SOCIAL SECURITY ADMINISTRATION BALTIMORE, MARYLAND Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	Case Nos. WA-CA-40267 WA-CA-40268

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **DECEMBER 26, 1995**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: November 22, 1995
Washington, DC

MEMORANDUM DATE: November 22, 1995

TO: The Federal Labor Relations Authority

FROM: SALVATORE J. ARRIGO
Administrative Law Judge

SUBJECT: SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND

Respondent

and Case Nos. WA-CA-40267

WA-CA-40268

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

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1 During the pendency of this case, the Social Security Administration, previously an agency within the U.S. Department of Health and Human Services (herein HHS), was established as an independent agency. The case caption has been modified to reflect that change.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

SOCIAL SECURITY ADMINISTRATION BALTIMORE, MARYLAND[1] Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	Case Nos. WA-CA-40267 WA-CA-40268

Ron Townsend, Carroll Rankin and
Mary Armstrong, Esq.
For the Respondent

Joe Goldberg, Esq. and James L. Campana
For the Charging Party

Christopher Feldenzer, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This matter arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon unfair labor practice charges having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent (herein sometimes the Social Security Administration or SSA), the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the Washington Regional Office, issued a Complaint and Notice of Hearing alleging, as more fully set forth below, that the Respondent violated section 7116

(a)(1) and (8) of the Statute by failing and refusing to comply with awards of an arbitrator as required by 5 U.S.C. §§ 7121 and 7122.

A hearing on the Complaint was conducted in Washington, D.C. at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent, the Union and the General Counsel and have been carefully considered.[2]

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

The American Federation of Government Employees, AFL-CIO (AFGE) is the certified exclusive collective bargaining representative of a nationwide consolidated unit of employees appropriate for collective bargaining at the Social Security Administration (SSA). Among the employees in that unit are GS 9 and 10 Claims Representatives (CRs) and GS 9 and 10 Claims Authorizers (CAs). The SSA initially determined that the CRs and the CAs were "administrative" employees and therefore exempt from coverage of the overtime provisions in the Fair Labor Standards Act (FLSA). As a consequence of this determination, the employees involved were paid for their overtime hours worked at the rate specified in 5 U.S.C. § 5542 (a maximum of GS 10, Step 1) rather than at the FLSA rate specified in 29 U.S.C. § 207(a)(1) (one and one-half times their regular rate of pay for each hour worked in excess of 40 hours per week), even where the latter calculation would provide a greater benefit to the employees.[3]

On December 16, 1987 and January 6, 1988, AFGE filed grievances on behalf of the CR and CA employees, respectively, under the parties' negotiated grievance procedure, protesting SSA's decision to exempt such employees from coverage under the FLSA. In an award on the

[2] I found the brief filed by counsel for the Union to be particularly helpful.

[3] The applicable Office of Personnel Management (OPM) regulations provide that where an employee is entitled to overtime pay under title 5 of the U.S. Code and under any authority outside title 5, the employee "shall be paid under whichever authority provides the greater overtime pay entitlement in the workweek." 5 C.F.R. § 551.513 (1994).

merits of the grievances, Arbitrator Henry L. Segal ruled that SSA had illegally designated the affected employees as exempt from coverage under the FLSA. The Arbitrator ordered SSA to treat the CR and CA employees as nonexempt and to pay them back pay for overtime pay to which they were entitled. SSA subsequently filed exceptions to the Arbitrator's award which the Authority denied. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, 44 FLRA 773 (1992) (Segal I).

In his award on the merits, the Arbitrator stated that he would retain jurisdiction over the question of a remedy pending the Authority's disposition of SSA's exceptions to Segal I. Once the Authority denied those exceptions on April 14, 1992, the Arbitrator considered the parties' briefs concerning the proper amounts of back pay to be awarded to the CR and CA employees and issued a remedy award resolving the issues raised by the parties.

First, the Arbitrator determined that the appropriate period for which the employees were entitled to back pay was six years prior to the dates that the grievances were filed, as prescribed in 31 U.S.C. § 3702 (the Barring Act) and applied by the Comptroller General in deciding claims against the United States Government.

Second, the Arbitrator concluded that the back pay to which the employees were entitled should include "suffered or permitted" overtime under 29 U.S.C. § 203(g) and 5 C.F.R. §§ 551.102 and 551.401(a)(2).[4] In this regard, the Arbitrator recognized in Section 3(C) of his opinion the practical difficulties in ascertaining the amounts of "suffered or permitted" overtime which "must be compensated" inasmuch as SSA kept no records of such overtime work performed, and placed the initial burden of proving (rather than merely asserting) that overtime work was suffered or permitted on the employee making the claim. He went on to note a number of methods suggested by the Union for gathering requisite information to calculate the amount of compensation for suffered or permitted overtime, but specifically stated that he "d[id] not direct the adoption of any of these methods." He then set forth seven "minimum

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As noted by the Arbitrator, "suffered or permitted" work is defined by OPM regulation as "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." 5 C.F.R. § 551.102(e).

