

**IN THE MATTER IN ARBITRATION BEFORE  
SAMUEL A. VITARO, ESQUIRE**

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	)	
U.S. Department of Homeland Security	)	
U.S. Immigration and Customs Enforcement)	)	Case: INS FLSA GRIEVANCE
	)	
Agency,	)	
	)	
and	)	
	)	
American Federation of	)	
Government Employees	)	
National Immigration and Naturalization	)	
Service Council	)	
	)	
Union .	)	
	)	

**Union’s Post Hearing Brief**

Pursuant to the agreement of the parties and the Arbitrator, the Union hereby files its post-hearing brief concerning “suffer or permit” overtime payment on the “Sally Port” and K-9 (Dog Handlers) issues.

During the course of this case the Union has claimed that the Agency violated the FLSA, as codified at 29 U.S.C.A. §§ 207(a)(1) and 215(a)(2). Section 207(a)(1) provides in relevant part that:

[n]o employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employees.

In 1974, the definition section of the FLSA amended to include, for the first time, federal employees. Federal employees are "employees" of an "employer" under the Fair Labor Standards Act, 29 U.S.C. §203(d). P.L. 93-259, 88 Stat. 55, codified at, 29 U.S.C. §203(e)(2)(A)(ii).

## BURDEN OF PROOF

Each employee must prove that "he has in fact performed work for which he was improperly compensated" and "produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687-688 (1946); Dept. of Labor v. Cole Enterprises, Inc., 62 F.3d 775,779 (6th Cir. 1995). The fact that a claimant is unable to prove the precise extent of the uncompensated work does not preclude recovery. Dept. of Labor v. Cole Enterprises, Inc., 62 F.3d 775,779 (6th Cir. 1995); Fegley v. Higgins, 19 F.3d 1126 (6th Cir. 1994); Herman v. Palo Group Foster Home, Inc. 976 F.Supp. 696, 701 (WD MI 1997); Reich v. Waldbaum, Inc., 833 F.Supp. 1037 (S.D.N.Y. 1993); Herman v. Hector I. Nieves Transp. Inc., 91 F.Supp.3d 435 (D. Puerto Rico 2000). Claimants are not required to produce actual records or logs, but may establish the amount of overtime worked through their own testimony. Bueno v. Mattner, 829 F.2d 1380 (6th Cir. 1987).

Testimony of a relevant sampling of employees may be sufficient to prove the claims of all similarly situated employees. Herman v. Hector I. Nieves Transp. Inc., 91 F.Supp.3d 435 (D. Puerto Rico 2000).

Where claimants establish that they performed overtime work for which they were not compensated and the amount and extent of that work as a matter of just and reasonable inference, the burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the claimants' evidence, and if the defendant fails to produce such evidence, the court may then award damages to the claimants, even if the amount is only approximate. Mt. Clemens Pottery, 328 U.S. at 687-688; Metzler v. IBP, Inc., 127 F.3d 959, 965-66 (10th Cir. 1997); Bueno, 829 F.2d at 1387. Under Mt. Clemens Pottery, an employer cannot complain about the employee's calculation method unless it introduces specific evidence to the contrary of the hours actually worked or evidence that undermines the reasonableness of the estimate. Waldbaum, 833 F.Supp. at 1045. The use of representational examples (rather than every overtime employee) is permissible. Reich v. Southern New England Telecommunications Corp., 121 F.3d 58 (2nd Cir. 1997).

#### SUFFER OR PERMIT OVERTIME

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

an employer to record, credit, and compensate employees for all of the time which the employer requires or permits employees to work. Tum v. Barber Foods Inc., 331 F.3d 1 (1<sup>st</sup> Cir. 2003).

Where an approximate award based on reasonable inferences forms a satisfactory surrogate for unquantified and unrecorded actual work time, an approximated award is permissible under the FLSA. Alvarez v. IBP, Ins. 339 F.3d 894 (9<sup>th</sup> Cir. 2003)

## THE SALLY PORT ISSUE

During the course of the hearings in this case the “Sally Port<sup>1</sup>” issue arose in at least four (4) different instances:

A.	U/Ex. 132	123-50-2335	<b>TR. 1016<sup>2</sup></b>
B.	U/Ex. 212	302-54-5655	<b>TR. 1231</b>
C.	U/Ex. 400	550-78-3980	<b>TR. 1996</b>
D.	U/Ex. 422	562-80-9560	<b>TR. 2149</b>

The Agency has described these “Sally Port” claims as follows:

The employee’s duty location is within a secure prison, and the time claimed is for going through the security process to arrive at his duty post, such as going through a metal detector. No briefing time or uniform time is involved. The time is considered to be normal commute time, home to work, his work being within a prison complex, but not within the prison itself. The claim is denied.

