ORAL ARGUMENT NOT YET SCHEDULED

No. 16-1144

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
IMMIGRATION AND CUSTOMS ENFORCEMENT,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent,

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
IMMIGRATION AND CUSTOMS ENFORCEMENT, NATIONAL COUNCIL 118

Intervenor for Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

Appearing below in the administrative proceeding before the Federal Labor Relations Authority ("Authority") were the U.S. Department of Homeland Security, U.S. Immigrations and Customs Enforcement ("Agency") and the American Federation of Government Employees, Immigration and Customs Enforcement, ("Union"). In this Court proceeding, the Agency is the petitioner and the Authority is the respondent. The Union has intervened on the side of the Authority.

B. Rulings Under Review

The Agency seeks review of the Authority's decision in *American Federation of Government Employees, Immigration and Customs Enforcement, National Council 118 and United States Department of Homeland Security, United States Customs and Border Protection*, 68 FLRA (No. 145) 910 (September 11, 2015). The Authority's subsequent decision denying the Agency's motion for reconsideration, published at 69 FLRA (No. 35) 248 (March 17, 2016), is also on review before the Court.

C. Related Cases

This case was not previously before this Court or any other court. There are no related cases currently pending before this Court or any court of which counsel for Respondent is aware.

/s/ Fred B. Jacob
Fred B. Jacob
Solicitor
Federal Labor Relations Authority

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GLOSSARY OF ABBREVIATIONS

Agency	Petitioner, the United States Department of Homeland Security, United States Customs and Immigration Enforcement
Authority	Respondent, the Federal Labor Relations Authority
Br.	Petitioner's opening brief
Dec.	The decision of the Authority in this case
JA	The parties' Joint Appendix
OPM	The Office of Personnel Management
Recons. Dec.	The decision of the Authority on reconsideration in this case
The proposal	A proposal that the Union advanced in negotiations with the Agency over a new collective-bargaining agreement
The Statute	The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135
Union	Intervenor, the American Federation of Government Employees, Immigration and Customs Enforcement, National Council 118

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is about the negotiability of a ground rule that the American Federation of Government Employees, Immigration and Customs Enforcement National Council 118 ("Union") proposed for negotiations with the United States Department of Homeland Security, U.S. Immigration and Customs Enforcement ("Agency") over a new collective-bargaining agreement, to ensure that employee negotiators did not lose pay or future retirement benefits for participating in bargaining. Specifically, the proposal provided that the Agency would code time that bargaining-team members and alternates spent on negotiations – known as "official time" under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2012) ("the Statute") – as administrative leave so that their participation in negotiations would not affect their future eligibility for administratively uncontrollable overtime ("AUO"). AUO is a pay premium of up to 25% of an employee's salary for performing irregular or occasional overtime work. (Am. Statement of Position, JA 4.)

As relevant here, the Agency contended that the proposal was contrary to Office of Personnel Management ("OPM") regulations on AUO, as supported by OPM guidance interpreting those regulations. Therefore, the Agency argued, the proposal was outside the Agency's duty to bargain under the Statute. However, the Authority found in both its initial decision and on reconsideration that neither the

regulations nor OPM's guidance on the regulations address the subject of the proposal: the exclusion of official time from an AUO review period. Accordingly, the Agency was required to bargain with the Union over the proposal under § 7117(a) of the Statute because the Agency failed to show that the proposal was contrary to OPM's AUO regulations.

The Agency now seeks review of the Authority's initial decision and its decision on reconsideration, arguing that the Authority erred in finding that the Agency failed to establish a conflict between the proposal and OPM's AUO regulations. Because the Authority correctly determined that the proposal was negotiable based on the arguments raised below, this Court should deny the Agency's petition for review.

The Authority had subject matter jurisdiction over this case pursuant to § 7105(a)(2)(E) of the Statute. 5 U.S.C. § 7105(a)(2)(E). The Authority's initial decision is published at 68 FLRA (No. 145) 910 (2015), and its decision denying the Agency's motion for reconsideration is published at 69 FLRA (No. 35) 248 (2016). A copy of the initial decision is included in the Joint Appendix ("JA") at JA 61-66, and a copy of the decision on reconsideration is included at JA 101-08. The Agency's petition for review was timely filed within 60 days of the Authority's decision on reconsideration. 5 U.S.C. § 7123(a).

STATEMENT OF THE ISSUE PRESENTED

Whether the Agency has a statutory duty to bargain with the Union over the proposal because the Agency failed to demonstrate that the proposal conflicts with OPM's AUO regulations, which do not address the subject of the proposal: the exclusion of official time from an AUO review period.

RELEVANT STATUTORY PROVISIONS

All relevant statutory and regulatory provisions are contained in the attached Statutory Addendum. Att. 1.

STATEMENT OF THE CASE

This case concerns the negotiability of a proposed ground rule that the Union advanced during collective-bargaining negotiations with the Agency to protect employee negotiators from losing pay and future retirement benefits as a result of participating in the bargaining process. (Dec., JA 62.) Under the Statute, an agency is required to bargain with the exclusive representative of its employees to the full extent of its discretion. 5 U.S.C. § 7117(a); *Am. Fed. of Gov't Emps., Locals 3807 & 3824*, 55 FLRA 1, 2 n.3 (1998) (citing cases). An exception to this rule is that an agency has no duty to bargain over a proposal to the extent that it is "inconsistent with . . . any Government-wide rule or regulation." 5 U.S.C. § 7117(a)(1). In this case, the Agency declared the proposal non-negotiable as contrary to OPM's AUO regulations, and in response, the Union filed a negotiability appeal with the Authority under § 7105(a)(2)(E) of the Statute. (Dec., JA 61; *see* 5 U.S.C. § 7105(a)(2)(E).) The Agency

filed a statement of position and an amended statement of position. (Dec., JA 61.) The Union filed a response and an amended response. (*Id.*) The Agency then filed a reply to the Union's amended response. (*Id.*)

The Authority concluded that the proposal was within the Agency's statutory duty to bargain. (Dec., JA 61.) The Agency filed a motion for reconsideration of that decision, which the Authority denied. (Recons. Dec., JA 101). The Agency now seeks review of the Authority's decision that the proposal is within the duty to bargain. The Union has intervened on the side of the Authority.

STATEMENT OF THE FACTS

I. The Parties Agree that the Proposal Would Protect Employee Members of the Bargaining Team from Suffering a Loss in Pay and Benefits as a Result of Exercising Their Statutory Right to Engage in Collective Bargaining.

A. Background

As discussed further below, the Union's proposal involves ensuring that employees' use of "official time" spent in negotiations with the Agency would not result in a reduction of their pay or future retirement benefits. The Authority found that proposal negotiable.

1. Official Time

Under § 7131(a) of the Statute, executive-branch agencies are required to grant employees "official time" for time spent representing an exclusive representative in negotiations over a collective-bargaining agreement, during which time the employees

would otherwise be in a duty status. 5 U.S.C. § 7131(a). "Congress enacted the Statute's official time provisions as an essential means of enabling federal-employee unions to meet their mandatory statutory obligations." (Recons. Dec., JA 106-07 & n.65.) In particular, Congress intended that "union representatives should not be penalized by a loss in salary while engaged in collective bargaining." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 104 (1983).

2. Administratively Uncontrollable Overtime

Under the Federal Employees Pay Act, 5 U.S.C. § 5544, an employee is entitled to overtime pay for all hours worked over eight hours in a day or forty hours in a week that are specifically ordered or approved. 5 U.S.C. § 5542(a). If an agency requires employees to work overtime hours that cannot be controlled administratively, then the agency may choose to pay an annual premium for the employees' administratively uncontrollable overtime, rather than paying an hourly overtime rate. *Id.* § 5545(c)(2). This premium – AUO pay – applies to irregular or occasional overtime work that has not been scheduled in advance of the employee's regularly

scheduled administrative workweek. *See* 5 C.F.R. § 551.501(c).[1] Because "AUO pay is basic pay for retirement purposes," a loss of or reduction in AUO pay will affect an employee's benefits: "the suspension of AUO pay would reduce agency and employee contributions to the Thrift Savings Plan and may reduce retirement annuities for employees who are close to retirement (by reducing the 'high-3' average rate of basic pay for these employees)." 67 Fed. Reg. 6640, 6640 (Feb. 13, 2002).

As the Authority explained in its decision, there are three steps to determining an employee's eligibility for, and amount of, AUO pay. (Dec., JA 63.) First, an agency determines whether 5 C.F.R § 550.153 authorizes a position to receive AUO pay. (*Id.*) Because the proposal in this case covers only AUO-eligible positions, that analysis is not at issue here. (*Id.*) Second, an agency analyzes "whether an employee performs the requisite amount of AUO – at least an average of three hours a week." (*Id.* at 64.) The Agency calls this step "certification for AUO." (*Id.*) Third, an agency determines the amount of an employee's AUO pay based on the average number of AUO hours the employee performed per week. (*Id.*) As the Authority explained, with "regard to the second and third steps, it is an agency's responsibility to

[1] As described in the premium-pay regulations on administratively uncontrollable work, "[a] typical example of a position which meets [the AUO] requirement is that of an investigator of criminal activities whose hours of duty are governed by what criminals do and when they do it . . . . His hours on duty and place of work depend on the behavior of the criminals or suspected criminals and cannot be controlled administratively." 5 C.F.R. § 550.153. There is no dispute that some employee members of the bargaining team in this case perform administratively uncontrollable work.

'determin[e] the number of hours of irregular or occasional overtime work' that qualifies as AUO." (*Id.* (quoting 5 C.F.R. § 550.151(d)).) An agency reviews that determination "'at appropriate intervals.'" (*Id.* (quoting 5 C.F.R. § 550.151(f)).) Each such interval is referred to as an "AUO review period" in guidance OPM issued on its AUO regulations in 1997. *See* OPM Compensation Policy Memorandum 97-5 (June 13, 1997) ("guidance" or "OPM 97-5"), Att. 2. In other words, an Agency will evaluate whether an employee will receive AUO pay, and if so, how much, during a subsequent AUO review period, based on how many AUO hours the employee worked in the current review period.

B. To Protect Employees from Losing Pay and Benefits for Representing the Union in Bargaining, the Proposal Would Exclude Official Time from the Period the Agency Uses to Compute AUO Pay.

As noted above, this case involves a proposed ground rule for negotiations that the Union advanced during negotiations with the Agency over a new collective-bargaining agreement.[2] The Union explained to the Authority that two members of the Union's bargaining team are law enforcement officers eligible for AUO pay. (Union's Resp., JA 22-23.) Those two employees are currently granted official time while they are away from their duty stations for negotiations. (*Id.*, JA 23.) The

[2] The proposal at issue here is one of three components of a broader proposal that the Authority found negotiable in its decision. The Agency does not challenge the Authority's holdings (Dec., JA 62, 65-66) on the negotiability of the other two components.

Agency and the Union agree that bargaining sessions, including preparation time, generally last two weeks each month until a collective-bargaining agreement is finalized. (Am. Statement of Position, JA 15; Union's Resp., JA 24, 26; *see also* Dec., JA 65.) Because the Agency had not previously excluded official time from its AUO computations, these employees risk losing their AUO certification or having their AUO pay reduced by spending time in negotiations – which could result in up to a 25% reduction in each employee's salary. (Am. Statement of Position, JA 4; Union's Resp., JA 23-25.)

Before the Authority, the parties agreed that the proposal was intended to protect employees from suffering a loss in AUO as a result of representing the Union during collective bargaining, either due to a reduction in their future AUO pay rate or loss of their future AUO certification. (*See* Dec., JA 62.) The proposal states that AUO-eligible employees who are members or alternates of the Union's negotiation team "will not have their AUO computed in such a way that would result in reduction or decertification as a result of their participation in the negotiations process." (Dec., JA 62 (internal quotation marks omitted).) To achieve this goal, the proposal requires that "official time . . . will be classified and paid as administrative leave." (*Id.* (internal quotation marks omitted).) The parties agreed in the post-petition conference that official time coded as administrative leave would be excluded from the AUO review period. (Dec., JA 62; Record of Post-Petition Conference, Att. 3, at 2-3.)

II. The Authority Determines that the Proposal is Negotiable Because the Agency Failed to Establish that It Conflicts with OPM's AUO Regulations, Which Do Not Address Official Time.

