

In the Matter of a Controversy)	
)	FLSA Grievance
between)	
)	
American Federation of Government Employees,)	
National Immigration and Naturalization Service)	
Council,)	
Union,)	Supplemental
)	Decision
and)	
)	
U.S. Department of Homeland Security,)	
Immigration and Customs Enforcement,)	Date: June 7, 2006
Agency.)	
_____)	

I. Introduction

This is a SUPPLEMENTAL DECISION, concerning several matters that were left unresolved, pending additional information, by the decision dated January 3, 2006. The Union submitted information as to commute times for certain class members on April 3, 2006. The Agency submitted its supplemental information and responses, as to putative class membership, by January 30, 2006. In addition to commute time and putative class matters, this SUPPLEMENTAL DECISION addresses other matters, to include several arithmetic and similar errors in the initial decision, computational matters concerning several class members that arose when suffer or permit calculations were performed by the Agency’s pay branch, and other information required by the January 3 Opinion , which is still outstanding.

As background, this arbitration involves a dispute under the Fair Labor Standards Act (FLSA) between the U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, (formerly U.S. Immigration and Naturalization Service (INS)), hereinafter referred to as the “Agency” or the “Employer”, and the American Federation of Government Employees, AFL-CIO, National Immigration and Naturalization Service Council (NINSC), hereinafter referred to as the “Union.” The Agency is represented by Ilir M. Tsungu, Deputy Chief Human Capital Officer, U.S. Immigration and Customs Enforcement, United States Department of Homeland Security, who is assisted by Leynisha Rosario, Employee and Labor Relations Specialist. The Union is represented by Joe Goldberg, Assistant General Counsel, Litigation and Angelia Wade, Legal Rights Staff Attorney, American Federation of Government Employees, AFL-CIO. The relevant general factual background is set out in considerable detail in the January 3, 2006 decision and does not require restatement. The matters addressed by this SUPPLEMENTAL DECISION follow.

II. Putative Class Issues

As provided in the initial decision, there were five putative class claimants for whom additional information was needed. They are SSA #s xxx-xx-xxxx, xxx-xx-xxxx, xxx-xx-xxxx, xxx-xx-xxxx, and xxx-xx-xxxx. On January 30, 2006, the Agency submitted a response and information as to these claimants.

1. Union Exhibit 515 / SS# xxx-xx-xxxx – The dispute here is whether this claimant was a class member for the period January 9, 1993 to April,

1994.¹ In her submission, she claimed entitlement to overtime beyond that period of time and up until she became a non bargaining unit employee on “4/94.” However, the Agency initially represented that she was in a supervisory or non covered position after January 9, 1993. In its January 30, 2006 submission, the Agency provided that this claimant was an Immigration Examiner from January 9, 1993 to March 6, 1994 and that the Agency records showed that this employee was “FLSA Exempt” between “January 9, 1993 and April 1994.” No records were provided, however. I am not aware of any reason that this employee should have been classified as Exempt for the period as an Immigration Examiner between January 9, 1993 and March 6, 1994. Thus, I find that she was a class member (i.e., misclassified) during that period of time.

2. Union Exhibit 521 / SS# xxx-xx-xxxx – This employee is an undisputed class member from June 2, 1991 to May 11, 1996, continuously. However, the employee also asserted that he was an Immigration Examiner between June 2, 1991 and August 8, 1998, in effect, claiming that he was a class member in addition to the period claimed by the agency. In its January 30, 2006 submission, the Agency reaffirmed its position, providing that this employee was promoted to a Supervisory District Adjudications Officer, as of May 12, 1996, and was therefore not a class member after that. This evidence is sufficient. The claimant is not a class member for the period after May 11, 1996.

¹ This employee is already a class member and has been recognized for the period June 6, 1991 to January 9, 1993.

3. Union Exhibit 530 / SS# xxx-xx-xxxx – This employee claims class entitlement for service in 1997 and 1998, when she was employed as a Deportation Officer, GS-1801-7 and 9, located in Buffalo, New York. This is a position and grade that is included in Appendix A. However, as I indicated in the previous decision, the Agency database lists this employee as non-exempt for that period. Accordingly, I found that the employee made out a prima facie case of class entitlement, which must be rebutted by documentation. I then directed the Agency to provide documentation, within 30 days, seeking to show that this employee was indeed classified as non-exempt and therefore not a class member. However, in its January 3, 2006 response, the Agency merely provided the same database evidence that was already in the record and that I had cited. Once again, the Agency is directed to provide documentation (e.g., pay records, SF Forms, etc.), within 10 days of receipt of this Supplemental Decision, showing that this employee was classified as non-exempt. The failure to submit such documentation, without cause, may lead to an adverse inference.