guidelines which should be observed by the parties [to] . . . minimize the task," concluding that "[t]he above guidelines may be fleshed out by the parties as necessary to properly comply with them."[5]

[5] These guidelines are found at Joint Exhibit 3, pp. 26-27, and state as follows:

> (a) The [SSA] will have to identify the employees who performed at anytime during the back pay period (CRs from December 16, 1981, CAs from January 6, 1982) as CRs or CAs, GS 9 or 10, for purposes of remedy, even aside from the issue of "suffered or permitted" overtime. As the same employees would be the ones entitled to compensation for "suffered or permitted" overtime, this list will constitute the names of employees to be contacted for requisite information, and it should, of course, be made available to the Union.
>
> (b) Immediately after the list is available, an inquiry for requisite information should be sent by whatever means most efficient (hand delivery, mail, etc.) considering the status of the employee (active, retired, etc.). A strict deadline of 30 days must be imposed on the employee for response with a warning that if none is received in 30 days he or she may not later claim such overtime.
>
> (c) The inquiry should be composed jointly. Besides explaining what is involved, the inquiry must clearly require that the employee provide enough specifics, such as dates, hours, work performed to meet the burden set in Anderson v. Mount Clemens [Pottery, 328 U.S. 680, 687 (1946)], as well as the name(s) of the supervisor(s) who knew of the work and who "suffered or permitted" that it be performed.
>
> (d) The responses should be returned to both parties. They should be first studied by the Union and within sixty (60) days after receipt the Union should notify the [SSA] of the names of the employees whom it considers to have met the burden set for employees.
>
> (e) The [SSA] should respond to the Union within sixty (60) days after receipt of the Union's position bearing in mind the burden which has shifted to it as set forth in Anderson v.

With respect to the matter of interest on the back pay award, the Arbitrator stated that he would "direct that the [SSA] pay back pay interest in the manner provided by the Back Pay Act at 5 U.S.C. 5596(b)(2)(A) and (B) on the back pay for CRs from December 16, 1981 and for CAs from January 6, 1982."

In view of the foregoing, the Arbitrator (as pertinent here) issued the following "supplemental award":

> 1. The [SSA] shall pay back pay to Claims Representatives (CRs), GS 9 and 10, and Claims Authorizers (CAs), GS 9 and 10, for uncompensated Fair Labor Standards Act (FLSA) overtime (the difference between Title 5 overtime actually paid, if any, and FLSA overtime) for a back pay claim period running from six years prior to the filing date of the grievances. Accordingly the claim period for CRs, GS 9 and 10, shall run from December 16, 1981 (Grievance No. FO-UMG-87-10, filed on December 16, 1987) and for CAs, GS 9 and 10, from January 6, 1982 (Grievance No. GC-UMG-88-01 filed on January 6, 1988).
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> 2. Such uncompensated FLSA overtime for which back pay is to be paid shall include "suffered or permitted" overtime performed by the CRs, GS 9 and 10, and the CAs, GS 9 and 10, during the claims periods involved. The compilation of "suffered or permitted" overtime shall be subject to the procedural guidelines established by the Arbitrator, at Section 3 C. above.
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> 3. Back pay shall include interest assessed as provided in the Back Pay Act at 5 USC 5596 (b)(2)(A) and (B).

The SSA subsequently filed exceptions to the Arbitrator's supplemental award which the Authority denied on June 9, 1993. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, 47 FLRA 819 (1993) (Segal II).

On June 10, 1993, the day after the denial of SSA's exceptions rendered the Arbitrator's supplemental award final and binding, the Union wrote a letter to the Respondent requesting "an immediate meeting . . . to set up an expedited overtime pay processing procedure for the payment of the tens of thousands of SSA employees who have

been illegally denied backpay by the Agency." On July 13, 1993, the Respondent replied to the Union's June 10 letter by stating that it was taking action in "a good-faith effort for drawing this matter to an equitable and satisfactory conclusion for all concerned."

During August 1993, the Union's representatives met on three separate occasions with SSA's representatives to discuss compliance efforts. At the parties' first meeting on August 5, SSA notified the Union that the payroll records for 1981 through the third quarter of 1983 were missing, according to the officials at HHS who were responsible for retaining such records on behalf of SSA and other HHS components.[6] SSA therefore proposed that the payroll records for the fourth quarter of 1983 (which were available) be used to "annualize" the employees' back pay entitlements by multiplying the fourth quarter figures by four to get the total amount due for 1983, and that the same method be used for 1982. It is undisputed that using this method of computation would result in an underpayment to the CR and CA employees who worked overtime during the fourth quarter of 1983, because multiplying the six bi-weekly pay periods in that quarter by four would result in a total of 48 pay periods during 1983 rather than the standard 52 pay periods. It is also undisputed that using the data from the fourth quarter of 1983 as SSA proposed would have the added disadvantage of eliminating any back pay for all CR and CA employees who happened to work no overtime during that quarter but who worked overtime during 1982 and the first three quarters of 1983.