In its amended statement of position to the Authority, the Agency argued that the proposal was contrary to OPM's AUO regulations, and, in particular, 5 C.F.R. § 550.162. (Dec., JA 63; Am. Statement of Position, JA 4.) Section 550.162 provides, in relevant part, that an agency may continue to pay an employee AUO pay during a period when the employee is not performing AUO-eligible duties only under certain circumstances:

> (c) An agency may continue to pay an employee premium pay on an annual basis under § 550.141 or § 550.151:
>
> (1) For a period of not more than 10 consecutive prescribed workdays on temporary assignment to other duties in which conditions do not warrant payment of premium pay on an annual basis, and for a total of not more than 30 workdays in a calendar year while on such a temporary assignment.
>
> (2) For an aggregate period of not more than 60 prescribed workdays on temporary assignment to a formally approved program for advanced training duty directly related to duties for which premium pay on an annual basis is payable.
>
> An agency may not continue to pay an employee premium pay on an annual basis under this paragraph for more than 60 workdays in a calendar year.

5 C.F.R. § 550.162(c). Specifically, the Agency claimed that, outside of those exceptions in § 550.162, "agencies must immediately discontinue the payment of AUO when an employee is not performing qualifying duties or sufficient amounts of AUO." (Dec., JA 64 (internal quotation marks and alteration omitted).) Therefore,

the Agency averred, there is no authorization for continuing AUO pay during official time, and, as a result, any such pay would be contrary to § 550.162. (*Id.*)

The Authority found that the Agency's § 550.162 argument was inapposite. It explained that, as the Authority previously held in *National Border Patrol Council, AFGE,* 23 FLRA 106, 109 (1986) ("*NBPC*"), § 550.162 deals with the actual payment of AUO when employees are on temporary assignments and leave with pay, not the computation of *future* certification for and rates of AUO pay – which was the subject of the proposal in *NBPC* and is the subject of the proposal in this case. (Dec., JA 64-65.) In *NBPC*, the Authority held that that an agency has discretion to determine the specific procedures by which computations of future rates of premium pay for AUO will be made under 5 C.F.R. §§ 550.151-550.164. (*Id.* at 64-65 (citing *NBPC,* 23 FLRA at 109).) Thus, the Authority reasoned that, because the Agency has discretion over the calculation of AUO hours to determine whether an employee is performing the requisite type and amount of overtime to be AUO-certified and to receive AUO pay, including the discretion to exclude official time coded as administrative leave from those calculations, the matter falls within the Agency's statutory duty to bargain. (*Id.* at 65.)

The Authority declined the Agency's invitation to overturn *NBPC* based on OPM guidance issued in 1997. (Dec., JA 65 (citing OPM 97-5, Att. 2).) The guidance provides that Executive Branch agencies do not have the authority to subtract certain amounts of time when determining the number of weeks in their AUO review

periods:

> [I]n determining the number of weeks in a review period, there is no authority to reduce the number of weeks by subtracting hours of paid leave (such as annual leave or sick leave), hours of unpaid leave (such as hours of leave without pay, including leave without pay under the Family and Medical Leave Act of 1993 . . . or hours during which an employee is suspended without pay), hours of excused absence with pay, hours or days during which an employee has been detailed to other duties for which employees seldom or never perform irregular or occasional overtime work, or hours in a training status.

(*Id.* (internal quotation marks omitted).) The Authority found that the guidance did not support the Agency's position that "the only days which may be excluded from the computation of the AUO rate are those which are listed in the regulations." (*Id.* (internal quotation marks omitted).) It determined that, like § 550.162, the guidance does not address the subject of the proposal: the exclusion of official time from the computation of future AUO eligibility and rates of pay. (*Id.*) The Authority further explained that the guidance distinguishes between excluding hours and excluding the "days" of bargaining that the proposal contemplates from the AUO computation, specifically addressing the former while, apart from one exception not applicable in this case, not addressing the latter. (*Id.*) Accordingly, the Authority found that the guidance did not support reversal of *NBPC*.

III. The Agency Fails to Establish Grounds for Reconsideration.

The Agency moved for reconsideration of the Authority's decision. The Agency raised no challenge to the Authority's determination that the guidance did not address the subject of the proposal. (Recons. Dec., JA 105; *see also* Mot. for Recons.,

JA 69-71.) As it related to OPM's guidance, the Agency only argued that the Authority's distinction between "hours" and "days" could not be supported. (Recons. Dec., JA 104 (internal quotation marks omitted).) The Authority found otherwise. It explained that, because the guidance refers to both "days" and "hours or days," the guidance indicates that there is, in fact, a distinction between "days" and "hours." (*Id.* at 104-05 (internal quotation marks omitted).)[3]

The Agency's petition for review in this case followed.[4]

[3] Before the Court, the Agency does not raise several other claims made in its motion for reconsideration to the Authority. (Recons. Dec., JA 103-04, 105-06.)

[4] The Authority's decisions were unanimous, with all three Members in agreement. But, after reviewing the pleadings filed with the Court, Acting Chairman Pizzella notes his belief that several unusual and intervening circumstances have occurred since the Authority's decisions on September 11, 2015 and March 17, 2016 (then-Member Pizzella concurring)– including the Office of Personnel Management appearing of counsel with the United States Department of Justice in representing the Agency's challenge to the Authority's interpretation of OPM's regulations concerning eligibility for AUO; Congress passing, and the President signing, the Administrative Leave Act of 2016, Pub. L. No. 114-328, 130 Stat. 2000, §1138 on December 23, 2016; and this Court issuing its decision in U.S. Department of the Air Force, Luke Air Force Base, Arizona v. FLRA, 844 F.3d 957, 960 (D.C. Cir. 2016). Although Acting Chairman Pizzella acknowledges that these decisions stand as final decisions of the Authority, in light of these developments, he believes the underlying decisions may require reexamination.

However, a majority of the Authority has not voted to seek the Court's permission to reexamine its earlier decisions.

SUMMARY OF THE ARGUMENT

The Agency is statutorily required to bargain with the Union over the proposal because it does not conflict with OPM's AUO regulations. Applying the plain language of the regulations and OPM's guidance interpreting the regulations, the Authority correctly determined that they do not address the subject of the proposal: the exclusion of official time from computations of future AUO certification and rates of pay. Accordingly, the Authority properly concluded that the proposal was negotiable.

First, as the Authority found, the proposal is not inconsistent with 5 C.F.R. § 550.162 because that regulation covers the continuation of AUO pay, whereas the proposal covers the computation of future eligibilty for, and rates of, AUO pay. In arguing to the contrary, the Agency conflates future certification for AUO payments with the continuation of AUO payments while on temporary assignment to other duties.

Shifting its argument from the one it initially made before the Authority, the Agency focuses on § 550.154(c) instead of § 550.162. According to the Agency, § 550.154(c) indicates that "agencies have no authority to exclude time from [AUO computation] periods" other than the three types of time specified in the regulation, during which employees are on temporary assignment to training or other duties that are not AUO-eligible. Br. at 17. But that argument does not withstand scrutiny. While § 550.154(c) directs agencies not to include those three types of time in their

AUO calculations, it neither provides nor suggests that agencies lack authority to exclude other, non-ennumerated types of time – like official time.

Second, the Agency's reliance on OPM guidance to show a conflict between the proposal and the AUO regulations similarly fails. Under § 7123(c) of the Statute, this Court lacks jurisdiction over the Agency's assertion that the Authority erred when it determined that the guidance did not cover the subject of the proposal because the Agency could have, but did not, present this argument to the Authority in its motion for reconsideration. In any event, the Authority was correct when it found that, like the regulations, "the guidance does not address the subject of the proposal, the exclusion of official time from the computation of AUO certification and AUO pay," because official time is not listed among the several categories of time that the guidance directs agencies to include in their AUO review periods. (Dec., JA 65.) Given the statutory guarantee of official time and its important role in federal-sector labor-management relations, the Court should not conclude that the regulations and guidance implicitly cover it, where neither does so explicitly. To the extent the Union proposed that official time would be classified as administrative leave, such language was intended for administrative time-coding purposes, to ensure that the time would be excluded from the AUO review period, as the parties agreed would happen. (Dec., JA 62; Record of Post-Petition Conference, Att. 3 at 2-3.)

STANDARDS OF REVIEW

This Court reviews an Authority decision "in accordance with section 10(e) of the Administrative Procedure Act" and will uphold the decision unless it is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1041 (D.C. Cir. 2014) (quoting *Am. Fed'n of Gov't Emps., Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998)); *see also* 5 U.S.C. § 706(2)(A), 5 U.S.C. § 7123(c) (incorporating Administrative Procedure Act standards of review). The scope of such review is narrow. *See, e.g., Am. Fed. of Gov't Emps., Local 2303 v. FLRA*, 815 F.2d 718, 722 (D.C. Cir. 1987) (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974)).

The Authority is tasked with interpreting and administering its own Statute. *See Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983); *Ass'n of Civilian Techs., Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (citing *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). This negotiability appeal arises under § 7117(a)(1) of the Statute, which, as noted above, states that federal agencies have no duty to negotiate over proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation." 5 U.S.C. § 7117(a)(1). This Court defers to the Authority's construction of the Statute, *U.S. Department of Air Force v. FLRA*, 949 F.2d 475, 480 (D.C. Cir.1991), which is "entrusted by Congress to FLRA's administration," and upholds the

Authority's negotiability conclusions so long as they are "reasonable and defensible," *Department of Treasury, Bureau of Alcohol, Tobacco, & Firearms v. FLRA*, 857 F.2d 819, 821 (D.C. Cir. 1988).

The Court reviews the Authority's interpretations of other agencies' regulations de novo. *Soc. Sec. Admin. v. FLRA*, 201 F.3d 465, 471 (D.C. Cir. 2000). Thus, because the Authority did not promulgate OPM's AUO regulations, the Court does not extend deference to the Authority's interpretation of what they do and do not require. *Id.* But the Agency also did not promulgate OPM's AUO regulations. Thus, this Court owes no deference to the Agency's interpretation of them, either.

With respect to the Agency's arguments based on the OPM guidance, under § 7123(c) of the Statute, this Court may not consider any "objection that has not been urged before the Authority, or its designee," unless "the failure or neglect to urge the objection is excused because of extraordinary circumstances." 5 U.S.C. § 7123(c); *see also Equal Emp't Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986); *accord Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1040 (D.C. Cir. 2014) ("We have enforced section 7123(c) strictly . . . .").

ARGUMENT

I. The Agency Is Statutorily Required to Bargain with the Union Over a Ground-Rule Proposal Regarding Official Time that Does Not Conflict with a Government-Wide Rule or Regulation.

The Statute confers collective-bargaining rights upon federal civilian employees and governs collective bargaining between those employees and management. *See generally Am. Fed. of Gov't Emps. v. FLRA*, 778 F.2d 850, 851-52 (D.C. Cir. 1985). As noted above, under the Statute, an agency is required to bargain with the exclusive representative of its employees to the full extent of its discretion. 5 U.S.C. § 7117(a); *Am. Fed. of Gov't Emps., Locals 3807 & 3824*, 55 FLRA 1, 2 n.3 (1998) (citing cases). As this Court has acknowledged, the Authority has long recognized that ground rules for negotiations fall squarely within an agency's duty to bargain under the Statute because ground rules affect the conditions of employment of bargaining-unit employees. *Ass'n of Civilian Technicians v. FLRA*, 353 F.3d 46, 51 (D.C. Cir. 2004). "'"The fact that some parties mutually agree to set [] preliminary arrangements apart and call them ground rules negotiations does not separate them from the collective bargaining process and the parties' mutual obligation to bargain in good faith."' *Am. Fed. of Gov't Emps.*, 15 FLRA 461, 462 (1984) (quoting *Dep't of Defense Dependents Sch.*, 14 FLRA 191, 193 (1984)).

The Statute also requires agencies to grant to employees representing their union in collective bargaining "official time . . . during the time the employee otherwise would be in a duty status." 5 U.S.C. § 7131; *Bureau of Alcohol, Tobacco &*

Firearms v. FLRA, 464 U.S. 89, 90-91, 98-99 (1983) ("*BATF*"). This provision's purpose is plain: Congress intended that "union representatives should not be penalized by a loss in salary while engaged in collective bargaining." *Id.* at 104; *see also U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 68 FLRA 846, 850 (2015) ("The purpose of official time is to permit employees to engage in [collective-bargaining] activities without loss of pay or leave." (internal quotation marks and alteration omitted)). Accordingly, the Authority has consistently held that employee negotiators are statutorily entitled to official time for their time spent in negotiations, during which time the employees would otherwise be in duty status. *E.g.*, *Dep't of Defense Dependents Sch.*, 14 FLRA 191, 193 (1984).