4. Union Exhibit 533 / SS# xxx-xx-xxxx – This employee was in GS-0303-Clerk, GS-0318-Secretary until June 9, 1996, when she became a GS-1801-5 District Adjudications Officer, where she served until June 8, 1997, when she became a Grade 7 until June 7, 1998. On June 7, 1998, she became a GS-9, District Adjudications Officer, until September 17, 1998. The District Adjudications, GS-5 position is not included on Appendix A. Based on the service up until that time, the employee is not a class member. As to the service after June 8, 1997 – and as I noted in the previous decision – the employee was in covered positions, GS-7 and 9 District Adjudications Officers. However, as also noted, the Agency asserted that she was classified

as a non-exempt employee, in those positions, relying on its database evidence. I then directed the Agency to provide documentation, within 30 days, seeking to show that this employee was indeed classified as non-exempt and therefore not a class member. However, in its January 3, 2006 response, the Agency merely provided the same database evidence that was already in the record. Once again, the Agency is directed to provide documentation (e.g., pay records, SF Forms, etc.), within 10 days of receipt of this Supplemental Decision, showing that this employee was classified as non exempt. The failure to submit such documentation, without cause, may lead to an adverse inference.

5. Union Exhibit 534 / SS# xxx-xx-xxxx – The evidence shows that this employee was employed in Correspondence Clerk (Typing) and Deportation Clerk (typing) positions, during the time period that she claims that she was denied overtime. Neither of those positions are within Appendix A. Moreover, the Agency's records classified her as non-exempt during this period of time. Thus, I determined in the previous decision that she was not a class member for that period. However, I also noted that on December 21, 1997, this employee became an Examinations Assistant, GS-1802-7 and that this position was covered in Appendix A as the Examinations Assistant position. However, as I further observed, the Agency asserted, relying on its database, that the employee was classified non-exempt (*i.e.*, and outside the class) while in that position. I then directed the Agency to provide documentation, within 30 days, seeking to show that this employee was indeed classified as non-exempt and therefore not a class member. However, in its January 3, 2006 response, the Agency merely provided the same database evidence that was already in the record. Once again, the Agency is

directed to provide documentation (e.g., pay records, SF Forms, etc.), within 10 days of receipt of this Supplemental Decision, showing that this employee was classified as non exempt. The failure to submit such documentation, without cause, may lead to an adverse inference.

III. Commute Time Issues

There were several cases for which normal commute time was needed, and, for which the Union was tasked by this Arbitrator with the obligation to provide such information. They include Case #s 1, 6 (commute time as well as another issue), 8 (commute time as well as another issue), 35 (commute time as well as another issue), 172, 354, and 369. By submission dated April 3, 2006, the Union represented that it had sought information from all but gained and submitted additional information from two claimants (Cases #s 172 and 354).

The claimant in Case # 172 provided by sworn statement that her commute time for her Houston, TX duty station was one hour each way and for her Christiansted duty station 35 minutes each way. The Agency shall use those commute times in calculating this claimant's entitlement.

Concerning the claimant in Case #354, she submitted a sworn statement that all of the claimed travel time was in a GOV, between two duty stations, and that commute time to and from her home, which was not part of the claim, should not be deducted. I agree. This claimant is entitled to 63 hours of suffer or permit overtime.

As to the other claimants – Case #s 1, 6, 8, 35, and 369, no commute time has been provided. Accordingly, the Agency will presume one hour each way of commute time for these claimants in making its calculations.

IV. Other Cases For Which Information Was Needed

Besides the above, there were other suffer or permit claims for which information was needed and was to be submitted by either the Union or Agency or both. These are: Case #s 6 (which involved commute time as well), 8 (which involved commute time as well), 35 (which involved commute time as well), 66, 98, 100, 213, 226, 308, 331, 343, 352, 463, 474 and 476.