The SSA also proposed that the overtime payments to which the CR and CA employees would otherwise be entitled should be reduced by 75% as "pre-Lanehart" deductions. As SSA explained its position, a 1986 study conducted by management for purposes totally unrelated to the CR and CA employees' entitlement to FLSA overtime indicated that an average of 75% of its employees use some leave during a pay period. Prior to the Federal Circuit's decision in Lanehart v. Horner, 818 F.2d 1574 (Fed. Cir. 1987), paid leave was not considered hours worked for FLSA overtime purposes, and therefore an employee with a 40-hour Monday through Friday workweek would not be entitled to overtime pay for Saturday

[6] While there was a great deal of testimony in the record that the pertinent records were not missing in August and September 1993 but were, in fact, knowingly in the possession of HHS at all times, I credit the testimony that SSA was advised and believed that the records were missing and that SSA's actions during this period were based on that assumption.

work if a holiday or paid leave occurred during that same week. SSA's proposal was to treat all CR and CA employees as if they had taken paid leave in every week that they worked overtime prior to August 1987, and to deduct 75% of all overtime entitlements without regard to the actual pay records. Finally, SSA proposed that with respect to the issue of "suffered or permitted" overtime, a lump sum would be provided and divided equally among the CR and CA employees without regard to how much if any such overtime they had actually worked during the back pay period. The Union recognized the difficulty of computing each employee's "suffered or permitted" overtime and therefore agreed to a lump sum concept, but proposed that employees who had specific records should present them and be paid what they were owed, and that the lump sum should be divided among the other employees who had no records or who would not produce them.

The parties did not reach agreement on any of these issues and a second meeting was held on August 11, at which SSA's representatives further proposed that interest on the back pay amounts due should be computed by using the interest rate in effect during the last quarter of 1983. The Union objected to this approach because the interest rate in the fourth quarter of 1983 was only 11%, far lower than the 20% rate in effect during 1982 and most of 1983. The parties also discussed how SSA would contact all of the former employees who were entitled to back pay under the Arbitrator's awards. SSA indicated that it would mail a letter to each employee's last known address. The Union objected, and offered a number of suggestions designed to provide a more realistic opportunity for reaching the former employees. Among the Union's suggestions were the use of the agency's newsletter; federal employee newsletters; the Federal Times; the OPM's list of addresses for retirees receiving annuities; and current addresses accessed by use of the former employee's social security number. SSA rejected these suggestions.

At the parties' final meeting on August 20, SSA's positions as set forth above remained unchanged. Thereafter, by letter dated August 27, 1993, SSA notified the Union that it "has decided to take the following action:" (1) "to make a total lump sum payment of $20.9 million . . . to employees covered under this award," explaining that with respect to back pay for 1982 and 1983 "only records for the fourth quarter of 1983 exist" and that as a consequence SSA "annualized the backpay and interest for 1983 by multiplying the fourth quarter figure by 4; the 1983 figure was duplicated to determine backpay and interest

for 1982"[7]; (2) to provide a lump sum of $3.4 million of the $20.9 million for the payment of "suffer and permit" overtime, "to be divided evenly among all CRs and CAs employed during the years in question"; and (3) to "notify former SSA bargaining unit employees, via letter mailed to their last known address, that they may be entitled to FLSA backpay based on the payment formula used for current employees."

On September 30, 1993, the Union responded in writing to SSA's August 27 letter, stating that it did not agree with the calculations or procedures set forth therein, and that it viewed "any payment by the Agency to the employees due backpay under the decisions of arbitrator Henry Segal (as affirmed by the FLRA), made unilaterally pursuant to your August 27, 1993 letter, as a mere partial payment of the moneys due the employees by the Agency." The Union further enumerated how SSA's proposed compliance with the Segal I and II awards would be "clearly erroneous," including (1) the failure to use the most accurate records available for calculating overtime hours due employees from December 1981 through the third quarter of 1983; (2) the use of legally incorrect interest rates for December 1981 through 1983; (3) the improper reduction of overtime amounts due through 1987 by making pre-Lanehart deductions; (4) the insufficiency of efforts to notify retirees and others no longer working for the Agency that they may be entitled to back pay; and (5) the failure to provide a method for employees to present actual records to substantiate the amounts of "suffered or permitted" overtime due them. That same day, September 30, 1993, SSA notified the Union that it was proceeding to make back pay payments in accordance with its August 27 letter. Subsequent efforts in December 1993 and January 1994 to have SSA reconsider the back pay methodology and payments proved unavailing, and resulted in the Union's filing of two unfair labor practice charges on February 22, 1994.

Additional Findings, Discussion and Conclusions

Based on the Union's charges, the General Counsel issued a complaint which specifically alleged that SSA, the Respondent, violated section 7116(a)(1) and (8) of the Statute by failing to comply with the Segal I and II awards in the following ways:

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[7] With respect to the interest rates used in its calculations, SSA indicated that it had followed FPM Letter 550-78 (1988), "Interest on Back Pay," "except for 1982 and the first three quarters of 1983 where records are not available."