To escape the Statute's mandate to bargain, an agency may show that a proposal is "inconsistent with any Federal law or any Government-wide rule or regulation." 5 U.S.C. § 7117(a)(1). Under Authority precedent, the agency bears the burden of establishing the conflict between the proposal and the regulation. *See Nat'l Treasury Emps. Union*, 40 FLRA 849, 857 (1991). For all of the reasons set out below, the Authority correctly found that, because OPM's regulations and guidance do not address the subject of the proposal, the Agency failed to demonstrate that it conflicted with the regulations.

II. The Authority Correctly Concluded that the Agency Failed to Demonstrate a Conflict Between the Proposal and OPM's AUO Regulations.

Because the Agency failed to establish that the proposal is inconsistent with OPM's AUO regulations, the proposal is negotiable under § 7117(a)(1) of the Statute. 5 U.S.C. § 7117(a)(1). The Agency's arguments before the Authority focused on 5 C.F.R. § 550.162. (*See* Dec., JA 65.) Section 550.162 covers the time period during which an agency may pay AUO to an AUO-eligible and -certified employee. Specifically, the Agency claimed that the proposal conflicted with the regulation because "§ 550.162 provides the only exceptions where AUO pay can continue during a period where an employee would not otherwise meet the statutory requirements for AUO pay." (*Id.*)

Relying on its decision in *NBPC*, the Authority correctly explained that the proposal did not conflict with § 550.162 because that regulation is inapposite: § 550.162 covers the continuation of AUO pay to currently AUO-eligible employees who are temporarily assigned to duties that are not AUO-eligible. (*See* Dec., JA 67.) By contrast, the proposal covers the computation of an employee's *future* certification for AUO pay and the rate of that pay during a subsequent AUO review period. (*Id.* at 64.) Accordingly, like the Authority held in *NBPC*, the proposal does not conflict with § 550.162. Because the Agency makes no mention of the Authority's § 550.162 holding in its opening brief, it has waived any objection to that holding before this Court. *See* Br. at 4-20; *Weinstein v. Islamic Republic of Iran*, 831 F.3d 470, 484 (D.C. Cir.

2016) (holding that "failure to brief the issues in the[] opening brief amounts to forfeiture"); *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) ("[B]y failing to address the failure to give proper notice issue in its opening brief, [Petitioner] has forfeited any right to challenge . . . .").

On appeal, the Agency has shifted its arguments to rely solely on 5 C.F.R. § 550.154(c), *see* Br. 16-17, a regulatory provision it referenced only obliquely to the Authority below, *see* JA 11, 68, 69. Section 550.154(c) directs agencies to exclude the periods of time described in § 550.162(c) and (g), during which employees are on temporary assignment to training or other duties that are not AUO-eligible, from their AUO review periods:

> The period of time during which an employee continues to receive premium pay on an annual basis under § 550.151 under the authority of paragraphs (c) or (g) of § 550.162 is not considered in computing the average hours of irregular and occasional overtime work under this section.

5 C.F.R. § 550.154(c). The Agency's claim that the periods of time specified in § 550.162(c) and (g) are the *only* permissible exclusions from AUO review periods finds no support in the plain language of § 550.154(c). While the regulation affirmatively requires agencies to exclude the time periods specified in § 550.162(c) and (g) from their AUO calculations, it does not *prohibit* agencies from excluding other, non-enumerated time periods from those calculations – including official time provided by the Statute. Put another way, the Agency's position would require the Court to re-write § 550.154(c) to add the following language to the end of the section:

> The period of time during which an employee continues to receive premium pay on an annual basis under § 550.151 under the authority of paragraphs (c) or (g) of § 550.162 is not considered in computing the average hours of irregular and occasional overtime work under this section. *The three periods of time under paragraphs (c) or (g) of § 550.162 are the only periods of time that an agency may not consider in computing the average hours of irregular and occasional overtime work under this section.*

But that is not what the regulation says. And given Congress's clear intent to protect employees from being financially penalized for participating in collective bargaining by creating the concept of official time, *BATF*, 464 U.S. at 104, this Court should not read words into § 550.154(c) that would eviscerate that protection. *Cf. Office of Personnel Mgmt. v. FLRA*, 864 F.2d 165, 168 (D.C. Cir. 1988) ("The task of a reviewing court is to give a statute the most harmonious, comprehensive meaning possible, and not to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." (internal quotation marks and citations omitted)).

The Agency fails to establish that the proposal conflicts with § 550.154(c). Accordingly, under the Authority's precedent in *NBPC*, the proposal is negotiable because the Agency has discretion "to determine the specific procedures by which computations as to appropriate rates of premium pay for AUO will be made." *NBPC*, 23 FLRA at 109.

III. Because OPM's Regulatory Guidance Also Does Not Address the Subject Matter of the Proposal, It Does Not Help the Agency Demonstrate that the Proposal Conflicts with the AUO Regulations.

In its initial decision, the Authority concluded that OPM's guidance did not address the exclusion of official time from the computation of AUO certification and the rate of AUO pay, and therefore did not demonstrate that the proposal conflicted with OPM's AUO regulations. Br. at 20 (quoting Dec., JA 65). The Agency filed a motion for reconsideration of the Authority's decision, but it did not challenge that holding. (*See* Mot. for Recons., JA 67-74.) Accordingly, the Agency failed to demonstrate that the Authority erred in finding that the guidance did not address the subject of the proposal. (Recons. Dec., JA 105.) The Agency only argued that the Authority erred by finding that the term "hours" in the guidance was distinct from "hours or days." (*See* Recons. Dec., JA 104-05; Mot. for Recons., JA 69-71.)

Despite failing to seek reconsideration of the Authority's finding that the guidance did not address the subject of the proposal, the Agency now argues that the Authority did err in concluding that OPM's guidance did not address the exclusion of official time from the computation of AUO certification and AUO pay. *See* Br. at 20-23. Specifically, the Agency claims that the guidance addresses the subject of the proposal because: (1) the guidance prohibits the exclusion of *any* periods of time from an AUO review period; and (2) the phrase "excused absence with pay" in the guidance includes administrative leave. Br. at 23 (internal quotation marks omitted).

Under 5 U.S.C. § 7123(c), however, the Court has routinely held that a party is

barred from making a new argument to the Court that it failed to make to the Authority in a motion for reconsideration. 5 U.S.C. § 7123(c) (barring extraordinary circumstances, "[n]o objection that has not been urged before the Authority . . . shall be considered by the court"); *see, e.g.*, *Nat'l Treasury Emps. Union, Chapter 161 v. FLRA*, 64 F. App'x 245, 246 (D.C. Cir. 2003) (unpublished); *Georgia State Chapter, ACT v. FLRA*, 184 F.3d 889, 891 (D.C. Cir. 1999); *NLRB v. FLRA*, 2 F.3d 1190, 1195 (D.C. Cir. 1993). The Agency cites no extraordinary circumstances for its failure to raise its arguments regarding whether the guidance addresses the subject of the proposal in its motion for reconsideration. Consequently, this Court lacks subject matter jurisdiction to hear them now under § 7123(c). Because the Agency has no argument properly before the Court supporting its claim that the guidance covers the Union's proposal, the Court should end its analysis here.

Even if the Agency had preserved its arguments for appeal, the Authority correctly determined that OPM's guidance does not address the subject of the proposal. The Agency claims that the Authority erred because the guidance "establishes that there is no authority to exclude periods of time from an AUO review period, unless otherwise required or permitted to do so by regulation." Br. at 21. But, just as it does with the regulations, the Agency attempts to write words into the guidance. The guidance provides that an AUO review period will be a certain number of weeks, determined by the agency, and that an agency may not exclude certain enumerated hours or days of time from an AUO review period. OPM 97-5, Att. 2.

The guidance does not say that agencies lack authority to exclude *any* periods of time from an AUO review period, but only that agencies may not exclude the specific types of time listed – of which official time is not one. *See* OPM 97-5, Att. 2.

It is uncontested that the guidance does not address official time. (JA 65.) Although the Agency says this "is not surprising" because the guidance "was drafted with a general audience in mind," Br. 21, the omission is dispositive of the guidance's inapplicability to official time. Official time is a specific category of paid duty time[5] that Congress created to promote effective labor-management relations *almost 20 years* before OPM issued the guidance. *See generally* "Official Time," Office of Personnel Management, *Labor-Management Relations in the Executive Branch* at 7-11 (Oct. 2014), *available at* https://www.opm.gov/policy-data-oversight/labor-management-relations/reports/labor-management-relations-in-the-executive-branch-2014.pdf (last visited Feb. 9, 2017). And it affects a large percentage of the federal workforce. *Id.* at 9-11. Thus, the Agency cannot credibly argue that OPM was not on notice of the existence and broad impact of official time at the time it drafted its AUO guidance. The guidance, as written, merely directs agencies not to exclude the specified types of time from their AUO calculations; the fact that official time is not one of those

[5] *See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 68 FLRA 846, 850 (2015) ("[T]he Authority has explained that both official time and regular duty time – unlike non-duty time such as periods of leave – shall be considered hours of work." (internal quotation marks omitted).)

specified types of time strongly indicates that it does not fall under the guidance's purview.

This distinction between the actual language of OPM's guidance and the Agency's presentation of the guidance demonstrates that, while the Agency is purportedly requesting deference to OPM's interpretation of its regulations, Br. at 15, the Agency, in fact, is asking the Court to defer to *the Agency's* reading of OPM's guidance.[6] And, of course, the Agency's interpretation not only is without support in

[6] The Agency appears to go even further, suggesting that its brief voices OPM's current interpretation of the guidance. Br. 15, 19; *see also id.* at 16 (". . . the construction OPM provided in 1997, and the one it reiterates now . . . ."). While courts sometimes defer to agency positions articulated in legal briefs, it should not do so now. The court did not invite OPM to submit a separate legal brief articulating its opinion on an ambiguous legal issue concerning unrelated parties, as in *Auer v. Robbins*, 519 U.S. 452, 462 (1997), where the Solicitor General accepted an invitation from the Supreme Court. Instead, OPM presumably was drafted to put its imprimatur on a brief involving a party embroiled in an ongoing legal dispute. Rather than a "fair and considered judgment" of OPM's views, OPM's stamp of approval on the Agency's brief appears to be "a 'post hoc rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." *Id.* (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)); *see also Bowen*, 488 U.S. at 213 ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."). *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007) (deferring to internal agency memo that Agency independently promulgated to clarify regulatory ambiguities in response to ongoing litigation between private parties). Given the significant role official time plays in federal-sector labor-management relations and its absence from the guidance, a more formal analysis from OPM should be required to demonstrate its considered views on the subject.

the guidance's plain language, but warrants no deference itself.[7]

Furthermore, accepting the Agency's argument that the guidance addresses the proposal solely *because it may cover administrative leave*, *see* Br. at 22-23, would require the Court to deny the fact that official time is different from administrative leave – a distinction that the Agency recognized before the Authority, *see* Dec., JA 63; *see also Local 1164, Am. Fed. of Gov't Emps.*, 19 FLRA 936, 936 (1985) (holding that Arbitrator erred in granting grievant administrative leave as a remedy in lieu of official time). Indeed, before the Authority, the Agency devoted almost four pages of its amended statement of position to arguing that official time and administrative leave are "[d]istinct [c]ategories of [t]ime" that are neither "[i]ndistinguishable [n]or [i]nterchangeable," citing controlling precedent from the Authority, OPM, the GAO, and the Office of Government Ethics. (Am. Statement of Position, JA 10-13.) Now, the Agency appears to have forgotten that precedent – and the Agency's staunch position on its weight. *Compare* Br. at 22-23 *with* Am. Statement of Position, JA 10-13.

[7] The Agency similarly alleges that the GAO supports the Agency's reading of OPM's guidance as treating "hours" and "days" as equivalent. But the very GAO report that the Agency cites, *see* Br. at 18, explicitly states that the "GAO did not independently evaluate the permissibility of excluding days for purposes of calculating AUO pay rates." GOVERNMENT ACCOUNTABILITY OFFICE, CONTINUED ACTION NEEDED TO STRENGTHEN MANAGEMENT OF ADMINISTRATIVELY UNCONTROLLABLE OVERTIME, GAO 15-95, at 28 n.46 (Dec. 17, 2014), http://www.gao.gov/assets/670/667617.pdf. And, to the extent that the GAO (like the Agency here) is merely offering its own interpretation of OPM's guidelines, that interpretation is entitled to neither deference nor persuasive effect – particularly when it conflicts with the guidance's plain language.