1. Case # 6 005324011 (UN.EX. 10, AG.EX. I-6)

This case was comprised of 107 claims submitted on 107 separate Form Bs. Claimant is an INS Inspector whose work location (home port) was Houlton, ME. The employee was apparently seeking compensation for travel time. While the claims were acceptable generally by the Agency, the Agency asserted a need to verify the identity of the work locations to confirm the reasonableness of the time claimed. Thus, I provided the Agency with an opportunity to do that, and, if there was a disagreement as to the reasonableness of the travel time claimed, to return to this Arbitrator for a decision. I have not been informed that the Agency views the travel claims

as unreasonable. Accordingly, the Agency shall calculate the claims based on the hours specified by the claimant.

2. Case #8 007366212(UN.EX. 82, AG.EX. I-76)

This case was comprised of 317 claims, each processed on a separate Form B. Claimant was an Immigration Inspector who is claiming a total of 480 hours for travel to various sub-ports in Maine, on various dates each year from 1992 to 1998. According to Agency records, claimant was an intermittent employee for most of the retroactive period.

The Agency contended that 5 CFR Section 555.501(a)(2) limits FLSA travel to travel over 40 hours in a workweek and that before this claim could be processed further, the Agency required the specific times the employee worked as an intermittent inspector, as well as the employee's normal commute time. The Agency agreed to supply the employee's work records at a later hearing and the Union agreed to supply evidence of the employee's normal commute time. I did not find additional information in the record. Accordingly, in the January 3, 2006 decision, I directed the following: "Thus, the Agency, the Agency will obtain the specific times the employee worked as an intermittent inspector and provide that information to the Union. After this is done, if the Agency and the Union do not agree as to that information, they may come back to this Arbitrator for a decision. Likewise, the Union shall provide the Agency with information concerning the employee's normal commute time within 30 days of this Opinion, and the Agency shall make an appropriate deduction from the agreed-upon hours of overtime in calculating the award to the employee. If the Union has not

provided that information within 30 days, the Agency shall presume one hour each way, in making any calculation.”

The commute time part of this has been resolved above in Section III. As to the intermittent inspector aspect, I assume that has been worked out because neither party has come back to this Arbitrator on that matter. Moreover, this case was not among those cases identified by the Dallas and Laguna Payroll Offices, for which additional information was needed. In any event, once calculations have been completed and payments made, this employee may challenge the computation, if dissatisfied with the workweek calculation.

3. Case # 35 xxx-xx-xxxx (UN.EX. 39, AG.EX. I-34)

Claimant was an Immigration Officer in 1991-1993, and a District Adjudications Officer thereafter, claiming unpaid working lunch periods at the Hartford, CT office where the employee performed work in the legalization and foreign adoption program. Similar to the above case, the claimant was a part-time employee, working 40 hours per pay period and the Agency needed to obtain the employee’s work schedule from the Hartford Office, as well as pay registers for 1991-1998. (Overtime is appropriate only if the employee performs work in excess of eight hours in a daily tour of duty or in excess of 40 hours in the weekly tour of duty.). Based on that understanding, I directed the following “Within 30 days of the date of this decision, the Agency shall obtain this claimant’s records to determine if the claimant has sufficient hours to qualify and to provide that information to the Union. If the claimant has sufficient hours or the parties disagree as to

hours or entitlement (*e.g.*, specificity, etc.), they should resubmit this matter to me for a brief, prompt decision.”

Again, I assume that this matter has been worked out because neither party has come back to this Arbitrator on this matter. Moreover, this case was not among those cases identified by the Dallas and Laguna Payroll Offices, for which additional information was needed. In any event, once calculations have been completed and payments made, this employee may challenge the computation, if dissatisfied with the calculation.

4. Case # 66 xxx-xx-xxxx (UN.EX. 70, AG.EX. I-64)

This case, submitted on **Form B I.D. # 3853**, involves a single claim for five hours of FLSA overtime during the period 11/19/1997-12/17/1997. Claimant is an Immigration Inspector assigned to Niagara Falls, NY. The claim is for uncompensated time for OTBIIOBTC Training in Glynco, GA. During the claim period, claimant represents that he was ordered to report every Wednesday, one hour before the scheduled shift began for mandatory uniform inspection drills.

This claim was accepted for adjudication by the Agency subject to confirmation of the type of training involved. (As correctly argued by the Agency, the FLSA does not pay overtime for basic training courses, but does pay overtime for advanced training. See 5 CFR Section 551.423 (a)(3)). Because no one at the hearing knew what the code “OTBIIOBTC” meant, the Agency was permitted to investigate further and a decision was deferred, pending the following: “Within 30 days of the date of this Opinion, the

Agency will make a determination as to whether the training was basic or advanced and provide that information to the Union. If the Union disagrees with the Agency's determination as to basic training, it will present this matter to the Arbitrator within 10 days of the receipt of information from the Agency, after which I will issue a prompt decision."