### **Tingley 1017/4**

Limited types of pre and post shift activities that would otherwise be covered by the FLSA were exempted from coverage by the Portal-to-Portal Act, 29 U.S.C. §§251-62.

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<sup>1</sup> Sally Port-A gate or passage in a fortified place... Webster’s Collegiate Dictionary, 10<sup>th</sup> Ed.1993

While §215(a)(2) of the FLSA provides that it shall be unlawful to violate §207 and §215(a)(2) by failing to pay employees for certain work done before and after their shifts and during their breaks the Portal-to-Portal Act, carves out a narrow exception for overtime while commuting.

[n]o employer shall be subject to any liability or punishment under the [FLSA] ... on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for ... activities, which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. §254(a)(2).

Activities are within the coverage of the FLSA – and outside of the overtime exception in the Portal-to-Portal Act if:

[t]hose activities are an integral and indispensable part of the principal activities for which covered workmen are employed.

Steiner v. Mitchell, 350 U.S. 247, 256, 76 S.Ct. 330, 335, 100 L.Ed. 267 (1956).

To be “integral and indispensable,” an activity must be necessary to the business and performed primarily for the benefit of the employer. Dunlop v. City Elec. Inc., 527 F.2d 394, 401 (5<sup>th</sup> Cir.1976); *see also* Alvarez v. IBP, Inc., 339 F.3d 894, 902-03 (9<sup>th</sup> Cir. 2003). The Portal-to-Portal Act exception is to be construed narrowly. Dunlop, 527 F.2d at 398-99.

In cases A-D, above, there can be no question that being present inside the security perimeter of a State prison was “integral and indispensable” to the employer. All of the claimants at making claims under the “Sally Port” issue are/were INS Deportation Officers. These employees were within the security perimeter of various State Prisons so that they could

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<sup>2</sup>References to the hearing transcripts will be indicated by “**TR.(pg no.)**” if the statement is not made by a sworn witness. Statements of sworn witnesses in the transcript will be indicated by “**Witness name page/line**” of the start

more effeciently facilitate the deportation of State prisons. The placing of the employees duty locations inside the security perimeter was solely within the discretion of the INS, as the employer. There was absolutely no effort that the employee could make (such as changing his/her residence) that would have the slightest impact of the time spent passing through the prison security procedures.

[Generally] The more the preliminary (or postliminary) activity is undertaken for the employer's benefit, the more indispensable is to the primary goal of employee's work, and the less choice the employee has in the matter, the more likely such work will be found to be compensable under the FLSA as amended by the Portal-to-Portal Act.

Reich v. New York City Transit Authority, 45 F.3d 646, 650 (2<sup>nd</sup> Cir. 1995); see also, Gonzalez v. Farmington Foods, Ind., 296 F.Sup.2d 912 (ND. IL 2003).

In this case the preliminary and postliminary time of clearing the State prison security perimeters was undertaken solely for the employers benefit and was an activity (accessing State prison prisoners) closely related to the job duties of the Deportation Officers making the "Sally Port" claim.

## K-9 (DOG HANDLER) ISSUE

A second issue that the parties have reserved for legal briefing is the compensation for K-9 (Dog Handlers) care . There are at least two (2) claimants that have made “suffer or permit” overtime claims based upon their Agency dog care responsibilities.

1. U/Ex. 184 226-04-7641 **TR. 1149**
2. U/Ex. 278 450-39-6778 **TR. 1541**

In both cases the claimants are INS Immigration Inspectors who are also dog handlers. See, BID 296 (U/Ex. 184); BID 1727 (U/Ex. 278). The Agency claimed that there is a Memorandum of Understanding (MOU) between the Agency and the Union that sets forth the hours that will be paid for dog handling. TR. 1551 It is the Union’s position that, the MOU, without more, does not act as a legitimate cap to dog handling hours.

Courts have generally agreed that caring for and training police dogs is compensable work under the FLSA as “integral and indispensable” part of the employees duties. See, Reich v. N.Y. City Transit Authority, 45 F.3d at 651; Leaving v. D.C., 869 F.Supp. 24, 27 (D.D.C. 1994); Truslow v. Spotsylvania County Sheriff, 78 F.Supp. 274, 277 (E.D. 1992).