Although the Union used the phrase "administrative leave" in the proposal, as the Authority found, and the parties did not dispute, that language addressed only how the Agency would "code" the time for "administrative purposes." (Dec., JA 62.) The Union's stated intent in advancing the proposal, which the Authority recognized and the Agency did not challenge, was to ensure that official time spent on negotiations would not adversely affect employees' AUO pay.[8] (*Id.*) And, at least as of the parties' post-petition conference, the Agency agreed that if the Union negotiators' official time spent bargaining were coded as administrative leave, "'it would be excluded from the AUO-computation period.'" (JA 62 (quoting Record of Post-Petition Conference, Att. 3, at 2-3).) Thus, it is far from clear that administrative leave, when utilized for official union duties pursuant to § 7131 of the Statute, would fall under the guidance.

Finally, even if the guidance could be read as implicitly including official time as an "excused absence with pay," the Authority properly rejected the Agency's claim that the guidance "clearly state[s] that the only days which may be excluded from the computation of the AUO rate are those which are listed in the regulations." (JA 65; *see also* Br. 17-20.) As the Authority observed, within the same sentence, the guidance

[8] The passage of the Administrative Leave Act of 2016 does not affect this case. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 § 1138, 130 Stat. 2000 (Dec. 23, 2016). While that Act affects Executive Branch agency grants of administrative leave, the parties will have an opportunity to negotiate any implications it may have on the use of administrative leave to implement the first clause of the proposal.

refers five times to "hours" and once to "hours or days." (*See* Dec., JA 67; Recons. Dec., JA 107.) It never refers to the "days" of time that the Agency claimed should be included in AUO computations, and the Authority correctly noted that "negotiations last for weeks at a time, indicating that [the proposal] intends to exclude days of negotiations," not the "hours" to which the guidance refers. (Dec., JA 65.) This difference demonstrates that "days" and "hours" are distinct terms and the guidance therefore does not prohibit agencies from "exclud[ing] entire days, as opposed to hours, from the computation of AUO certification and AUO pay." (*Id.*, JA 65.)

In sum, the Agency's reliance on OPM's guidance to show a conflict between the proposal and OPM's AUO regulations fails: like the regulations, the guidance is silent on the issue of official time and its exclusion from calculations of future AUO certification and rates of pay.

CONCLUSION

The Authority respectfully requests the Court to deny the petition for review.

Respectfully submitted,

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February 15, 2017

FED. R. APP. P. RULE 32(a) CERTIFICATION

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Garamond font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 13,000 words. It contains 7,136 words excluding exempt material.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I also certify that the foregoing document is being served on counsel of record and that service will be accomplished by the CM/ECF system.

/s/ Stephanie J. Fouse
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ATTACHMENT 1
STATUTORY PROVISIONS

5 U.S.C. § 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 5542(a). Overtime rates; computation

(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 (including any applicable

locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:

(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to the greater of one and one-half times the hourly rate of the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) or the hourly rate of basic pay of the employee, and all that amount is premium pay.

(3) Notwithstanding paragraphs (1) and (2) of this subsection for an employee of the Department of Transportation who occupies a nonmanagerial position in GS-14 or under and, as determined by the Secretary of Transportation,

(A) the duties of which are critical to the immediate daily operation of the air traffic control system, directly affect aviation safety, and involve physical or mental strain or hardship;

(B) in which overtime work is therefore unusually taxing; and

(C) in which operating requirements cannot be met without substantial overtime work;

the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(4) Notwithstanding paragraph (2) of this subsection, for an employee who is a law enforcement officer, and whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to the greater of--

(A) one and one-half times the minimum hourly rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law); or

(B) the hourly rate of basic pay of the employee,

and all that amount is premium pay.

(5) Notwithstanding paragraphs (1) and (2), for an employee of the Department of the Interior or the United States Forest Service in the Department of Agriculture engaged in emergency wildland fire suppression activities, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(6)(A) Notwithstanding paragraphs (1) and (2), for an employee of the Department of the Navy who is assigned to temporary duty to perform work aboard, or dockside in direct support of, the nuclear aircraft carrier that is forward deployed in Japan and who would be nonexempt under the Fair Labor Standards Act but for the application of the foreign area exemption in section 13(f) of that Act (29 U.S.C. 213(f)), the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(B) Subparagraph (A) shall expire on September 30, 2017.

5 U.S.C. § 5544. Wage-board overtime and Sunday rates; computation

(a) An employee whose pay is fixed and adjusted from time to time in accordance with prevailing rates under section 5343 or 5349 of this title, or by a wage board or similar administrative authority serving the same purpose, is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week. However, an employee subject to this subsection who regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 a week. The overtime hourly rate of pay is computed as follows:

(1) If the basic rate of pay of the employee is fixed on a basis other than an annual or monthly basis, multiply the basic hourly rate of pay by not less than one and one-half.

(2) If the basic rate of pay of the employee is fixed on an annual basis, divide the basic annual rate of pay by 2,087, and multiply the quotient by one and one-half.

(3) If the basic rate of pay of the employee is fixed on a monthly basis, multiply the basic monthly rate of pay by 12 to derive a basic annual rate of pay, divide the basic annual rate of pay by 2,087, and multiply the quotient by one and one-half.

An employee subject to this subsection whose regular work schedule includes an 8-hour period of service a part of which is on Sunday is entitled to additional pay at the rate of 25 percent of his hourly rate of basic pay for each hour of work performed during that 8-hour period of service. For employees serving outside the United States in areas where Sunday is a routine workday and another day of the week is officially recognized as the day of rest and worship, the Secretary of State may designate the officially recognized day of rest and worship as the day with respect to which the preceding sentence shall apply instead of Sunday. Time spent in a travel status away from the official duty station of an employee subject to this subsection is not hours of work unless the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively (including travel by the employee to such event and the return of the employee from such event to the employee's official duty station). The first and third sentences of this

subsection shall not be applicable to an employee who is subject to the overtime pay provisions of section 7 of the Fair Labor Standards Act of 1938. In the case of an employee who would, were it not for the preceding sentence, be subject to the first and third sentences of this subsection, the Office of Personnel Management shall by regulation prescribe what hours shall be deemed to be hours of work and what hours of work shall be deemed to be overtime hours for the purpose of such section 7 so as to ensure that no employee receives less pay by reason of the preceding sentence.

(b) An employee under the Office of the Architect of the Capitol who is paid on a daily or hourly basis and who is not subject to chapter 51 and subchapter III of chapter 53 of this title is entitled to overtime pay for overtime work in accordance with subsection (a) of this section. The overtime hourly rate of pay is computed in accordance with subsection (a)(1) of this section.

(c) The provisions of this section, including the last two sentences of subsection (a) and the provisions of section 5543(b), shall apply to a prevailing rate employee described in section 5342(a)(2)(B).

5 U.S.C. § 5545(c). Night, standby, irregular, and hazardous duty differential

(c) The head of an agency, with the approval of the Office of Personnel Management, may provide that--

(1) an employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for irregular, unscheduled overtime duty in excess of his regularly scheduled weekly tour. Premium pay under this paragraph is determined as an appropriate percentage, not in excess of 25 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) (or, for a position described in section 5542(a)(3) of this title, of the basic pay of the position), by taking into consideration the number of hours of actual work required in the position, the number of hours required in a standby status at or within the confines of the station, the extent to which the duties of the position are made more onerous

by night, Sunday, or holiday work, or by being extended over periods of more than 40 hours a week, and other relevant factors; or

(2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is an appropriate percentage, not less than 10 percent nor more than 25 percent, of the rate of basic pay for the position, as determined by taking into consideration the frequency and duration of irregular, unscheduled overtime duty required in the position.

5 U.S.C. § 7105(a)(2). Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

5 U.S.C. § 7117(a). Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

5 U.S.C. § 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under:

> (1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or
>
> (2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence

is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

5 U.S.C. § 7131(a). Official Time

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

5 C.F.R. § 550.103. Definitions

In this subpart:

Administrative workweek means any period of 7 consecutive days (as defined in this section) designated in advance by the head of the agency under section 6101 of title 5, United States Code.

Agency means—

(1) A department as defined in this section; and

(2) A legislative or judicial branch agency which has positions that are subject to subchapter V of chapter 55 of title 5, United States Code.

Basic workweek, for full-time employees, means the 40–hour workweek established in accordance with § 610.111 of this chapter.

Criminal investigator means a law enforcement officer as defined in 5 U.S.C. 5541(3) and this section—

(1) Whose position is properly classified under the GS–1811 or GS–1812 series in the General Schedule classification system based on OPM classification standards (or would be so classified if covered under that system);

(2) Who is a pilot employed by the United States Customs Service;

(3) Who is a special agent in the Diplomatic Security Service in a position which has been properly determined by the Department of State to have a Foreign Service primary skill code of 2501;

(4) Who is a special agent in the Diplomatic Security Service who has been placed by the Department of State in a non-covered position on a long-term training assignment that will be career-enhancing for a current or future assignment as a Diplomatic Security Service special agent, provided the employee is expected to return to duties as a special agent in a Foreign Service position with a 2501 primary skill code or to a position properly classified in the GS–1811 series immediately following such training;

(5) Who occupies a position in the Department of State in which he or she performs duties and responsibilities of a special agent requiring Foreign Service primary skill code 2501, pending the opening of a position with primary skill code 2501 and placement in that position as a special agent; or

(6) Who is a special agent in the Diplomatic Security Service with a Foreign Service personal primary skill code of 2501 (or whose position immediately prior to the detail was properly classified in the GS–1811 series) and who meets all of the following three conditions:

(i) The individual is assigned outside the Department of State;

(ii) The assigned position would have a primary skill code of 2501 (or would be properly classified in the GS–1811 series under the General Schedule classification system based on OPM classification standards) if the position were under the Foreign Service (or General Schedule) in the Department of State; and

(iii) The individual is expected to return to a position as a special agent in the Diplomatic Security Service with a 2501 primary skill code (or to a position that is properly classified in the GS–1811 series) immediately following such outside assignment.

Day (for overtime pay purposes) means any 24–hour period designated by an agency within the administrative workweek applicable to the employee. A day need not correspond to the 24–hour period of a calendar day. If the agency has not designated another period of time, a day is a calendar day.

Department means an executive agency and a military department as defined by sections 105 and 102 of title 5, United States Code.

Emergency means a temporary condition posing a direct threat to human life or property, including a forest wildfire emergency.

Employee means an employee to whom this subpart applies.

Head of a department means the head of a department and, except for the purpose of § 550.101(b)(2), an official who has been delegated authority to act for the head of a department in the matter concerned.

Holiday work means nonovertime work performed by an employee during a regularly scheduled daily tour of duty on a holiday designated in accordance with § 610.202 of this chapter.

Irregular or occasional overtime work means overtime work that is not part of an employee's regularly scheduled administrative workweek.

Law enforcement officer means an employee who—

(1) Is a law enforcement officer within the meaning of 5 U.S.C. 8331(20) (as further defined in § 831.902 of this chapter) or 5 U.S.C. 8401(17) (as further defined in § 842.802 of this chapter), as applicable;

(2) In the case of an employee who holds a secondary position, as defined in § 831.902 of this chapter, and is subject to the Civil Service Retirement System, but who does not qualify to be considered a law enforcement officer within the meaning of 5 U.S.C. 8331(20), would so qualify if such employee

had transferred directly to such position after serving as a law enforcement officer within the meaning of such section;

(3) In the case of an employee who holds a secondary position, as defined in § 842.802 of this chapter, and is subject to the Federal Employees Retirement System, but who does not qualify to be considered a law enforcement officer within the meaning of 5 U.S.C. 8401(17), would so qualify if such employee had transferred directly to such position after performing duties described in 5 U.S.C. 8401(17)(A) and (B) for at least 3 years; and

(4) In the case of an employee who is not subject to either the Civil Service Retirement System or the Federal Employees Retirement System—

(i) Holds a position that the agency head (as defined in §§ 831.902 and 842.802 of this chapter) determines would satisfy paragraph (1), (2), or (3) of this definition if the employee were subject to the Civil Service Retirement System or the Federal Employees Retirement System (subject to OPM oversight as described in §§ 831.911 and 842.808 of this chapter); or

(ii) Is a special agent in the Diplomatic Security Service.

Nightwork has the meaning given that term in § 550.121, and includes any nightwork preformed by an employee as part of his or her regularly scheduled administrative workweek.

Overtime work has the meaning given that term in § 550.111 and includes irregular or occasional overtime work and regular overtime work.

Performing work in connection with an emergency means performing work that is directly related to resolving or coping with an emergency or its immediate aftermath.