No additional information has been submitted to me and, presumably, this matter has been worked out. In any event, I find that the requested five hours of overtime is appropriate and must be awarded to the claimant.

5. Case # 98 xxx-xx-xxxx (UN.EX. 103, AG.EX. I-97)

The issue here was whether the employee was law enforcement qualified, and therefore entitled to 1/2 hour lunch period compensation for the period claimed. In that regard, the Agency was "directed to review its records and determine the law enforcement status of this employee." It is unclear whether the Agency has made that determination. In any event, the Agency must advise the Union and this Arbitrator as to the claimant's status within 10 days of this decision.

6. Case # 100 xxx-xx-xxxx (UN.EX. 105, AG.EX. I-99)

Because of the multiple movements in the employee's FLSA status, the Agency suggested that it would be prudent to evaluate her claim using her official personnel folder, so as to accurately establish the parameters of her exempt/non-exempt history. The Agency agreed to undertake that investigation and the Union agreed to elicit additional information from the

employee as to the specificity of her claim. However, in the January 3 Opinion, I noted that the information had not been submitted and deferred a decision “pending receipt of additional information from the Agency and the Union, which must be submitted within 30 days of the date of this Opinion, after which I will issue a prompt supplemental decision.” I have not received the information from the Agency.

The Agency is directed to provide that information within 10 days of receipt of this Supplemental Decision. The failure to submit such information, without cause, may lead to an adverse inference.

7. Case # 213 xxx-xx-xxxx (UN.EX. 220, AG.EX. I-211)

Claimant, an Inspector assigned to Sault Ste. Marie, MI, submitted 19 Form Bs, claiming a total of 32 hours of FLSA overtime performing inspections on various dates in 1996, 1997 and 1998. The accompanying Form Cs list G-259 duty assignment sheets as supporting documentary evidence. Although specific dates and times are provided, the Agency rejected the claim, contending that these hours are ordinarily compensable by Title 5 overtime, but not by Act 31 overtime, suggesting that the time is probably already in the system. Moreover, the Agency pointed out several inconsistencies on the claim forms. For example, **Form B I.D. # 2601** claims one hour of overtime on 3/29/1997 between 4:00 and 5:00 PM when the employee’s normal work time was listed as midnight to 8:00 AM.

The Union was afforded the opportunity to contact the employee and supplement the record with information concerning these seeming

inconsistencies as well as to clarify whether the employee had been paid for the claimed hours through the payroll system.

On May 20, 2004, the Union submitted Exhibit 220S. In his letter dated March 2, 2004 to claimant, the attorney for the Union requested a clarification of some of the inconsistencies, but did not inquire of the employee as to whether he had been paid. In his response, the employee explained that on March 27, 1997 his shift was midnight to 8:00 AM and that he had overtime from 8:00 AM to 9:00 AM. With respect to the March 29, 1997 claim, the employee stated that he worked a shift on his day off and was paid 45 Act overtime from 4:00 PM to 5:00 PM and 31 Act overtime from 5:00 PM to 12 PM. He included copies of his time sheets for the pay period ending 3/29/1997.

This was a case in which the Agency was to review whether at least some of the employee's claims had been compensated in the regular payroll system. I therefore directed the following in the January 3 Opinion: "Within 30 days of the date of this decision, the Agency shall report its conclusion as to that review to the Arbitrator and the Union. If dissatisfied, the Union will then have 10 days from receipt of the Union's position to put this matter before the Arbitrator, after which I will issue a prompt decision." The Agency's conclusion, if made, has not been reported to me.

If the Agency is contesting this claim, the Agency is directed to provide information as to whether the employee's claims have been compensated in the regular payroll system within 10 days of receipt of this Supplemental

Decision. In the absence of such information, the claimant will be awarded 32 hours of FLSA suffer or permit overtime.