(a) Unilaterally estimating the back pay and interest calculations for the period between December 16, 1981 and 1983 by "annualizing" the payroll records from the fourth quarter of 1983;

(b) Improperly deducting an arbitrary percentage of leave from back pay and interest on overtime earned prior to August 2, 1987 based upon Lanehart v. Horner, 818 F.2d 1574 (Fed. Cir. 1987);

(c) Unilaterally imposing arbitrary calculations for "suffered or permitted" overtime without following Arbitrator Segal's minimum guidelines set forth in section 3(C) of SEGAL II; and

(d) Failing to exhaust all reasonable means to contact former employees entitled to back pay and overtime under SEGAL I and II.

The Respondent essentially denies that its conduct violated the Statute, contending that its attempt to comply with the Arbitrator's award was fair, reasonable and consistent with the award.

Under section 7122(b) of the Statute, an agency must take the action required by an arbitrator's award when that award becomes "final and binding." The award becomes "final and binding" when there are no timely exceptions filed to the award under section 7122(a) of the Statute or when timely filed exceptions are denied by the Authority. U.S. Department of Health and Human Services, Health Care Financing Administration, 35 FLRA 491, 494-95 (1990). The Authority denied the Respondent SSA's exceptions to the Arbitrator's remedial award on June 9, 1993; at that point, the Respondent was legally obligated to comply fully with the terms of that "final and binding" award. The issue in this case is whether the Respondent fully met that obligation. A failure to comply with an arbitration award under section 7122(b) of the Statute is, of course, a violation of section 7116(a)(1) and (8) of the Statute. U.S. Department of the Air Force, Carswell Air Force Base, Texas, 38 FLRA 99, 105 (1990); United States Department of the Treasury, Internal Revenue Service, Austin Compliance Center, Austin, Texas, 44 FLRA 1306, 1315 (1992).

Whether an agency has adequately complied with an arbitration award depends, in part, on the clarity of the award. Where an agency disregards portions of an arbitrator's unambiguous award or otherwise changes such an award, the agency fails to comply with the award within the meaning of section 7122(b) of the Statute. See, for

example, Department of the Interior, Bureau of Reclamation, Upper Colorado River Storage Project, Salt Lake City, Utah, 28 FLRA 596, 605 (1987); U.S. Department of Justice and Department of Justice Bureau of Prisons (Washington, D.C.) and Federal Correctional Institution (Danbury, Connecticut), 20 FLRA 39, 43 (1985), enforced sub nom. U.S. Department of Justice and Department of Justice, Bureau of Prisons v. FLRA, 792 F.2d 25 (2d Cir. 1986); and Department of Justice, U.S. Immigration and Naturalization Service, Washington, D.C., 16 FLRA 840, 842 (1984). Where an arbitrator's award is ambiguous, the Authority examines whether the agency's construction of the award is reasonable in determining whether the agency adequately complied with the award. See, for example, U.S. Patent and Trademark Office, 31 FLRA 952, 975 (1988), remanded as to other matters sub nom. Patent Office Professional Association v. FLRA, 872 F.2d 451 (D.C. Cir. 1989); United States Department of the Treasury, Internal Revenue Service and United States Department of the Treasury, Internal Revenue Service, Austin Service Center, Austin, Texas, 25 FLRA 71, 72 (1987).

The General Counsel contends that the Respondent has failed to comply with the Arbitrator's awards, Segal I and II, in four particulars. Each of the four is considered separately below.

A. Unilaterally Estimating the Back Pay and Interest Calculations for the Period Between December 16, 1981 and 1983 by "Annualizing" the Payroll Records from the Fourth Quarter of 1983

As set forth above, Arbitrator Segal's remedial award required the Respondent to pay its CR and CA employees back pay for uncompensated FLSA overtime--the difference between Title 5 overtime actually paid and FLSA overtime (including "suffered or permitted" overtime)--performed during a six-year period commencing approximately January 1982, with interest assessed as provided in the Back Pay Act at 5 U.S.C. § 5596(b)(2)(A) and (B). There is no dispute between the parties in this case concerning the Respondent's back pay and interest calculations for any of the six-year back pay period except for the period between December 16, 1981 and the end of the third quarter of 1983.

The record establishes, and it is undisputed, that the Respondent--over the Union's objections--decided to "annualize" the CR and CA employees' back pay entitlements for the period between December 1981 and the third quarter of 1983 by multiplying the payroll records for the fourth quarter of 1983 by four and using those same figures to establish the employees' back pay entitlements for 1982. It

is equally clear from the record, and again undisputed, that the Respondent determined the interest payable on the "annualized" back pay for this two-year period by using the interest rate in effect during the fourth quarter of 1983. In both of these respects, the Respondent's actions constituted a departure from the manner in which back pay and interest were calculated for the rest of the back pay period. Respondent seeks to justify its actions on the basis that the applicable payroll records for the portion of the back pay period in question were "missing" in the sense that the custodian of those records--HHS agency headquarters--could not retrieve the necessary computer data or microfiche records. It further contends that the back pay calculations had to be completed by September 30, 1993, or else the Respondent would not have been able to use available funds appropriated in prior fiscal years' budgets to satisfy the back pay claims, but instead would have had to satisfy such claims out of the current fiscal year's appropriation.