Premium pay means the dollar value of earned hours of compensatory time off and additional pay authorized by subchapter V of chapter 55 of title 5, United States Code, and this subpart for overtime, night, Sunday, or holiday work; or for standby duty, administratively uncontrollable overtime work, or availability duty. This excludes overtime pay paid to employees under the Fair Labor Standards Act and compensatory time off earned in lieu of such overtime pay. This includes an overtime supplement received by a Border Patrol agent under 5 U.S.C. 5550 and subpart P of this part for regularly scheduled overtime hours

within the agent's regular tour of duty and the dollar value of hours of compensatory time off earned by such an agent.

Protective duties means duties authorized by section 3056(a) of title 18, United States Code, or by section 2709(a)(3) of title 22, United States Code.

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by an employee, including any applicable locality payment under 5 CFR part 531, subpart F; special rate supplement under 5 CFR part 530, subpart C; or similar payment or supplement under other legal authority, before any deductions and exclusive of additional pay of any other kind.

Regular overtime work means overtime work that is part of an employee's regularly scheduled administrative workweek.

Regular tour of duty, with respect to a Border Patrol agent covered by 5 U.S.C. 5550 and subpart P of this part, means the basic 40–hour workweek plus any regularly scheduled overtime work hours that the agent is assigned to work as part of an officially established 5–day weekly work schedule generally consisting of—

(1) 10–hour workdays (including 2 overtime hours each workday) in exchange for a 25–percent overtime supplement (Level 1); or

(2) 9–hour workdays (including 1 overtime hour each workday) in exchange for a 12.5–percent overtime supplement (Level 2).

Regularly scheduled administrative workweek, for a full-time employee, means the period within an administrative workweek, established in accordance with § 610.111 of this chapter, within which the employee is regularly scheduled to work. For a part-time employee, it means the officially prescribed days and hours within an administrative workweek during which the employee is regularly scheduled to work.

Regularly scheduled work means work that is scheduled in advance of an administrative workweek under an agency's procedures for establishing workweeks in accordance with § 610.111, excluding any such work to which availability pay under § 550.181 applies.

Sunday work means nonovertime work performed by an employee during a regularly scheduled daily tour of duty when any part of that daily tour of duty is

on a Sunday. For any such tour of duty, not more than 8 hours of work are Sunday work, unless the employee is on a compressed work schedule, in which case the entire regularly scheduled daily tour of duty constitutes Sunday work.

Tour of duty means the hours of a day (a daily tour of duty) and the days of an administrative workweek (a weekly tour of duty) that constitute an employee's regularly scheduled administrative workweek.

5 C.F.R. § 550.151. Authorization of premium pay on an annual basis

An agency may pay premium pay on an annual basis, instead of other premium pay prescribed in this subpart (except premium pay for regular overtime work, and work at night, on Sundays, and on holidays), to an employee in a position in which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular or occasional overtime work, with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty. Premium pay under this section is determined as an appropriate percentage, not less than 10 percent nor more than 25 percent, of the employee's rate of basic pay (as defined in § 550.103).

5 C.F.R. § 550.152. [Reserved]

5 C.F.R. § 550.153. Bases for determining positions for which premium pay under § 550.151 is authorized

(a) The requirement in § 550.151 that a position be one in which the hours of duty cannot be controlled administratively is inherent in the nature of such a position. A typical example of a position which meets this requirement is that of an investigator of criminal activities whose hours of duty are governed by what criminals do and when they do it. He is often required to perform such duties as shadowing suspects, working incognito among those under suspicion, searching for evidence, meeting informers, making arrests, and interviewing persons having knowledge of criminal or alleged criminal activities. His hours on duty and place of work depend on the behavior of the criminals or suspected criminals and cannot be controlled administratively. In such a situation, the hours of duty cannot be controlled by such administrative devices as hiring additional personnel; rescheduling the hours of duty (which can be done when, for example, a type of work occurs primarily at certain times of the day); or granting compensatory time off duty to offset overtime hours required.

(b) In order to satisfactorily discharge the duties of a position referred to in § 550.151, an employee is required to perform substantial amounts of irregular or occasional overtime work. In regard to this requirement:

(1) A substantial amount of irregular or occasional overtime work means an average of at least 3 hours a week of that overtime work.

(2) The irregular or occasional overtime work is a continual requirement, generally averaging more than once a week.

(3) There must be a definite basis for anticipating that the irregular or occasional overtime work will continue over an appropriate period with a duration and frequency sufficient to meet the minimum requirements under paragraphs (b)(1) and (2) of this section.

(c) The words in § 550.151 that an employee is generally "responsible for recognizing, without supervision, circumstances which require him to remain on duty" mean that:

(1) The responsibility for an employee remaining on duty when required by circumstances must be a definite, official, and special requirement of his position.

(2) The employee must remain on duty not merely because it is desirable, but because of compelling reasons inherently related to continuance of his duties, and of such a nature that failure to carry on would constitute negligence.

(3) The requirement that the employee is responsible for recognizing circumstances does not include such clear-cut instances as, for example, when an employee must continue working because a relief fails to report as scheduled.

(d) The words "circumstances which require him to remain on duty" as used in § 550.151 mean that:

(1) The employee is required to continue on duty in continuation of a full daily tour of duty or that after the end of his regular workday, the employee resumes duty in accordance with a prearranged plan or an awaited event. Performance of only call-back overtime work referred to in § 550.112(h) does not meet this requirement.

(2) The employee has no choice as to when or where he may perform the work when he remains on duty in continuation of a full daily tour of duty. This differs from a situation in which an employee has the option of taking work home or doing it at the office; or doing it in continuation of his regular hours of duty or later in the evening. It also differs from a situation in which an employee has such latitude in his working hours, as when in a travel status, that he may decide to begin work later in the morning and continue working later at night to better accomplish a given objective.

5 C.F.R. § 550.154. Rates of premium pay payable under § 550.151

(a) An agency may pay the premium pay on an annual basis referred to in § 550.151 to an employee who meets the requirements of that section, at one of the following percentages of the employee's rate of basic pay (as defined in § 550.103):

(1) A position which requires an average of at least 3 but not more than 5 hours a week of irregular or occasional overtime work—10 percent;

(2) A position which requires an average of over five but not more than 7 hours a week of irregular or occasional overtime work—15 percent;

(3) A position which requires an average of over seven but not more than 9 hours a week or irregular or occasional overtime work—20 percent;

(4) A position which requires an average of over 9 hours a week of irregular or occasional overtime work—25 percent.

(b) If an agency proposes to pay an employee premium pay on an annual basis under § 550.151 but unusual conditions seem to make the applicable rate in paragraph (a) of this section unsuitable, the agency may propose a rate of premium pay on an annual basis for OPM approval. The proposal shall include full information bearing on the frequency and duration of the irregular or occasional overtime work required; the nature of the work which prevents hours of duty from being controlled administratively; the necessity for the employee being generally responsible for recognizing, without supervision, circumstances which require him to remain on duty; and any other pertinent conditions.

(c) The period of time during which an employee continues to receive premium pay on an annual basis under § 550.151 under the authority of paragraphs (c) or

(g) of § 550.162 is not considered in computing the average hours of irregular and occasional overtime work under this section.

5 C.F.R. § 550.161. Responsibilities of the agencies

The head of each agency, or an official who has been delegated authority to act for the head of an agency in the matter concerned, is responsible for:

(a) Fixing tours of duty; ordering employees to remain at their stations in a standby status; and placing responsibility on employees for remaining on duty when required by circumstances.

(b) Determining, in accordance with section 5545(c) of title 5, United States Code, and this subpart, which employees shall receive premium pay on an annual basis under § 550.141 or § 550.151. These determinations may not be retroactive.

(c) Determining the number of hours of actual work to be customarily required in positions involving longer than ordinary periods of duty, a substantial part of which consists of standby duty. This determination shall be based on consideration of the time required by regular, repetitive operations, available records of the time required in the past by other activities, and any other information bearing on the number of hours of actual work which may reasonably be expected to be required in the future.

(d) Determining the number of hours of irregular or occasional overtime work to be customarily required in positions which require substantial amounts of irregular or occasional overtime work with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty. This determination shall be based on consideration of available records of the hours of irregular or occasional overtime work required in the past, and any other information bearing on the number of hours of duty which may reasonably be expected to be required in the future.

(e) Determining the rate of premium pay fixed by OPM under § 550.144 or § 550.154 which is applicable to each employee paid under § 550.141 or § 550.151; or, if no rate fixed under § 550.144 or § 550.154 is considered applicable, proposing a rate of premium pay on an annual basis to OPM.

(f) Reviewing determinations under paragraphs (b), (c), (d) and (e) of this section at appropriate intervals, and discontinuing payments or revising rates of

premium pay on an annual basis in each instance when that action is necessary to meet the requirements of section 5545(c) of title 5, United States Code, and this subpart.

5 C.F.R. § 550.162. Payment provisions

(a) Except as otherwise provided in this section, an employee's premium pay on an annual basis under § 550.141 or § 550.151 begins on the date that he enters on duty in the position concerned for purposes of basic pay, and ceases on the date that he ceases to be paid basic pay in the position.

(b) When an employee is in a position in which conditions warranting premium pay on an annual basis under § 550.141 or § 550.151 exist only during a certain period of the year, such as during a given season, an agency may pay the employee premium pay on an annual basis only during the period he is subject to these conditions.

(c) An agency may continue to pay an employee premium pay on an annual basis under § 550.141 or § 550.151:

(1) For a period of not more than 10 consecutive prescribed workdays on temporary assignment to other duties in which conditions do not warrant payment of premium pay on an annual basis, and for a total of not more than 30 workdays in a calendar year while on such a temporary assignment.

(2) For an aggregate period of not more than 60 prescribed workdays on temporary assignment to a formally approved program for advanced training duty directly related to duties for which premium pay on an annual basis is payable.

An agency may not continue to pay an employee premium pay on an annual basis under this paragraph for more than 60 workdays in a calendar year.

(d) When an employee is not entitled to premium pay on an annual basis under § 550.141, he is entitled to be paid for overtime, night, holiday, and Sunday work in accordance with other sections of this subpart.

(e) An agency shall continue to pay an employee premium pay on an annual basis under § 550.141 or § 550.151 while he is on leave with pay during a period in which premium pay on an annual basis is payable under paragraphs (a), (b), and (c) of this section.

(f) Unless an agency discontinues authorization of premium pay under § 550.141 or § 550.151 for all similar positions, it may not discontinue authorization of such premium pay for an individual employee's position—

(1) During a period of paid leave elected by the employee and approved by the agency in lieu of benefits under the Federal Employees' Compensation Act, as amended (5 U.S.C. 8101 et seq.), following a job-related injury;

(2) During a period of continuation of pay under the Federal Employees' Compensation Act, as amended (5 U.S.C. 8101 et seq.);

(3) During a period of leave without pay, if the employee is in receipt of benefits under the Federal Employees' Compensation Act, as amended (5 U.S.C. 8101 et seq.). (Note: No premium pay is payable during leave without pay; however, the continued authorization may prevent a reduction in an employee's retirement benefits if the leave without pay period occurs during the employee's high–3 average salary period.)

(g) Notwithstanding paragraph (c)(1) of this section, an agency may continue to pay premium pay under § 550.151 to an employee during a temporary assignment that would not otherwise warrant the payment of AUO pay, if the temporary assignment is directly related to a national emergency declared by the President. An agency may continue to pay premium pay under § 550.151 for not more than 30 consecutive workdays for such a temporary assignment and for a total of not more than 90 workdays in a calendar year while on such a temporary assignment.

5 C.F.R. § 551.501(c). Overtime pay

(c) In this subpart, "irregular or occasional overtime work" is overtime work that is not scheduled in advance of the employee's workweek.

ATTACHMENT 2
OPM COMPENSATION POLICY MEMORANDUM 97-5

Attachment

OPM GUIDANCE ON ADMINISTRATIVELY UNCONTROLLABLE OVERTIME (AUO) PAY

I. General statutory and regulatory requirements

The head of an agency may approve administratively uncontrollable overtime (AUO) pay for an employee who occupies a position that requires substantial amounts of irregular, unscheduled overtime work which cannot be controlled administratively, with the employee generally being responsible for recognizing, without supervision, circumstances that require the employee to remain on duty. (See 5 CFR 550.153 for information on the meaning of "substantial amounts of irregular or occasional overtime work," "responsible for recognizing, without supervision," and "circumstances which require the employee to remain on duty." Note particularly that the regulations provide that the performance of "call-back overtime work" alone, as referred to in 5 CFR 550.112(h), does not constitute a circumstance that requires the employee to remain on duty.)