8. Case # 226 xxx-xx-xxxx (UN.EX. 233, AG.EX. I-224)

While the Agency was satisfied with the degree of specificity of the claim, it questioned whether the employee was a member of the class during the times claimed. Thus, this matter was left open and I directed the following: “Within 30 days, the Agency will determine whether the claimant was a class member during the period claimed and communicate that view, along with any supporting documents to the Union and Arbitrator. If the Union disagrees with the Agency’s position, it will put this matter before the Arbitrator, within 10 days thereafter. The Arbitrator would then issue a prompt decision.”

If the Agency is contesting this claimant’s class membership, it must provide documents (not just database information) within 10 days of receipt of this Supplemental Decision. In the absence of such information, the claimant will be determined to be a class member entitled to the claimed suffer or permit overtime.

9. Case # 308 xxx-xx-xxxx (UN.EX. 316, AG.EX. I-306)

As I noted in the January 3 Opinion and Award, there were two unresolved factual issues presented by this case that arose at the hearing. First, there was a question as to whether the position that claimant occupied during the

time claimed was exempt or non-exempt. The Agency was going to investigate the employee's status further. Second, the Union was going to get some clarification from the claimant as to the Agency's awareness of claimant's work at home and whether steps were taken to prevent it. By the time of the January 3 Opinion, additional information had not been submitted by the parties. Accordingly, I ordered the following: "Within 30 days of the date of this opinion, the parties will submit the above-described information to the Arbitrator, after which I will issue a prompt supplemental opinion."

That information has not been provided. The parties will have 10 days from the date of this Opinion to submit the needed information. The failure to submit such information, without cause, may lead to an adverse inference.

10. Case # 331 xxx-xx-xxxx (UN.EX. 339 and 339X, AG.EX. I-329)

Claimant, an Immigration Inspector assigned to Lincoln, NE, submitted six claims. **Form B I.D. # 5352** claimed four hours of FLSA overtime on 9/12/1992 for review and research of I-140 cases. Claimant asserted that she often did research on weekends/evenings; otherwise she would not have met her quota.² The accompanying Form C did not list any documentary evidence. It listed claimant's ex-supervisor as a witness, indicating that other than mentioning her work to her supervisor in a conversation, she did not have any witnesses to confirm that she worked on her own at home. **Form B I.D. # 5374** is a similar claim for two hours on 9/9/1992, indicating

² In the January 3 Opinion, I erroneously referred to the claimant as a "he."

that she recalled mentioning her work at home to her supervisor. **Form B I.D. # 5380** requested three hours on 10/3/1992. Here, there was no Form C on file.

Form B I.D. # 5405 claimed eight hours of overtime on 2/25/1995 for completing a computerized index of information regarding the Library of Congress. The accompanying Form C did not list any supporting documentary evidence. It listed as a witness an ex co-worker who lived with claimant at the time, who knew that claimant was working on the project, and advised claimant that the work should be done during duty hours. There is no indication that management or supervision was aware of this work at home claim.

Form B I.D. # 5673 claimed 20 hours during the period 4/26/1993-7/23/1993. Form B asserted that for 10 weeks claimant worked an extra hour, two days a week off the clock in order to complete cases. Claimant's normal work time was 7:30 to 17:00 and the overtime was worked between 5:00 PM and 6:00 PM. The accompanying Form C does not reference any documentary evidence. It lists claimant's ex-supervisor as a witness, indicating that he or another supervisor would be in the building until it closed, typically 6:00 PM.

Form B I.D. 5425 apparently claims travel time. At the time of the January 3 Opinion, I was unclear as to the amount because this B I.D. Form (3505 of 5399) was not included with Union Exhibit 339.

While the record reflected that the Union submitted Union Exhibit 339X at the May 21, 2004 hearing, I was unable to locate that exhibit. The Agency had responded to that exhibit, and accepted **Form B I.D. 5425** but argued, as it had at the hearing, that there was still no evidence that claimant's supervisor had knowledge the work was being performed.

In my January 3 Opinion, I noted that "While the Agency has accepted **Form B I.D. 5425** and that claim is therefore proven, I am unable to rule on the other claims until I review Union Exhibit 339X. Within 30 days of the date of this Opinion, the Union will submit that exhibit, after which I issue a prompt supplemental opinion."

The Union has submitted what it believes to be the missing Union Exhibit 339X. Based on the record evidence, I find that the claimant has proven entitlement to 10 hours identified in **Form B I.D. # 5425**, 4 hours claimed in **Form B I.D. # 5352**, and 2 hours claimed in **Form B I.D. # 5374**, for a total of 16 hours. Her other claims are denied.