The General Counsel and the Union contend that the Respondent's back pay and interest calculations for the foregoing period constituted a departure from--and therefore a failure to comply with--Arbitrator Segal's unambiguous remedial award. For the reasons set forth below, I agree.

In my judgment, the Arbitrator's remedial award was clear and unambiguous. It required the Respondent to provide back pay to all CR and CA employees for a six-year period. It spelled out that the back pay entitlement was the difference between what the employees had been paid in overtime under Title 5 of the U.S. Code and what they should have been paid under the FLSA. It further specified that back pay must include interest calculated as required by a referenced provision of the Back Pay Act. The Respondent has never argued that the Arbitrator's award is ambiguous. Instead, the Respondent contends essentially that its departure from the terms of the Arbitrator's award were reasonable under the circumstances. I disagree.

It is apparent to me that the Respondent's failure to comply with the Arbitrator's remedial award for the period in question was attributable in the first instance to HHS' failure to retrieve the applicable payroll data from its computer or microfilm/microfiche records. As previously noted, I find no improper purpose in HHS' report that the payroll data for the period in question were "missing." Rather, I conclude that HHS simply failed to involve the right people in the search until well after September 30, 1993. Having received no payroll data from HHS for the period in question, the Respondent was in the difficult

position of being forced to act on incomplete information. Where the Respondent erred was in failing to heed the Union's warning that the methodology chosen unilaterally by management would result in significant underpayments to the CR and CA employees entitled to back pay with interest. Thus, even assuming the legitimacy of the Respondent's choice of using the payroll data for the fourth quarter of 1983 to calculate back pay entitlements for the preceding two-year period, the Respondent clearly had no justification for multiplying the fourth quarter data by four to reach a total back pay entitlement for 1983 and for 1982. As the Union had previously pointed out to the Respondent in August 1993, there were only six pay periods in the fourth quarter of 1983, so that multiplying those figures by four would result in "annualizing" a 48 rather than the requisite 52 week pay year. The resulting underpayment of back pay cannot be attributed to the absence of accurate payroll data for that period. Moreover, as the Union also pointed out to the Respondent in August 1993, the Respondent's methodology would eliminate <u>any</u> back pay for those CR and CA employees who did not work overtime during the fourth quarter of 1983 but who were entitled to back pay for overtime worked from mid-December 1981 through the third quarter of 1983.

Similarly, there was absolutely no justification for the Respondent's decision to use the interest rate in effect during the fourth quarter of 1983 to calculate the interest due on the back pay from December 1981 through the third quarter of 1983. Again, the Respondent's action was taken in the face of the Union's warning that such an approach would result in the underpayment of interest because the interest rate during the fourth quarter of 1983 was approximately 11% whereas the interest rate during 1982 and most of 1983 was close to 20%. The "missing" payroll data for the period in question cannot provide any excuse for the Respondent's miscalculation of interest on the estimated back pay due the CR and CA employees. The Respondent should have calculated the interest due for this portion of the back pay period in the same manner that it made the calculations for the rest of the six-year back pay period: by following the instructions in Federal Personnel Manual (FPM) Letter 550-78 (May 31, 1988), entitled "Interest on Back Pay," which provides in Attachment 1 at paragraph 4 that "[t]he applicable interest rate is the 'overpayment rate' adjusted quarterly by the Secretary of the Treasury and published in the Internal Revenue Service (IRS) Bulletin issued before the beginning of each quarter. The interest rates for all periods through June 30, 1988, are listed in Attachment 2. . . ." Accord-ingly, instead of using the 11% interest rate that was applicable for the fourth quarter of 1983 to all of 1982 and 1983, the Respondent should have

calculated the interest due based on the quarterly rates established by the Secretary of the Treasury as reflected in Attachment 2 to FPM Letter 550-78.

Finally, once the "missing" payroll records for December 1981 through the third quarter of 1983 were "found" in 1994, the Respondent was obligated to recalculate the amount of back pay due to each CR and CA employee who worked overtime during that period, and to recompense those who were underpaid or not paid at all. In my judgment, the Respondent was not at liberty to react as it did when the Union sought to have such recalculations performed. That is, it was not being faithful to the Respondent's obligation to fully comply with Arbitrator Segal's remedial award for the Respondent to take the position--as stated by Ruth Pierce, SSA's Deputy Commissioner of Human Resources--that despite its belated possession of the accurate payroll records, there would be no recalculation because "[w]e had made the payment that we had determined we would be making." While it is understandable and even commendable that the Respondent acted with dispatch to take advantage of the opportunity to use prior years' available funds to satisfy the Arbitrator's award on or before September 30, 1993, such prompt action could not relieve the Respondent of its obligation to comply fully with that award, even if such compliance required the use of some funds from the current fiscal year's appropriation to fully satisfy the employees' legitimate claims. The Respondent's "stand pat" approach simply did not constitute compliance with the Arbitrator's remedial award and therefore constituted a violation of section 7116(a)(1) and (8) of the Statute.