AUO pay is a substitute form of payment for irregular, unscheduled overtime work and is paid on an annual basis instead of on an hourly basis. However, agencies may not pay AUO pay to a prevailing rate (wage) employee, a member of the United States Park Police or the United States Secret Service Uniformed Division, a member of the Senior Executive Service, or a member of the Federal Bureau of Investigation or Drug Enforcement Administration Senior Executive Service. (See 5 U.S.C. 5541(2)(iv), (xi), (xvi), and (xvii).)

AUO pay is determined as a percentage, not less than 10 percent nor more than 25 percent, of an employee's rate of basic pay fixed by law or administrative action for the position held by the employee, including any applicable special pay adjustment for law enforcement officers under section 404 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509), locality-based comparability payment under 5 U.S.C. 5304, or continued rate adjustment under subpart G of 5 CFR part 531, before any deductions and exclusive of additional pay of any other kind. (See 5 CFR 550.151.)

Under OPM regulations, the rate of AUO pay that is authorized for a position is based on the average number of hours of irregular or occasional overtime work performed per week. For example, a 25 percent rate is authorized for a position that requires an average of over 9 hours per week of irregular or occasional overtime work. (See 5 CFR 550.154.) Agency reviews of the percentage of AUO pay paid to employees must be conducted "at appropriate intervals" and OPM recommends that such reviews be completed every 3 to 6 months by Federal agencies. If the results of these reviews indicate that the employee is not receiving AUO pay in accordance with the law and regulations, the percentage of annual premium pay must be revised or, if appropriate, AUO pay must be discontinued. (See 5 CFR 550.161(d).)

II. Relationship to other premium pay entitlements

An employee who receives AUO pay for irregular or occasional overtime work may also receive overtime pay on an hourly basis for regularly scheduled overtime work. Regularly scheduled overtime work creates an entitlement to overtime pay on an hour-for-hour basis and generally must be officially ordered or approved by a supervisor or manager in advance of the employee's regularly scheduled administrative workweek. (See 5 U.S.C. 5542(a).)

If an employee who is engaged in law enforcement activities (including security personnel in correctional institutions) receives AUO pay and is nonexempt from (covered by) the overtime pay provisions of the Fair Labor Standards Act of 1938, as amended (FLSA), he or she is entitled to additional overtime pay equal to 0.5 times the employee's hourly regular rate of pay for all hours of work in excess of 42.75 hours in a week, including meal periods. Other nonexempt employees who receive AUO pay and who are not engaged in law enforcement activities are entitled to additional FLSA overtime pay equal to 0.5 times their hourly regular rate of pay for all hours of work in excess of 40 hours in a week, not including meal periods.

An employee receiving AUO pay is also entitled to night, Sunday, and holiday pay when the requirements for these types of premium pay have been met. However, hazardous duty pay may not be paid for hours of work that are compensated by AUO pay because AUO pay is provided in lieu of other types of premium pay except overtime pay for regularly scheduled overtime work, and premium pay for night, Sunday, and holiday work. (See 5 U.S.C. 5545(c)(2).)

III. Work scheduling requirements

Whenever possible, work for Federal employees must be scheduled on a regular basis, and AUO pay generally cannot be paid for work that has been regularly scheduled. Regularly scheduled work means work that is scheduled in advance of an administrative workweek. An administrative workweek means a period of 7 consecutive calendar days designated in advance by the head of an agency (e.g., Sunday through Saturday midnight). (See 5 U.S.C. 6101 and subpart A of 5 CFR part 610.)

The Comptroller General has determined that while the conditions for AUO pay in 5 U.S.C. 5545(c)(2) "generally" require that an employee's hours of duty may not be subject to administrative control, that does not mean that overtime work must be compensated on an hourly basis as if it were regularly scheduled overtime work when circumstances occasionally require supervisors or managers to direct overtime work for short periods of time. (See B-168048, August 19, 1970.) Also, the courts have ruled that work is not regularly scheduled when an agency cannot predict the beginning or the end of an event (such as a prison riot) that leads to assignment of employees to a temporary period of predictable tours of overtime work until the event ends. (See Robert A. Buchan v. United States, 92-505C (Cl. Ct.), March 30, 1995.)

IV. AUO pay limitations

A law enforcement officer may receive AUO pay only to the extent that the payment will not cause the total of the employee's basic pay and premium pay (including AUO pay; regularly scheduled overtime pay; night, Sunday, or holiday pay; and hazardous duty pay) for any biweekly pay period to exceed the lesser of--

(1) 150 percent of the minimum rate for GS-15, including a locality-based comparability payment under 5 U.S.C. 5304 or special pay adjustment under section 404 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509) and any special salary rate established under 5 U.S.C. 5305; or

(2) the rate payable for level V of the Executive Schedule. (See 5 CFR 550.107.)

A lower biweekly pay limitation applies to employees who are not law enforcement officers. An employee who is not a law enforcement officer may be paid premium pay under subpart A of part 550, Code of Federal Regulations, to the extent that the payment does not cause the total of his or her basic pay and premium pay for any pay period to exceed the maximum rate for GS-15, including a locality-based comparability payment under 5 U.S.C. 5304 and a special rate established under 5 U.S.C. 5305. This limitation may be applied on an annual (calendar year) basis instead of on a biweekly basis if the head of an agency, or his or her designee, has determined that an emergency exists, and the employee has been determined to be performing work in connection with the emergency. (See 5 CFR 550.105 and 106.) A criminal investigator who is entitled to receive availability pay may not receive AUO pay. (See 5 U.S.C. 5545a(g).)

V. Payment for seasonal work and temporary assignments

When the requirements for AUO pay are met by an employee during only part of a year, such as during a given season, an agency may pay AUO pay only during the period when all requirements for AUO pay are met. Further, an agency may continue AUO pay for not more than 10 workdays when an employee receiving AUO pay has been temporarily assigned to duties that do not warrant payment of AUO pay, and such payments for performance of nonqualifying duties may not exceed 30 workdays in a calendar year. One exception is that AUO payments may continue for up to 60 workdays at any one time and cumulatively in a calendar year while an employee is on temporary assignment to a formally approved program for advanced training directly related to the duties for which AUO pay is paid. (See 5 CFR 550.162(c).) An employee is entitled to continuation of AUO pay during any period of paid leave. (See 5 CFR 550.162(e).)

VI. Examples of abuse of AUO pay authority

OPM strongly encourages agencies to implement the recommendations made by the reports of their Inspectors General and conduct their own reviews as needed to determine whether agency

AUO policies, practices, and payments are in accord with law, regulations, and good personnel management practices.

Examples of potential abuses of the AUO pay authority which should be identified and corrected are the following:

(1) payment of AUO pay to an employee who almost always works in a supervised office environment and does not perform independent investigative or other administratively uncontrollable work;

(2) crediting of hours of work for AUO pay that are clerical or administrative in nature, can be easily scheduled in advance, and do not involve independent investigative or other administratively uncontrollable work;

(3) payment of a rate of AUO pay that is unauthorized because the average number of hours of irregular or occasional work is too low;

(4) payment of AUO pay that causes total basic pay and premium pay received by the employee to exceed the applicable biweekly pay limitation for the employee;

(5) payment of both AUO pay and overtime pay on an hourly basis for the same hours of work;

(6) payment of AUO pay to a criminal investigator who is entitled to receive availability pay;

(7) for an employee engaged in law enforcement activities (including security personnel in correctional institutions) who receives AUO pay and is not exempt from the Fair Labor Standards Act of 1938, as amended, failure to pay an additional 0.5 times the hourly regular rate of pay for each overtime hour in excess of 42.75 hours per week, including meal periods; and

(8) continuation of AUO pay for more than 10 consecutive prescribed workdays on temporary assignment to perform only regularly scheduled administrative duties.

VII. Inspectors General audit reports

OPM has received 12 Inspectors General audit reports on AUO pay. The audit reports were from the Inspectors General for the Departments of Agriculture, Commerce, Defense, Energy, Health and Human Services, Interior, Justice, Transportation, and Treasury (for the Bureau of Alcohol, Tobacco and Firearms; Customs Service; and Secret Service); and the Social Security Administration.

OPM received letters or fax notices from Inspectors General of 45 other agencies stating that no AUO pay was paid by their agencies during Fiscal Year 1996. Therefore, no audit report was required. The Inspector General for the Central Intelligence Agency (CIA) stated that the CIA's audit report would be provided in May 1997. Therefore, OPM's guidance on AUO pay does not reflect the findings of the CIA report.

VIII. Audit report findings and OPM comments

Finding 1: Current agency guidance on AUO pay is not available.

> In some cases, agency regulations, guidance, manuals, forms, and internal review procedures for AUO pay are out of date, not available to supervisors or managers, and/or not implemented.

OPM comments:

It appears that regulations or guidance on AUO pay in many agencies were written several years ago and not updated. In some agencies, relatively few employees receive AUO pay, and sufficient attention may not have been paid to recent changes. In other cases, it appears that AUO pay has been viewed incorrectly as a pay entitlement rather than as form of annual premium pay with specific eligibility requirements.

One important statutory change that should be incorporated into agency regulations and guidance was enacted as part of Public Law 101-173, November 27, 1989. This act eliminated the requirement to use the rate of basic pay for GS-10, step 1, as the "cap" or maximum rate of basic pay that can be used for computing annual premium pay for AUO work. (See 5 U.S.C. 5545(c)(2).) OPM issued final regulations implementing this provision of law on October 10, 1990. The statutory change and corresponding OPM regulations require that an employee whose rate of basic pay is greater than the rate of basic pay for GS-10, step 1, is entitled to AUO pay computed on the rate of basic pay for the employee's actual grade and step.

Another change in law that should be incorporated into agency regulations and guidance, where applicable, is a revision of the biweekly limitation on the payment of AUO pay and certain other types of premium pay for law enforcement officers. The revised limitation is incorporated in 5 U.S.C. 5547(c) and was added by section 410 of the Federal Employees Pay Comparability Act of 1990. OPM regulations implementing this change in law are found in 5 CFR 550.107, and the limitation is summarized above in this document in the section on "AUO Pay Limitations."

A third change in law that should be incorporated into agency regulations and guidance is the prohibition on paying AUO pay to criminal investigators who are entitled to receive availability pay. (See 5 U.S.C. 5545a(g).) The authority for availability pay for criminal investigators (5 U.S.C. 5545a) was added by section 633 of the Treasury, Postal Service, and General Government Appropriations Act, 1995 (Public Law 103-329, September 30, 1994). OPM's

interim regulations implementing this authority became effective on October 30, 1994, and are found in 5 CFR 550.181 through 550.187.

To the extent that agency regulations and guidance on AUO pay and other types of premium pay are out of date or incomplete, they should be updated to reflect the changes in law summarized above and any other applicable changes in law, OPM regulations, and guidance that have occurred since the agency's documents were last issued. Agencies should also give appropriate consideration to applicable Comptroller General opinions and court decisions in updating these documents, such as those cited in section III of this guidance above, entitled "Work Scheduling Requirements," and those cited below in OPM's comments under "Finding 5."

Finding 2: AUO approval process is not adequate.

> In some instances, the initial authorization of AUO pay for individual employees has not been reviewed and approved at the agency level or, if it was, it has not been reviewed and reapproved periodically as required by OPM regulations.

OPM comments:

The head of an agency (or his or her designee) is responsible for determining which employees shall receive AUO pay, consistent with law and applicable OPM and agency regulations. These AUO coverage determinations must be reviewed at appropriate intervals, and AUO pay must be discontinued if the employee is no longer entitled to AUO pay. (See 5 U.S.C. 5545(c)(2) and 5 CFR 550.151 and 161(b).)

OPM urges each agency to determine annually in writing whether AUO pay should be continued for each employee who has received it in the past. In addition, agencies should re-examine positions already approved for AUO pay when new employees fill the positions, even if the positions appear to be identical to those that are encumbered by individuals who already receive AUO pay. OPM urges that these determinations be made in writing by the first level supervisor or higher and that the initial determinations be reviewed at a higher management level in the agency. OPM also urges that each agency establish a mechanism for independent review and audit of these determinations (such as by using special internal codes and cost controls to quantify the use of AUO pay or through unannounced staff reviews). The review and audit mechanisms should be designed to measure the accuracy of pay computations and conformance with all applicable legal and regulatory requirements and guidance. In agencies with multiple organizations using the AUO pay authority, the agency-wide AUO program should be reviewed at appropriate intervals (e.g., every 5 years) to ensure consistency.

Finding 3: Insufficient documentation

> In many cases, there is insufficient written documentation available to enable an independent outside reviewer to determine whether an employee is entitled to the rate of AUO pay he or she receives.