11. Case # 343 xxx-xx-xxxx (UN.EX. 351 and 351X, AG.EX. I-341)

Claimant, a DAO assigned to Seattle, WA, submitted 70 Form Bs claiming a total of 857 hours of FLSA overtime during the period 6/3/1991-5/31/1996.

At the hearing on this case, the Agency was to report back as to which of 70 forms were specific enough for adjudication and which were too general, as a way to simplify this claim. That information was not supplied.

Accordingly, in the January 3 Opinion I directed the following: “The Agency will have 30 days from the date of this Opinion to provide its analysis, after which I will issue a prompt supplemental Opinion.”

After that Opinion, there was some confusion as to whether the Agency had received certain information provided by the claimant. Consequently, the Union thereafter delivered numerous documents to the Agency and the Arbitrator, as requested by the Agency.

The analysis directed by the January 3 Opinion has not been provided by the Agency. The Agency will have 10 days from the date of this Opinion to submit the needed analysis. The failure to submit such information, without cause, may lead to an adverse inference.

12. Case # 352 xxx-xx-xxxx (UN.EX. 360, AG.EX. I-350)

Claimant, an SRI assigned to Sweetgrass, MN, submitted 60 Form Bs, claiming a total of 113 hours of FLSA overtime at specific times on specific dates in 1991, 1992 and 1993. The overtime was variously described as FLSA travel, inspectional work, phone calls made from home, and being called back to work from home.

The Agency did not contest these claims generally, except for the difficulty of distinguishing the parts of the claims involving the calls made from home and the parts involving being called back to work. Also, it required normal commute time. At the hearing on March 30, 1994, I continued the matter to

enable the Union to gather further information from the employee, and for the Agency to perform further analysis of the claim.

On May 20, 2004, the Union submitted Exhibit 360S, consisting of a letter from the attorney for the Union to the employee dated April 12, 2004, inquiring of the employee's normal commute time, and claimant's responsive declaration dated April 22, 2004. Claimant attested that he resided only four blocks from his official duty station and that his normal commute time was only five minutes under the most inclement conditions.

In its submission on August 31, 2004, the Agency acknowledged the commute time but noted that the employee did not provide any supplemental information regarding whether phone calls were responded to at home or required returning to work. Post-hearing, the Agency re-reviewed the claims and accepted 20 but rejected 40 of the forms without further information. In the January 3 Opinion, I noted the following: "In order for me to resolve this matter, the Agency must identify which of the 60 Form Bs that were accepted and why as well as the total number of hours accepted. This should be submitted within 30 days of this Opinion, after which I will issue a prompt supplemental Opinion."

That information has not been submitted. The Agency will have 10 days from the date of this Opinion to submit the needed analysis. The failure to submit such information, without cause, may lead to an adverse inference.

13. Case # 463 xxx-xx-xxxx (UN.EX. 471, AG.EX. I-461)

Claimant, an Asylum Officer assigned to Woodlands, TX, submitted 10 Form Bs claiming a total of 24 hours of overtime for FLSA travel at specific times on specific dates in 1996, 1997 and 1998. The accompanying Form Cs listed Form SF-1012 and travel vouchers as supporting documentary evidence.

At the hearing, the Agency noted that it needed additional information about the claimed travel, in order to properly evaluate the claim. The Union was to obtain that information from the claimant but I was unaware of any supplemental information in the record. Accordingly, in my January 3 Opinion, I directed the following: “The Union is provided 30 days from the date of this decision to gain declaration evidence from the claimant as to the reason for the travel, and where the travel was to and from. The Agency will then have 30 days to make a determination and inform the Union and this Arbitrator. If the claim is not accepted, I will issue a prompt supplemental Opinion.”

That information has apparently not been gathered. The Union will have 10 days from the date of this Opinion to submit the needed information to this Arbitrator and the Agency, and the Agency will have 10 days to reply. The failure to submit such information by the Union, without cause, may lead to a finding that the claims are unproven.

14. Case # 474 xxx-xx-xxxx (UN. EX. 482 and 482X, AG.EX. I-472)

As to part of these claims, the issue here was whether claimed Sunday or Holiday travel occurred within the claimant's regular working hours. (5 CFR 551.422 (a)(4) provides that "An employee is required to travel as a passenger on an overnight assignment away from the official duty station during hours on nonworkdays that correspond to the employee's regular working hours"). Accordingly, in the January 3 Opinion, I ordered the following: "Within 30 days of the date of this Opinion, the Union shall provide the Agency with a declaration from the claimant as to his working hours and days of work. The Agency shall then award the number of Sunday or Holiday travel hours that fall within the claimant's tour of duty hours."