In the present case the Agency attempts to argue that the presence of an MOU limits the hours that dog handlers may claim under the FLSA. TR. 1552. A review of the transcript indicates that the Agency makes no claim to the “suffer or permit” overtime claims other than the mere fact of an MOU. The mere fact that an MOU does exist does not excuse the Agency from paying the claimed FLSA overtime. The facts of the recent case of Leever v. Carson City, 360 F.3d 1014 (9<sup>th</sup> Cir. 2004) are almost identical to facts in the present case. The employer in Leever, attempted to use the existence of an MOU with a union as a shield from paying FLSA

overtime in excess of the MOU for time spent on dog care. The Ninth Circuit, analogizing to the “work at home” overtime rules, held that the mere fact of the MOU does not settle the overtime claim. The Court found that the employer has the burden of proof of proving:

[p]lainly and unmistakably” that (1) there was an agreement to compensate [the employee] for her overtime work caring for [the dog], and (2) that agreement was “reasonable,” having taken into account “all of the pertinent facts.” See, Brignam [v. Eugene Water & Elec. Bd.], 357 F.3d 931, 942 (9<sup>th</sup> Cir. 2004)] at 943. (emphasis added)

Leever, 360 F.3d at 1018

The Court went on to find that, though there was an agreement, the employer had not proven that the agreement was “reasonable”. Leever, 360 F.3d at 1018-21.

In the present case the Agency made absolutely no effort to prove that the MOU was reasonable. No testimony was adduced as to the reasonableness of the MOU hours nor were any exhibits introduced to satisfy the Agency’s “plain and unmistakable” burden of proof. The fact that the Union introduced no evidence (other than the fact of the MOU) does not suggest that the two dog handlers at issue are not entitled to their claimed “suffer or permit” overtime pay. Again, the Court of Appeals has unambiguously held that the burden of proof falls on the employer, not the employee to use the MOU as a bar to additional FLSA overtime compensation.

The Agency, having utterly failed to meet its burden of proof (or offer any evidence whatsoever on the reasonableness of the MOU issue) must fail in its attempt to limit the overtime claimed by the dog handlers.

## PAYMENT AND DAMAGES

Upon proof of a violation of §207(a)(1), an Agency is liable for the amount of unpaid overtime compensation. 29 U.S.C. §216(b). Note that if any Title 5 overtime was paid for the challenged work, the employee is only entitled to the difference between the Title 5 overtime and the FLSA overtime. Sums paid for occasional periods when no work is performed due to vacation, holiday, illness, payments for traveling and other reimbursable expenses, and other payments to an employee which are not made as compensation for hours of employment are not included in determining an employee's "regular rate" under §207(a)(1). 29 U.S.C. §207(e)(2). For purposes of the FLSA, the regular rate of pay, by its very nature, must reflect all payments which the parties have agreed shall be received regularly during the work week, exclusive of overtime payments. It is not an arbitrary label chosen by the parties, but is instead an actual fact. Herman v. Anderson Floor Co., Inc., 11 F.Supp.2d 1038, 1041 (E.D. WI. 1998).

Where an approximate award based on reasonable inferences forms a satisfactory surrogate for unquantified and unrecorded actual work time, an approximated award is permissible under the FLSA. Alvarez v. IBP, Ins. 339 F.3d 894 (9<sup>th</sup> Cir. 2003)

## LIQUIDATED DAMAGES

In addition to recovering the wrongfully withheld FLSA overtime, an award of liquidated damages in an amount equal to the unpaid back wages is mandated in the case of a violation of the statute. Thus the FLSA provides for a doubling of any overtime award. This doubling of the wrongfully withheld overtime is called **liquidated damages**.

29 U.S.C. §216 provides:

(b) Any employer who violates the provisions of section 206 or section 207 of this title [hours of work over 40 per week] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and an additional equal amount as liquidated damages. (Emphasis added.)