OPM comments:

The percentage amount of AUO pay must be established initially and reviewed periodically in accordance with OPM regulations. Agencies do not have the authority to establish alternative methods for determining the percentage rate of AUO pay, such as establishing a uniform percentage of AUO pay for a group of employees based on the average amount of overtime work performed by the group. (See 5 CFR 550.154 and 550.161(d), (e), and (f).)

To determine the appropriate rate of AUO pay consistent with OPM regulations, it is necessary to determine the average number of irregular or occasional hours of work customarily performed by an employee each week. OPM regulations require that these determinations be based on available records of the hours of irregular or occasional overtime work required in the past and any other information bearing on the number of hours of duty that may reasonably be expected to be required in the future. (See 5 CFR 550.154 and 550.161(d) and (e).) OPM regulations also require that reviews of the rate of AUO pay be conducted at appropriate intervals and that rates of AUO pay be revised or discontinued when necessary to meet legal or regulatory requirements. For additional information, see section I of this guidance above, entitled "General Statutory and Regulatory Requirements."

OPM urges that all employees receiving AUO pay and their supervisors and managers receive training and/or detailed information on the difference between regularly scheduled and irregular or occasional overtime work, including an explanation of what constitutes an administratively uncontrollable event requiring irregular or occasional overtime work. For additional information, see section III of this guidance above, entitled "Work Scheduling Requirements."

Employees who receive AUO pay and/or their supervisors must be required to keep records of all hours of work, including whether each hour of work is regularly scheduled or irregular and occasional in nature. This documentation is necessary not only to determine the appropriate rate of AUO pay, but also to determine whether employees are entitled to additional pay for regularly scheduled overtime work and premium pay for regularly scheduled night, Sunday, and holiday work. Each agency is responsible for timekeeping records, and the records should include all hours of AUO work (i.e., irregular or occasional overtime work), as well as regularly scheduled overtime work (i.e., hours of work scheduled in advance of the administrative workweek). The timekeeping records should be reviewed and approved in writing by each employee's supervisor.

OPM also urges that each agency establish a mechanism for independent review and audit of timekeeping records and AUO pay rates (as well as other premium pay determinations) at least once every 5 years for accuracy, conformance with all applicable legal and regulatory requirements and guidance, and consistent application within the agency. Supervisors and auditors should especially review the sufficiency and accuracy of documentation for irregular or occasional overtime work. Evidence of overtime work that may not be irregular or occasional in nature may include overtime work that is performed at the same time each day over an extended period of time, on the same day each week, or performed immediately prior to or following the

employee's basic daily tour of duty on a regular basis. Agency documentation might also show that the purpose of the overtime work was to complete administrative or clerical duties that are clearly not administratively uncontrollable. However, agencies should note that the law requires only that the employee must "generally" be responsible for recognizing, without supervision, circumstances which require the employee to remain on duty. Therefore, agencies must consider the work environment as a whole, not just a specific work incidence. (See OPM's regulatory criteria at 5 CFR 550.153.)

A determination that hours of regularly scheduled overtime work are being credited improperly as irregular or occasional in nature may result in a determination that the rate of AUO pay must be revised or discontinued. This also may result in a determination that the employee is entitled to overtime pay and other premium pay on an hour-for-hour basis for regularly scheduled overtime work that was ordered or approved in advance.

Finding 4: Errors in computation of AUO percentage rate

> In some cases, agencies have not determined the rate of AUO pay correctly because the number of irregular or occasional hours per week has been determined incorrectly.

OPM comments:

OPM regulations provide for determining the rate of AUO pay by calculating the average number of hours of irregular or occasional overtime work performed by an employee per week. (See 5 CFR 550.154.) For example, the regulations establish a 25 percent rate of AUO pay for a position that requires an average of over 9 hours a week of irregular or occasional overtime work. See OPM's comments on "Finding 3," above, for determining whether hours of overtime work are irregular or occasional in nature.

It is also necessary to calculate the number of weeks correctly. Agencies may use the number of calendar weeks or the number of administrative workweeks (as defined in 5 CFR 610.102) for the review period in determining the rate of AUO pay for an employee. However, in determining the number of weeks in a review period, there is no authority to reduce the number of weeks by subtracting hours of paid leave (such as annual leave or sick leave), hours of unpaid leave (such as hours of leave without pay, including leave without pay under the Family and Medical Leave Act of 1993 (FMLA), or hours during which an employee is suspended without pay), hours of excused absence with pay, hours or days during which an employee has been detailed to other duties for which employees seldom or never perform irregular or occasional overtime work, or hours in a training status.

Nevertheless, there is a permissible way to ensure that an employee's AUO rate of pay is not adversely affected by an extended absence from performing normal duties, such as an extended period of training, receipt of continuation of pay under the Federal Employees Compensation Act (FECA), detail to duties that do not require a substantial amount of irregular or occasional

overtime work, or leave without pay (including leave without pay approved under the FMLA or the FECA). Specifically, an agency may establish a policy to disregard a period of time that would otherwise be included in its established review periods under these circumstances. For example, an agency could establish a policy that an AUO review period will normally cover a 6-month period with a specified beginning and ending date. However, an agency could also decide to make an exception in certain circumstances to begin or end a particular AUO review period when an employee will not be performing regular AUO duties for a specified amount of time (e.g., up to 12 weeks) because of approved leave without pay, extended training, continuation of pay, or extended detail to other duties that do not require substantial amounts of irregular or occasional overtime work. Thus, an agency could vary the length of the normal AUO review cycle so as to accommodate unusual circumstances as they arise.

Such a policy could provide that the next AUO review period will begin when the employee returns to a paid working status that includes substantial amounts of irregular or occasional overtime hours for which AUO pay has previously been approved. OPM recommends that agencies avoid permitting gaps between AUO review periods of more than 12 weeks or the full length of time an employee is not working and is receiving workers compensation benefits. An agency policy permitting gaps between AUO review periods in these limited circumstances is permitted because OPM regulations simply provide that agencies must review AUO rate determinations at appropriate intervals. However, agencies must not create exceptions for the AUO review period for absences resulting from paid leave (unless annual leave or sick leave is substituted for leave without pay, as appropriate, under the FMLA for a period of up to 12 weeks, as discussed above), excused absence with pay, or suspensions without pay. In addition, OPM strongly recommends that agency AUO review periods for determining the rate of AUO pay never exceed 1 year in length.

An agency policy permitting gaps between AUO review periods on an exception basis will help the agency comply with the requirement in 5 U.S.C. 6384 that an employee shall not lose any employment benefits as a result of a period of leave without pay under the FMLA. In addition, a policy permitting gaps between AUO review periods is consistent with OPM's recommendation that the same rate of AUO pay be continued during a period of continuation of pay or leave without pay (even though the employee may not actually be paid AUO pay during a period of leave without pay), provided that the employee is in receipt of benefits under the FECA and that AUO pay continues to be authorized by the agency for the position.

OPM notes that employees are not paid AUO pay during any period in a nonpay status and that OPM has established regulations limiting payment of AUO pay for periods of training and detail to nonqualifying duties. See section V of this guidance above, entitled "Payment for Seasonal Work and Temporary Assignments," and OPM regulations at 5 CFR 550.162.

Finding 5: Improper AUO percentage rates of pay

In some cases, employees have received AUO pay who are not qualified to receive it, have received a percentage rate of AUO pay lower or higher than is authorized by OPM

regulations, or have not received premium pay they are entitled to receive for regularly scheduled overtime work.

OPM comments:

The Inspectors General audit reports indicate that in several instances employees who receive AUO pay are not qualified to receive it or are entitled to a lower or higher percentage rate of AUO pay than has actually been paid. Agencies must terminate payment of AUO pay to any employee who does not qualify for it and must reduce the amount of any AUO pay that is earned in excess of the rate authorized by OPM regulations.

For each overpayment of AUO pay, agencies must determine whether the employee is required to reimburse the Government for all or part of the overpayment or whether all or part of the overpayment may be waived. (See the legal requirements for waiving such overpayments in 5 U.S.C. 5584.) Agencies must also increase the rate of AUO pay in instances where employees are entitled to a higher rate than they have received and must determine an employee's entitlement, if any, to back pay in such circumstances

Agencies may not provide AUO pay to an employee who is entitled to availability pay. (See 5 U.S.C. 5545a(g).) Also, agencies may not provide AUO pay to employees who do not perform substantial amounts of irregular or occasional overtime work, with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty. In addition, agencies may not pay AUO pay for customary and routine work duties and work duties that are primarily administrative in nature or occur in noncompelling circumstances, e.g., work that should have been regularly scheduled. (See section 650 of the Treasury, Postal Service, and General Government Appropriations Act, 1997. Also, see section I of this guidance above, entitled "General Statutory and Regulatory Requirements.")

While the conditions for AUO pay in 5 U.S.C. 5545(c)(2) "generally" require that an employee's hours of duty may not be subject to administrative control, this does not mean that overtime work must be compensated on an hour-for-hour basis as if it were regularly scheduled overtime work when circumstances occasionally require supervisors or managers to direct overtime work for short periods of time in connection with responses to administratively uncontrollable events. (See "Work Scheduling Requirements," above.) However, in instances where documentation shows that overtime work exists (i.e., the employee has performed work in excess of the overtime standards--generally 8 hours in a day or 40 hours in a week), overtime pay has been approved (i.e., by the employee's supervisor or another designated agency official), and an overtime work pattern exists (i.e., indicating that overtime work has been performed at the same time each day or each week over an extended period of time), agencies would have to conclude that the work is not irregular or occasional in nature and could not be properly compensated by payment of AUO pay unless convincing evidence exists to the contrary.

In general, regularly scheduled overtime work must be ordered or approved in advance of the applicable regularly scheduled administrative workweek by the employee's supervisor or another agency official designated by the head of an agency to schedule work, including hours of overtime work. However, OPM regulations provide that failure by authorized officials to regularly schedule work in advance of the applicable administrative workweek does not eliminate an employee's entitlement to overtime pay and other premium pay for regularly scheduled overtime work. Thus, when overtime work that should have been regularly scheduled in advance of the workweek is ordered or approved during a workweek, the employee is entitled to premium pay for regularly scheduled overtime work if the designated scheduling official (1) had knowledge of the specific days and hours of the work requirement in advance of the administrative workweek and (2) had the opportunity to determine which employees had to be scheduled, or rescheduled, to meet the specific days and hours of that work requirement. (See 5 CFR 610.111(a)(2) and 5 CFR 610.121(b)(3).

The Comptroller General has ruled that an employee may be paid both regularly scheduled overtime on an hour-for-hour basis and AUO pay for irregular or occasional overtime work, as long as the same work is not compensated twice. Thus, an employee may receive two different types of payment for two different types of overtime work. The separate types of premium pay are mutually exclusive methods for compensating two distinct forms of overtime work. (See 52 Comp. Gen. 310 (1972).) The Comptroller General has also stated that if an employee is found to be entitled to overtime pay for regularly scheduled overtime work but was already compensated improperly for that work with AUO pay improperly, the excess amount of AUO pay should be used to pay for the allowable regularly scheduled overtime pay. (See 52 Comp. Gen. 319 (1972) and B-196328, April 22, 1980.)

Finding 6: Misperceptions of premium pay costs and limitations

In some cases, agencies have misperceptions about premium pay costs and limitations.

OPM comments:

OPM encourages agencies to analyze all positions that require a substantial amount of overtime work to determine the most cost-effective and efficient way to accomplish work requirements. This may be done in part by assessing the feasibility of the various work scheduling and premium pay options that are permitted by law and OPM regulations. Payment of AUO pay may not necessarily be the most efficient and cost-effective way to compensate all the employees who now receive it. On the other hand, AUO pay may be appropriate for some positions and grade levels for which it has not been approved previously.

Some considerations that should be taken into account when assessing work scheduling and premium pay options for compensating employees who have substantial amounts of irregular or occasional overtime work have been provided in previous sections of this guidance, and others are mentioned below.

As noted under "Finding 1," above, a change in law enacted in 1989 eliminated the requirement to use the rate of basic pay for GS-10, step 1, as the maximum rate of basic pay for computing annual premium pay for AUO work. Final OPM regulations implementing that change became effective in September 1990. However, for overtime hours that are not compensated by AUO pay, the hourly overtime pay rate is limited for employees who are exempt from (not covered by) the FLSA. The hourly overtime pay limitation for a law enforcement officer is found in 5 U.S.C. 5542(a)(4). The hourly overtime pay limitation for most other FLSA-exempt employees is found in 5 U.S.C. 5542(a)(1) and (2).