I am unaware that the Union provided the needed declaration to the Agency. If it has already done so, the Union must advise this Arbitrator that it submitted a declaration to the Agency. If it has not already done so, the Union will have 10 days from the date of this Opinion to submit the needed declaration to this Arbitrator and the Agency. Failing that submission, I will find that the claims are unproven.

15. Case # 476 xxx-xx-xxxx (UN.EX. 484 and 484X, AG.EX. I-474)

Claimant, a Senior Immigration Inspector assigned to El Paso, TX, submitted 156 Form Bs claiming FLSA overtime for unpaid lunches during the period 12/26/1995-7/24/1998. According to undisputed Agency records,

the employee was not a member of the class from 6/8/1997 through 8/1/1997 because of a temporary promotion, a portion of the claimed period.

At the hearing, there were two issues that arose, (1) whether the employee was law enforcement qualified and, (2) whether the employee worked an 8 1/2 hour shift (Each of the claim forms state that the employee's normal work time was 6:00 to 14:00 and the overtime from 2:00 PM to 2:30 PM, suggesting perhaps that the employee did not work more than 8 hours per day). The parties were to seek that additional information.

In Exhibit Q, submitted on June 25, 2004, the Agency acknowledged that the employee was a qualified law enforcement officer throughout the employee's claim period. That still left the question as to the length of the workday. Thus, in the January 3 Opinion, I directed the following: "Within 30 days of the date of this Opinion, the Union shall provide the Agency with a declaration from the claimant as to the length of his workday. If he worked more than an eight hour day, he is entitled to compensation for an unpaid lunch."

I am unaware that the Union provided the needed declaration to the Agency. If it has already done so, the Union must advise this Arbitrator that it submitted a declaration to the Agency. If it has not already done so, the Union will have 10 days from the date of this Opinion to submit the needed declaration to this Arbitrator and the Agency. Failing that submission, I will find that the claims are unproven.

V. Arithmetic or Other Errors in the January 3, 2006 Decision

There were three claims that were calculated incorrectly by me in the January 3, 2006 decision. They are Case #s 193, 236 and 247.

In Case# 193, my Union Exhibit 200 included only three of five Form Bs submitted by the claimant. I erroneously only added the number of hours on the three Form Bs, and calculated only 119, rather than 555 hours, when the other two Form Bs are added in. accordingly, this employee is entitled to suffer or permit compensation for 555 hours.

As to both of the other claims, I erred by including duplicate hours. Thus, the claimant in Case #236 is entitled to compensation for 25 rather than 33 hours (BID 5587 and 5592 claimed 8 hours for the same date and time). Likewise, the claimant in Case # 247 is entitled to compensation for 71 rather than 75 hours (BID 4203 and 4191 included 1 duplicate hour, BID 4199 and 4187 included 1 duplicate hour and BID 4195 and 4182 included 2 duplicate hours). These corrected calculations will be used by the Agency.³

³ There were also two claims for which erroneous SSNs were used in the January 3 decision; Case # 376 should have been xxx-xx-xxxx instead of xxx-xx-xxxx and Case # 384 should have been xxx-xx-xxxx rather than xxx-xx-xxxx.

VI. Questions That Arose During Calculations

The suffer or permit calculations have been split up between the Agency's CBP Laguna and Dallas Payroll Offices. The Laguna office has asked calculation-related questions as to several cases.⁴ Those cases and questions are addressed below:

1. Case # 308 – Question: “The CBP Payrollfiles worksheet says to pay 120 hours of OT during the period 06/15/96-08/0/96. However, the decision says there is question as to whether the employee was in a non-exempt or exempt position at the time. The employee became exempt on 09/1/96, and therefore was non-exempt during this timeframe. Since she was already non-exempt, shouldn't she be excluded as a class member during this period?”

Answer: See Section IV.9, above.

2. Case # 311 – Question: “Please verify length of meal period. Decision says to pay meal periods between 06/2/1991 - 08/08/1998, but doesn't specify the length of the meal period. The excel file says to pay 1 hour per day. Most of the meal periods are 30 minutes unless specified in the decision.”

