which he defined as "one to two times a year." (T.L.A. 745-746) When such circumstances arise, he explained that the employee who volunteers to cover the weekend event is given credit hours. (T.L.A. 746-747) He stated that employees in the Honolulu are never instructed or required to perform outreach for which they did not volunteer. (T.L.A. 747; 785-786) Mr. Riera testified that outreach opportunities in the Honolulu Local Office are so "few" in number that he could "count on my hand the amount." (T.L.A. 786)

Mr. Riera also explained that Honolulu Local Office Investigators also travel to Saipan to conduct investigations. (T.L.A. 747-748) Such trips occur, at most, once a year although in some years (such as the current one) there are no funds for any trips at all. (Id.) Mr. Riera testified he has never had to assign an investigator to go to Saipan who did not volunteer for the trip, (T.L.A. 748-749), explaining on cross-examination that "usually they all wanted to go to Saipan." (T.L.A. 776) He testified that the Investigators "compete for the work, basically." (T.L.A. 748-749) Investigators who travel to Saipan continue to work their eight hour slide-and-glide schedules. (T.L.A. 749)

Finally, Mr. Riera testified that other then the Saipan trips any time worked outside regular hours is "usually credit hours." (T.L.A. 792 and 802)

Raymond Griffin testified that he has been employed with the Commission as an investigator in the Honolulu Local Office since September 2001. (T.L.A. 461)

During his service with the Commission Mr. Griffin testified that he has been to Saipan on two occasions. (T.L.A. 463-464) Mr. Griffin testified that he prepared Agency Exhibit 38 and that the words on that document were his. (T.L.A. 479) Agency Exhibit 38 reflects that Mr. Griffin advised his supervisor, Mr. Riera, that "[d]uring my trip to Saipan, I would like to work the following compensatory hours for travel, perform intake and enforcement activities." Mr. Griffin followed his request with a projection of the number of hours he might work on travel to and while in Saipan for which he was requesting compensatory time. (Agency Exhibit 38 at 1) Mr. Riera testified that Mr. Griffin prepared Agency Exhibit 38 without any guidance or instruction from him. (T.L.A. 751-752) Mr. Riera also explained that travel time outside of regular work hours is treated differently than other hours of work. (T.L.A. 752-753)

Mr. Griffin also testified regarding Union Exhibit 131. Mr. Griffin explained that on a Sunday, May 22, 2005, he worked 2.75 hours to interview a management representative. (T.L.A. 465-466)[64] Mr. Riera also testified that on the following Friday, May 27, 2005, he only worked four hours and took the four hours of "compensatory time." (T.L.A. 468 and 474)

Mr. Riera explained that he does not assign work on Sundays but that the interview which was the cause for the creation of Union Exhibit 131 had to be done on a Sunday because that was the only day the interviewee was available. (T.L.A. 754-755) Mr. Riera testified that the four hours of "compensatory time" that Mr. Griffin took on May 27, 2005 were the four hours had earned the "previous Sunday." (T.L.A. 756-757) Mr. Riera testified that Mr. Griffin only worked 40 hours during the week that began with Sunday, May 22, 2005. (T.L.A. 757)

Glory Gervacio testified that she was an Investigator who was hired by the Commission in September 2001. (T.L.A. 620-621) She has been stationed in the Honolulu Local Office for

[64] Because Mr. Griffin works an eight hour per day slide-and-glide schedule, this time should have been denominated as "credit time."

all of her time with the Commission. (T.L.A. 621) Ms. Gervacio testified that she works from 9:00AM to 5:30 PM each day but that she is on a slide-and-glide schedule that allows her to vary her starting time as long as she works her eight hours per day. (T.L.A. 631-632) She is on that schedule because she has a long commute. (Id.)

Ms. Gervacio testified that she does not "usually" work beyond her scheduled hours. (T.L.A.627) She explained that if she did, she would report to work an hour later on the following day or later that week. (Id.) This is one of the benefits (flexibility) of the slide-and-glide schedule that Ms. Ms. Gervacio works.

Ms. Gervacio also authenticated Union Exhibit 132 which reflected that during the months of June, August and September she used a total of 28 hours of "compensatory time." (T.L.A. 621-624; 626) The Union, however, elicited no testimony as to how this time came to be credited to Ms. Gervacio. There is no evidence as to whether it was for travel, for example, and as to the time Ms. Gervacio used in August and September (four hours on each occasion) whether it was simply credit time she earned in some prior pay period on her slide-and-glide schedule. (See Union Exhibit 132B and C.)