B. Improperly Deducting an Arbitrary Percentage of Leave from Back Pay and Interest on Overtime Earned Prior to August 2, 1987 Based Upon Lanehart v. Horner, 818 F.2d 1574 (Fed. Cir. 1987)

In its Lanehart decision, the Federal Circuit overturned a lower court ruling which denied overtime pay to federal employees for the hours that they were on paid leave. The lower court had ruled that the federal employees--who were covered by the overtime provisions of Title 5 and the FLSA--were not entitled to overtime pay under the FLSA for periods of paid leave because the FLSA does not allow overtime to be paid for hours not actually worked. The Federal Circuit concluded, however, that "the [federal] 'leave with pay' statutes in their purpose and effect prevent any reduction
in the customary and regular pay of appellants, including overtime under Title 29 [FLSA] to which they would be entitled, when appellants are on authorized leave under

sections 6303 [annual leave], 6307 [sick leave], 6322 [court leave] and 6323 [military leave]." Lanehart, 818 F.2d at 1583. In other words, the court in Lanehart ruled that a federal employee is entitled to overtime pay under the FLSA when the total of hours worked and paid leave taken exceed 40 in a given work week. At the time of the Lanehart decision, the OPM regulations implementing the FLSA for federal employees had directed agencies to deduct paid leave from hours worked in determining whether the employee was entitled to overtime pay under the FLSA. Following the Lanehart decision, OPM revised its regulations so that "hours of paid absence must be counted as if they were 'hours of work' for the purpose of determining the employee's FLSA overtime pay entitlement" but made the revised regulations retroactive only "to the first full biweekly pay period beginning on or after July 21, 1987, for all affected employees."[8] That is, OPM's revised regulation applied the Lanehart decision prospectively only. The Respondent contends that it was entitled to rely on OPM's regulations to deduct "paid leave" from "hours worked" for the entire back pay period pre-dating the Lanehart decision, i.e., from December 16, 1981 through July 21, 1987. For the reasons stated below, I reject this contention.

In its Lanehart decision, the Federal Circuit interpreted a number of existing federal statutes as they applied to each other. In doing so, the court determined what these statutes required in terms of federal employees' entitlement to overtime pay under the FLSA for hours of paid leave. In essence, the court was declaring what those statutes had always required. The fact that OPM had adopted a regulation which was inconsistent with the requirements of federal law as explicated by the court simply means that OPM's regulation was invalid. Similarly, when OPM amended its regulation to conform with Lanehart but made it apply prospectively only, the regulation again failed to conform to the requirements of federal law. In both instances, the Respondent's reliance on OPM's flawed regulations implementing the FLSA cannot excuse its failure to comply with the requirements of federal law. As the Supreme Court stated in Harper v. Virginia Department of Taxation, 113 S. Ct. 2510, 2517 (1993), citing its earlier decision in James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2447 (1991):

> When this Court applies a rule of federal law to the parties before it, that rule is the

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[8] FPM Letter 551-22 (December 23, 1987), entitled "Paid Absences as 'Hours of Work' Under the Fair Labor Standards Act," paragraphs 6 and 7.

> controlling interpretation of federal law and must be given full retroactive effect in all cases . . . and as to all events, regardless of whether such events predate or postdate our announcement of the rule. . . . In both civil and criminal cases, we can scarcely permit "the substantive law [to] shift and spring" according to "the particular equities of [individual parties'] claims" of actual reliance on an old rule and of harm from a retroactive application of the new rule.

Indeed, the Federal Circuit itself applied the Lanehart decision retroactively in Acton v. United States, 932 F.2d 1464 (Fed. Cir. 1991), by holding that the proper statute of limitations for back pay claims by federal employees under the leave-with-pay provisions of Title 5 is six years. Thus, as in Lanehart, the court applied a six-year statute of limita-tions period to federal employees' back pay claims which extended back well beyond the date of the Lanehart decision. Accordingly, I conclude that the Respondent could not properly reduce the employees' back pay entitlements for the period prior to Lanehart by deducting their paid leave.