These hourly overtime pay limitations do not apply to employees who are nonexempt from (covered by) by the FLSA. In addition, FLSA-nonexempt employees who are paid for irregular or occasional overtime work on an hourly basis are not only entitled to overtime pay for hours of work that are ordered or approved, but are also entitled to overtime pay for hours of work that are "suffered or permitted." "Suffered or permitted work" means any work performed by an employee for the benefit of an 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 following additional premium pay entitlements must also be taken into account, whether or not the employee receives AUO pay, for employees who are covered by subchapter V of chapter 55 of title 5, United States Code:

- When an employee performs hours of work between 6 p.m. and 6 a.m. that are regularly scheduled in advance of the administrative workweek by the employee's supervisor, the employee is entitled to a night pay differential of 10 percent of his or her hourly rate of basic pay for each hour of night work, including overtime hours at night.

- When an employee performs hours of work during any tour of duty that begins or ends on Sunday and was scheduled by the employee's supervisor in advance of an administrative workweek, the employee is entitled to Sunday premium pay at the rate of 25 percent of his or her hourly rate of basic pay for up to 8 nonovertime hours of each Sunday tour of duty.

- When an employee is required to perform hours of work on a holiday (during hours when he or she would otherwise perform nonovertime work if not for the holiday), the employee is entitled to his or her rate of basic pay plus holiday premium pay equal to the employee's rate of basic pay for each hour of holiday work.

Entitlements to night, Sunday, and holiday premium pay differ from those summarized above for employees under flexible or compressed work schedules. See OPM's *Handbook On Alternative Work Schedules* for guidance on these types of premium pay for employees under alternative work schedules. The handbook is available on OPM ONLINE by dialing (202) 606-4800 and is also available on OPM's Internet web site at http://www.opm.gov. Also, for further information

on premium pay limitations and entitlements, see section II of this guidance above, entitled "Relationship to Other Premium Pay Entitlements," and section IV of this guidance above, entitled "AUO pay limitations."

In implementing this guidance from OPM, agencies need to be mindful of any obligations they may have to negotiate or consult, as appropriate, with the exclusive representative(s) of their employees. In addition, agencies are also urged to utilize existing Partnership arrangements that they may have with the exclusive representative(s) of their employees.

For further information or assistance concerning the administration of AUO pay, please contact OPM's Compensation Administration Division at (202) 606-2858, FAX: (202) 606-0824, or email at payleave@opm.gov.

ATTACHMENT 3
RECORD OF POST-PETITION CONFERENCE

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
IMMIGRATION AND CUSTOMS ENFORCEMENT
NATIONAL COUNCIL 118
(Union)

and

UNITED STATES DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION AND CUSTOMS ENFORCEMENT
(Agency)

0-NG-3248

RECORD OF POST-PETITION CONFERENCE

February 9, 2015

On February 3, 2015, the parties in the above-captioned case participated in a post-petition conference held pursuant to § 2424.23 of the Authority's Regulations.[1] The conference was conducted telephonically by Authority representative Anne Katz. Authority representatives Melissa Wisniewski, Claire Sobczak, Kaylee Davis, Fernando Colón, and Ally Jozwik were also present. Union representatives Anju Mathew, David Cann, Chris Crane, and Leann Mezzacapo, and Agency representatives Meir Braunstein and John Van Doren participated. This report describes the results of the conference.

The parties did not mutually agree to use the services of the Authority's Collaboration and Alternative Dispute Resolution Office. They also confirmed that there are currently no pending related proceedings involving the proposal at issue in this case. In addition, the Union confirmed that it is not requesting a hearing in this case.

The Union clarified that its petition for review (petition) concerns one proposal with three "components" referenced in the petition as: (1) "Ground Rules, Section VII.A.1" (Section VII.A.1); (2) "Ground Rules, Section VII.A.2" (Section VII.A.2); and (3) "Ground Rules, Section VII.B" (Section VII.B). The Union requested that each "component" be severed from each other and the rest of the proposal, and it asserted that each severed portion could operate independently. The Union clarified that each

[1] 5 C.F.R. § 2424.23.

"component," in combination, makes up various proposed subsections of a ground rule for ongoing bargaining between the parties over their collective-bargaining agreement that began in June 2014 (CBA negotiations).

The Union stated, and the Agency did not dispute, that the Union presented the Agency with a written request that the Agency respond, in writing, with the Agency's position on the negotiability of the proposal.[2] Further, the Union stated, and the Agency did not dispute, that the Agency did not respond in writing to the Union's written request for an allegation of non-negotiability.[3] At the conference, the Agency declared Section VII.A.1 of the proposal nonnegotiable. And, although not bound by legal assertions made at the conference, the Agency stated that the proposal, as a whole, is contrary to law.

The Union modified the wording of Section VII.A.1 at the conference. As modified, Section VII.A.1 now states:

> Team members and alternates who are LEOs will not have their AUO computed in such a way that would result in reduction or decertification as a result of their participation in the negotiations process; official time for AUO certified team members and alternates will be classified and paid as "administrative leave."

The Union explained that Section VII.A.1 means that the Agency must not compute the law enforcement officers' (LEOs') administratively uncontrollable overtime (AUO) in a way that would result in: (1) reduction of their AUO pay and percentage; or (2) ineligibility to receive AUO, thus, becoming decertified. The Union defined AUO as premium pay that is paid annually and calculated on a periodic basis (every four pay periods by reviewing AUO worked). The Union clarified that Section VII.A.1 applies only to AUO-eligible LEOs who are team members and alternates on the Union's CBA negotiations team. Currently, the Union stated, there are two AUO-eligible participants on the Union's CBA negotiations team.

The Union further explained that the wording of Section VII.A.1 that comes after the semi-colon describes the method by which the wording that precedes the semicolon would be achieved. This method, according to the Union, is intended to operate by requiring the Agency to grant administrative leave (and code it as such for administrative purposes) for time spent by AUO-certified team members and alternates in CBA negotiations, rather than granting or coding this time as official time. In addition, the Union explained that coding this time as administrative leave would prevent AUO-certified LEOs participating in CBA negotiations from losing AUO pay or from becoming decertified. The Union explained that after thirty cumulative days or ten consecutive days of being on official time, an AUO-certified employee loses AUO certification. In this regard, the Union clarified that the time spent by the two LEOs participating on the CBA negotiations team does not represent work that contributes to

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[2] *See* Petition at 2, 5; *id.*, Attachs. 1, 2.
[3] *See* Petition at 2.

AUO; but, if this time is paid as administrative leave, it would be excluded from the AUO-computation period. The Union also clarified that Section VII.A.1 does not prevent the LEOs from performing AUO work during time not spent in the CBA negotiations. The Union explained that Section VII.A.1 is intended to avoid any adverse impact on AUO-eligible LEOs' AUO pay and certification as a result of participating in the CBA negotiations. The Agency agreed with the Union's explanation of the meaning and operation of Section VII.A.1.

The Union modified the wording of Section VII.A.2 at the conference by replacing "will be" with "may, at the discretion of the Agency." As modified, Section VII.A.2 now states: "The AUO computation period for Union CBA team members, who are in positions eligible to receive AUO may, at the discretion of the Agency, be 26 pay periods during CBA negotiation periods."

The Union explained that Section VII.A.2 means that the AUO-computation period for AUO-eligible team members who participate in the CBA negotiations may be extended, at the Agency's discretion, from twelve pay periods to twenty-six pay periods. Again, the Union stated that Section VII.A.2 would apply to AUO-eligible LEOs who are team members and alternates on the Union's CBA negotiations team, and that, currently, there are two AUO-eligible participants on the Union's CBA negotiations team. The Union defined "computation period" as a period of time during which determinations of an employee's continuing eligibility to receive AUO pay and the appropriate rate of pay are made.

The Union further explained that Section VII.A.2 would operate by requiring the Agency to review each LEO's AUO performed during the last twenty-six pay periods when computing the AUO rate (which occurs every four pay periods). The Union also stated that the Agency would review these twenty-six pay periods as long as negotiations are ongoing, regardless of whether the week in which the computation is made occurs in a week during which negotiations are actively taking place. The Union also clarified that extending the AUO-computation period would allow LEOs to work more AUO when not in the CBA negotiations to meet the time requirements for maintaining their average AUO hours. The Union also reiterated that it requests severance of Section VII.A.2 as a separate proposal and not as an alternative to Section VII.A.1.

The Agency agreed with the Union's explanation of the meaning and operation of the proposal. Because the Union modified the wording of Section VII.A.2 at the conference and because the Union is not offering this component as an "alternative" to Section VII.A.1, the Agency stated that it was not prepared to take a position on the negotiability of Section VII.A.2.

The parties agreed that the wording of Section VII.B is accurately set forth in the petition.[4] The Union explained that the wording means that the Agency will permit AUO-certified team members on the CBA negotiation's team to work additional AUO hours at their duty stations when AUO-certified work is available and when the team

[4] *Id.* at 4; *id.*, Attach. 5.

members are not in negotiations. The Union defined "additional AUO hours" as AUO hours in addition to that employee's regular shift time as AUO work arises. The Union also explained that Section VII.B reflects the Agency's current practice. Again, the Union stated that Section VII.B would apply to AUO-eligible LEOs who are team members and alternates on the Union's CBA negotiations team, and that, currently, there are two AUO-eligible participants on the Union's CBA negotiations team.

The Agency agreed with the Union's explanation of the meaning and operation of the proposal. The Agency also stated that it was not prepared to take a position on the negotiability of Section VII.B at the conference.

During the conference, the conference holder informed the Agency that it must file its statement of position with the Authority by **February 17, 2015**. The Union's response and the Agency's reply thereto shall be filed in accordance with the time limits set forth in 5 C.F.R. §§ 2424.25(b) and 2424.26(b). The parties should file any request for an extension of time for filing these submissions to the Authority in accordance with § 2429.23 of the Authority's Regulations.

This record is prepared in conformance with § 2424.23(c) of the Authority's Regulations.[5] The parties may raise any objection to the content of this record in subsequent filings to the Authority. The parties should submit all filings to Gina K. Grippando, Chief, Case Intake and Publication, 1400 K Street, NW, Suite 201, Washington, D.C. 20424-0001. The parties may contact that office by phone at (202) 218-7740.

For the Authority:

Gina K. Grippando, Chief
Office of Case Intake and Publication

[5] 5 C.F.R. § 2424.23(c).

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, DC

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
IMMIGRATION AND CUSTOMS ENFORCEMENT
NATIONAL COUNCIL 118
(Union)

and

UNITED STATES DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION AND CUSTOMS ENFORCEMENT
(Agency)

0-NG-3248

STATEMENT OF SERVICE

I hereby certify that copies of the Record of Post-Petition Conference of the Federal Labor Relations Authority in the subject proceeding have this day been transmitted by facsimile and mailed to the following:

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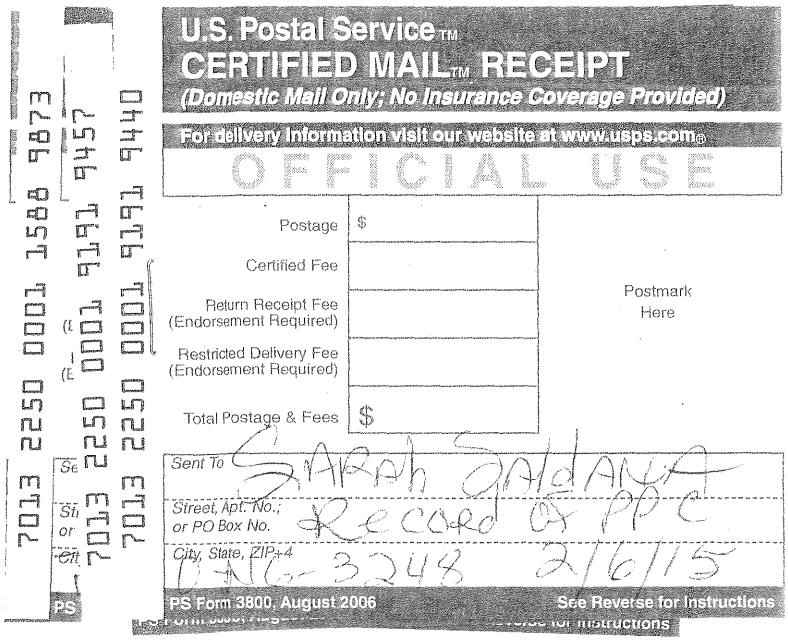

for Deborah Johnson
Belinda Stevenson
Legal Assistant