V. THE WILLFULLNESS ALLEGATIONS

A violation of the "suffered and permitted" provision of the FLSA is willful if the Agency violates the law deliberately or intentionally. Angelo v. United States, 57 Fed. Cl. 100 (2003). The Agency has sought to allow investigators, mediators and paralegals to voluntarily modify schedules or to voluntarily work extra hours for compensatory or credit time in compliance with 5 U.S.C. § 5543, without intimidation, threats or coercion. 5 C.F.R. § 551.531. While employees know that paid extra hours of work beyond forty hours a week or eighty hours

a pay period will not be approved because they are not considered necessary by supervisors, they have the choice of working extra hours for compensatory time or not working them at all. See AFGE Local 507 and VA Medical Center West Palm Beach, 58 FLRA 378, 380 (2003); AFGE, Local 3614, 60 FLRA No. 121 (2005) at 7 n.5. They have not been ordered or required by supervisors or the duties to work more than forty hours a week or eighty hours a pay period. Agency management believes that investigators, mediators and paralegals desire and appreciate the flexibility offered, and the Union's position regarding these practices is not embraced by the vast majority of Agency non-exempt employees. The Agency submits that its interpretation of the statutory and case law, to permit extra time of voluntary work for compensatory time off, is both correct and a reasonable interpretation of existing law.

VI. LIQUATED DAMAGES

Liquidated damages are awarded under the FLSA if there is a violation of law and the actions were taken in bad faith and unreasonable. U.S. Department of Justice, Bureau of Prisons v American Federation of Government Employees Local 720, 60 F.L.R.A. No. 65 (2004); U.S. Department of Commerce National Oceanic and Atmospheric Administration and International Brotherhood of Electrical Workers Local 80, 57 F.L.R.A. No. 98 (2001). The practice of allowing investigators, mediators and paralegals to voluntarily modify schedules for their own convenience without working more than forty hours a week or eighty hours a pay period is a reasonable, good faith effort to provide flexibility to the employees.

VII. DAMAGES

The Union, in the eight weeks of hearings, presented very little evidence of loss of pay for suffered and permitted overtime.

VIII. CONCLUSION

The Agency settled a nation-wide overtime grievance in 1995. As a result of that settlement, the Agency has attempted to comply with the law while providing its employees the maximum amount of flexibility in the work environment. The system being challenged by the Union has been in place many years. Clearly, bargaining unit employees enjoy the flexibility to change schedules and work at home. Only after the Agency notified the Union that it was going to re-classify the Investigator and Mediator positions from non-exempt to exempt did the Union decide to include the overtime issue in its grievance relating to the exemption issue. The fact that the Union resorted to forcing bargaining unit employees to testify on its behalf underscores the chasm between the Union leadership's vindictiveness and the rank and file members' satisfaction with their work environment.

The testimony of all but a handful of witnesses established that employees who work extra hours receive the same amount of time off so that, overall, they do not work more than 40 hours a week or 80 hours a pay period, including those who stay extra time against the express direction of their supervisors. Those who claimed there is too much work to accomplish in the allotted time can be counted on one hand. Management's response to those is that they are only expected to work their tour of duty. The work will always be there tomorrow.

The Agency treats its employees fairly in terms of pay, as well as in terms of the various laws it is charged with enforcing. Most of the Agency's employees, non-exempt and exempt, are dedicated to the mission of the Agency. If the supervisor learns of the extra time worked, in most cases the employee is given time off. Where employees are dedicated to the mission of

eliminating discrimination in the workplace, some look at the work as a life fulfilling goal; and sneak extra work home because of that dedication and satisfaction with their work.

On the other side of the employee spectrum are those few who look at employment with the Agency as just another government job where their goal is to attempt to squeeze extra money out of the Agency wherever and whenever the opportunity presents itself. The Union's argument that a bargaining unit employee should be offered pay for extra time worked voluntarily, where the employee is free to not work the extra time, is an example of that opportunistic attitude.

The evidence of extra time worked for compensatory time off by individual employees is not significant. In most cases, after consideration of credit time, lack of prior knowledge of the supervisor, more than a half hour for lunch and specific requests for compensatory or credit time, very little suffered and permitted extra hours were shown and since most employees are on flexible schedules, those extra hours represent credit hours earned which is by definition not overtime . Most of the documentation intended to show extra hours worked was not complete enough to establish that more than 40 hours in the week or 80 hours in the pay period were worked. Where it did establish weeks with extra time, the witnesses uniformly testified that

compensatory time was used later.

Respectfully submitted,

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