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

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

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

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

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

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

Under the [FLSA] Act, liquidated damages are compensatory, not punitive in nature. Herman v. RSR Sec. Services Ltd., 172 F.3d 132 (2<sup>nd</sup> Cir. 1999). Congress provided for liquidated damages to compensate employees for losses they might suffer by reason of not receiving their lawful wage at the time it was due. Reich v. Southern New England Telecommunications Corp., 121 F.3d 58 (2<sup>nd</sup> Cir. 1997); Marshall v. Brunner, 668 F.2d 748, 753 (3<sup>rd</sup> Cir. 1982); Martin v. Cooper Electric Supply Co., 940 F.2d 893, 907 (3<sup>rd</sup> Cir. 1991). See also, L-246 Utility Workers v. Southern Cal. Edison Co., *supra*; Cox v. Brookshire Grocery Co., 919 F.2d 354, 357 (5<sup>th</sup> Cir. 1990); Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094 (11<sup>th</sup> Cir. 1987);

The Federal Labor Relations Authority has confirmed that arbitrators have the authority to award liquidated damages against the federal government in FLSA situations. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, 49 FLRA No. 40, 49 FLRA 483, 489-90 (March 10, 1994), *citing*, U.S. Department of the Treasury, Internal Revenue Service,

Washington, D.C. and National Treasury Employees Union, 46 FLRA No. 97, 46 FLRA 1063, 1073 (1992) (finding a waiver of sovereign immunity under the Back Pay Act (5 U.S.C. §5596)).

## INTEREST

Although interest is usually not recoverable<sup>3</sup> against the United States, there is an explicit waiver of sovereign immunity for backpay interest under the Backpay Act, 5 U.S.C.

§5596(b)(2)(A).<sup>4</sup>

The FLRA has found that payment for wrongfully withheld FLSA overtime is made pursuant to the Back Pay Act.

The Back Pay Act requires backpay for the amount of pay or differentials lost by an employee due to an Agency's unwarranted or unjustified personnel action. 5 U.S.C.

§5596(b)(1)(A). The failure of an Agency to pay employees monies to which they are entitled constitutes an unwarranted personnel action within the meaning of the Back Pay Act. See

Federal Employee Metal Trades Council and U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 39 FLRA 3, 7 (1991). An arbitrator can properly award

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<sup>3</sup> Federal employees cannot be actually awarded and paid both liquidated damages and interest on the back-pay award, as this would amount to double payment. Parker v. Burnley, 703 F.Supp. 925, 927 (N.D. Ga. 1988); see also, Braswell v. City of el Dorado, Ark., 187 F.3d 954 (8<sup>th</sup> Cir. 1999). The Union requests that the Arbitrator award both liquidated damages and interest and requests the arbitrator to require the Agency to calculate the backpay due employees under both systems and actually pay the higher (liquidated damages (usually) or interest).

<sup>4</sup> The Backpay Act specifically mandates the payment of interest on backpay awards for federal employees. 5 U.S.C. §5596:

- 2(A) An amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest.
- (B) Such interest--
  - (i) shall be computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date not more than 30 days before the date on which payment is made;
  - (ii) shall be computed at the rates in effect under section 6621(a)(1) of the Internal Revenue Code of 1986 during the period described in clause (i); and
  - (iii) shall be compounded daily.
- (C) Interest under this paragraph shall be paid out of amounts available for payments under paragraph (1) of this subsection. (Emphasis added.)

backpay to remedy an unjustified or unwarranted personnel action that resulted in the loss of a differential, such as overtime pay, that employees otherwise would have received. See generally U.S. Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina and Federal Employees Metal Trades Council, 39 FLRA 987, 993 (1991). Backpay is authorized for violations of the overtime provisions of the FLSA. See, International Association of Firefighters, Local 13, and Panama Canal Commission, General Services Bureau, Balboa, Republic of Panama, 43 FLRA 1012, 1026 (1992). See also, 29 U.S.C. §216(b).

Arbitrators have found that grievants have been affected by the Agency's unjustified personnel action that improperly classified them as exempt from coverage under the FLSA. He ruled that the grievants were entitled to backpay for the amount of overtime pay that they would have received "but for the Agency's illegal designation that they were exempt from coverage under the FLSA, for a back pay period and in a manner to be determined." Award at 32. Therefore, we conclude that the Arbitrator made the proper findings for an award of backpay and there is no basis on which to find the award deficient under the Back Pay Act.

U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, 44 FLRA No. 66, 44 FLRA 773, 798 (April 14, 1992) (emphasis added).

## SUMMARY

For the reasons stated above, the Union respectfully requests that the Arbitrator grant the reasonable hours of “suffer or permit” overtime claimed by the above identified claimants.

Respectfully Submitted,

Joe Goldberg, Esq.  
For the Union

**CERTIFICATE OF SERVICE**

I hereby certify that on the 28<sup>th</sup> day of February 2005, the Union's Post Hearing Brief was sent by first class mail to the following:

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