In any event, even if the Respondent lawfully could have made such reductions, there was no justification for the arbitrary manner in which the reductions were made. Thus, as set forth above, the Respondent simply took the results of a 1986 study based on the analysis of only one quarter's data which suggested that 75% of its employees took some leave during a bi-weekly pay period, and used that information to reduce each employee's back pay entitlement by 75%. This approach has no basis in reality. It assumes that each employee has taken leave during every pay period even if
the employee has taken no leave at all, and reduces that employee's back pay by 75%. Further, it reduces the employee's back pay entitlement by 75% regardless of the amount of leave actually taken and the amount of overtime worked, so that an employee who worked 16 hours of overtime and took one hour of sick leave for a doctor's appointment would lose 75% (i.e., 12 hours) of his back pay entitlement rather than having an offset of only one hour and an entitle-ment to 15 hours of overtime pay. Moreover, the Respondent's approach fails to appreciate that even under the discredited pre-Lanehart offset of paid leave against overtime hours worked, the calculation was made on a weekly basis, so that even if the statistics were valid that 75% of employees take some leave during a bi-weekly period, it would not provide a proper basis for reducing back pay entitlements. For example, an employee might work overtime

during the first week of a bi-weekly pay period and take leave only during the second week. Under the OPM's pre-Lanehart policy, there would be no offset against the employee's back pay entitlement. The fact that the Respondent decided to reduce the employee's back pay entitlement by only 50% (rather than 75%) on "equitable" grounds makes the offset no less arbitrary. Accordingly, even if the Respondent properly could have offset back pay entitle-ments by the amount of paid leave taken, which it could not, the approach used in this case would not withstand scrutiny.

C. Unilaterally Imposing Arbitrary Calculations for "Suffered or Permitted" Overtime Without Following Arbitrator Segal's Minimum Guidelines Set Forth in Section 3 (C) of SEGAL II

As previously quoted, paragraph 2 of Arbitrator Segal's remedial award specified that the uncompensated FLSA overtime for which the CR and CA employees were entitled to back pay "shall include 'suffered or permitted' overtime performed by [them] during the claims periods involved" and that "[t]he compilation of 'suffered or permitted' overtime shall be subject to the procedural guidelines established by the Arbitrator, at Section 3 C. above." I find that the above-quoted language is clear and unambiguous: it required the Respondent to apply the procedural guidelines in Section 3(C) of the Arbitrator's supplemental opinion (i.e., Segal II) in compiling the amount of "suffered or permitted" overtime to be compensated under the FLSA.

I reject the Respondent's assertion that in Section 3 (C) of his supplemental opinion, the Arbitrator's use of the word "should" made the guidelines discretionary. In context, not only as clarified by the Arbitrator's use of the word "shall" in paragraph 2 of his remedial award but also by the organiza-tion and language of his opinion in Section 3(C), I conclude that the Arbitrator clearly intended his guidelines to be applied by the parties. Thus, at the outset of Section 3(C), the Arbitrator discussed the Union's proposed guidelines and recommended them for the parties' serious consideration but specifically indicated that he "does not direct the adoption of any of these methods." By contrast, when the Arbitrator next turned to his own seven "minimum guidelines," designated as (a) through (g), he concluded the list by stating that "[t]he above guidelines may be fleshed out by the parties as necessary to properly comply with them." I further note that in his seven "minimum guidelines" the Arbitrator used a number of words and phrases, such as "will have to," "will constitute," "deadline . . . must be imposed," and "must

clearly require," which underscored his intention for the parties to apply them. Under these circumstances, I conclude that the Arbitrator's opinion as well as his award clearly indicate that the guidelines had to be followed as a minimum. His use of the word "should" is simply an indication of the sequence in which the procedural guidelines "should" be applied.

It is undisputed that the Respondent did not apply any of the Arbitrator's "minimum guidelines" in determining the amount of "suffered or permitted" overtime pay to be accorded the CR and CA employees for the six-year back pay periods. Instead, the Respondent unilaterally determined--although the record is unclear on what basis--that it would provide a lump sum of $3.4 million to be divided equally among all of the CR and CA employees, irrespective of how much (if any) "suffered or permitted" overtime the employees actually performed. As a result, each CR and CA employee received $131 as compensation for "suffered or permitted" overtime performed during the back pay periods, thereby creating a windfall for those who performed no such overtime work and a shortfall for those who had records to substantiate that they worked considerably more such overtime than the amount for which they were compensated. In view of the foregoing, I conclude that the Respondent failed to comply with the Arbitrator's remedial award by ignoring his "minimum guidelines" for determining the amounts of back pay to be received by the CR and CA employees as compensation for the "suffered or permitted" overtime work performed by them during the back pay periods.

D. Failing to Exhaust All Reasonable Means to Contact Former Employees Entitled to Back Pay and Overtime Under SEGAL I and II

The final allegation in the complaint is that the Respondent failed to take all reasonable steps to contact former employees entitled to back pay under the Arbitrator's remedial award. While the award in question does not specify what steps the Respondent was required to take in attempting to reach former employees, and indeed does not identify former employees as a separate category of back pay recipients, it does require that the Respondent provide back pay to CR and CA employees at the GS 9 and 10 levels for a six-year period extending back in time to December 1981. It is implicit in such an award of back pay with interest that those who are within the scope of the award will actually receive payment. Accordingly, in my judgment the issue with respect to this allegation is whether the Respondent took reasonable steps to contact all of the former CR and CA, GS 9 and 10 employees.