⁴ The Dallas office also posed questions as to two cases (and perhaps a third), which the Agency is addressing without the intervention of this Arbitrator.

Answer: Pay as provided in the Excel file.

3. Case # 328 – Question: “Part 2 of case states that the employee should receive 160 hours of overtime during the period of 06/02/91 through 06/02/97 due to the Cuban Review Panels. It looks like this should be for travel time to the different prisons, 2 days for each visit. Need more specific information on how to pay the claim, especially what dates or pay periods and how many hours for each pay period.”

Answer: This information should be obtained from the Agency files and records.

4. Case # 339 – “No entitlement to meal periods as the employee never earned AUO.”

Answer: These unpaid lunch hour claims were not contested. Please pay the claims for the period from 3/1/1998 to 5/23/1998.

5. Case # 351 – Question: “Decision indicates, ‘...the employee is not a member of the class prior to 04/17/1994 and after 04/30/1994. Only five of the claims, FORM B I.D. #s 2502, 2503, 2506, 2514 and 4689, totaling 50 hours, fall within the period of claimant's eligibility...’ However, 22 of the hours claimed are prior to 04/17/1994. 10 hrs on 4/10/1994, and 12 hours on 04/15/94 - 04/16/94. Should these hours be omitted?”

Answer: Yes. The employee is eligible only for the claims during which the claimant was a member of the class.

6. Case # 352 – Question: “Decision states that ‘...the Agency acknowledged the commute time but noted that the employee did not provide supplemental information regarding whether phone calls were responded to at home or required returning to work. Post-hearing, the Agency re-reviewed the claims and accepted 20 but rejected 40 of the forms without further information.” The arbitrator states that “...the Agency must identify which of the 60 Form Bs that were accepted and why as well as the total number of hours accepted.’ It is unknown if this information was provided and if the arbitrator issued a supplemental Opinion.”

Answer: See Section IV, Para. 12 above.

7. Case # 357 – Question: “The case states the Claimant is an Examiner/DAO assigned to Anchorage, AK. The case also states that the Claimant should receive FLSA overtime for unpaid lunch periods and that the Claimant is law enforcement qualified. However, the Claimant is not law enforcement qualified and never received AUO. This case needs additional clarification.”

Answer: This claim was not contested. Please calculate as directed in the decision.

8. Case # 384 – Question: “Cannot identify employee by SSN (not on database). No name provided.”

Answer: The correct SSA is xxx-xx-xxxx and not xxx-xx-xxxx.

9. Case # 406 – “Question: Claim is from 6/2/91 to 1/1/95; however, the employee was non-exempt until 01/12/92. Shouldn't 06/02/91 through 01/11/92 be excluded since he was non-exempt?”

Answer: Most likely but it should not matter, because the employee is entitled to compensation under the settlement agreement, which provides as follows:

2. Each claimant identified in #1, supra [which includes this claimant] shall be credited with .5 hours of overtime pay for every day worked by that claimant during the time period as defined in #3, infra.

3. Overtime pay for the claimants identified in #1 , supra, shall be compensated for the overtime specified in #2, supra, for the shorter of either of the two periods listed below:

A. The period of time that the individual claims to have participated in the “San Ysidro muster” as noted on the claimants’ previously filed FLSA “suffer or permit” claims for the period of time not to exceed December 31, 1992, which are currently in the arbitration record as Union Exhibits, or:

B. June 1, 1991, through December 31, 1992.

10. Case # 412 – Question: “Please verify length of meal period. Decision says to pay meal periods between 03/21/1994 and 08/08/1998, but doesn't specify the length of the meal period. The excel file says to pay 1

hour per day. Most of the meal periods are 30 minutes unless specified in the decision.”

Answer: Pay as provided in the Excel file.

11. Case # 419 – Question: The CBP Payrollfiles worksheet says to pay 485 hours OT from 06/2/91-05/2895; however, the decision denied both claims.

Answer: Please check with Ilir Tsungu but unless he has determined otherwise, the claimant is not entitled to compensation.

12. Case # 474 – Question: “Per Decision, claimant needs to provide his working hours.”

Answer: See Section IV, Para. 14 above.

13. Case # 476 – Question: “Per Decision, claimant needs to provide declaration regarding the length of his workday.”

Answer: See Section IV, Para. 15 above.

Respectfully submitted,

Samuel A. Vitaro
Arbitrator

Date: _____