The Respondent's only attempt to reach its former employees covered by the Arbitrator's remedial award was to send a letter of notification to their last known address, as listed in the Respondent's internal files. Since some of those last known addresses could have been over 10 years old, it is hardly surprising that of the 7,500 letters sent out by the Respondent, only about 3500 responses were received and only 3000 former employees were actually paid any back pay. Thus, the record indicates that over 4000 former employees were never contacted, and 4,337 of the former employees were never paid anything under the Arbitrator's remedial award. In my view, when close to 60% of all eligible former employees have received no back pay, and more than half of such former employees were not even contacted, the Respondent has failed to comply with the Arbitrator's award that they be paid. This is particularly true where the Respondent consistently maintained that it had no obligation to try and reach the former employees in any other way than their last known address, and rejected the Union's suggestions as to how such employees might be found. The Respondent would not have been unduly burdened, for example, if it had sought to reach retired former employees by contacting OPM to determine where the retirees' annuity checks were being mailed, or to access former employees' current addresses by using their social security numbers. Similarly, it would have been no hardship for the Respondent to place an article in its newsletter or an advertisement in the Federal Times. Accordingly, I conclude that the Respondent's failure to take these reasonable measures in an attempt to reach former employees who were entitled to back pay under the Arbitrator's remedial award constituted noncompliance with the award in the circumstances of this case. I therefore recommend that the Respondent be required at a minimum to take these reasonable steps to try and reach its former employees, and that the General Counsel is to determine at the compliance stage of these proceedings whether reasonable steps have been taken by the Respondent in this regard.

Having concluded that the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to comply with Arbitrator Segal's final and binding remedial award as alleged in the complaint herein,[9] it is recommended that the Authority issue the following Order:

ORDER

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[9] In so concluding, I have carefully considered and rejected other related arguments raised by the Respondent.

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Social Security Administration, Baltimore, Maryland, shall:

1. Cease and desist from:

(a) Failing and refusing to fully comply with the May 3, 1991 and October 28, 1992 final and binding arbitration awards of Arbitrator Henry L. Segal.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Fully comply with the May 3, 1991 and October 28, 1992 arbitration awards, including (1) payment of back pay to all Claims Representatives and Claims Authorizers, GS 9 and 10, for uncompensated Fair Labor Standards Act overtime for a back pay claim period running from six years prior to the filing date of the grievances; (2) payment of back pay to such employees for the "suffered or permitted" overtime performed by them during the claims periods involved, compiled in accordance with the procedural guidelines established by the Arbitrator in Section 3(C) of his Supplemental Opinion and Award on Remedy dated October 28, 1992; and (3) payment of interest assessed as provided in the Back Pay Act at 5 U.S.C. § 5596(b)(2)(A) and (B).

(b) Take reasonable measures, including the use of (1) Office of Personnel Management and Social Security Administration records containing the former employees' current addresses where available, (2) the Federal Times, and (3) the internal newsletter distributed to employees and others, to contact all former Claims Representatives and Claims Authorizers covered by the Arbitrator's award of back pay with interest for uncompensated Fair Labor Standards Act overtime performed during the back pay period.

(c) Post at all of its facilities where bargaining unit employees are located copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Administrator, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices

to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Washington Regional Office, Federal Labor Relations Authority,
in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, November 22, 1995

_____
SALVATORE J. ARRIGO
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to fully comply with the May 3, 1991 and October 28, 1992 final and binding arbitration awards of Arbitrator Henry L. Segal.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL fully comply with the May 3, 1991 and October 28, 1992 arbitration awards, including (1) payment of back pay to all Claims Representatives and Claims Authorizers, GS 9 and 10, for uncompensated Fair Labor Standards Act overtime for a back pay claim period running from six years prior to the filing date of the grievances; (2) payment of back pay to such employees for the "suffered or permitted" overtime performed by them during the claims periods involved, compiled in accordance with the procedural guidelines established by the Arbitrator in Section 3(C) of his Supplemental Opinion and Award on Remedy dated October 28, 1992; and (3) payment of interest assessed as provided in the Back Pay Act, 5 U.S.C. § 5596(b)(2)(A) and (B).

WE WILL take reasonable measures, including the use of (1) available Office of Personnel Management and Social Security Administration records containing the former employees' current addresses, (2) the Federal Times, and (3) the internal newsletter distributed to employees and others, to contact all former Claims Representatives and Claims Authorizers covered by the Arbitrator's award of back pay with interest for uncompensated Fair Labor Standards Act overtime performed during the back pay period.

_____

(Activity)

Dated:_____ By: _____

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Washington Regional Office, whose address is: 1255 22nd Street, NW., Suite 400, Washington, DC 20037-1206 and whose telephone number is: (202) 653-8500.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by SALVATORE J. ARRIGO, Administrative Law Judge, in Case Nos. WA-CA-40267 and WA-CA-40268 were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Ron Townsend and Carroll Rankin
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6401 Security Boulevard
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Mary Armstrong, Esq.
Department of Health and Human Services
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Washington, DC 20201

Joe Goldberg, Esq.
American Federation of Government
Employees, AFL-CIO
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American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: November 22, 1995
Washington, DC