

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

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**SOCIAL SECURITY ADMINISTRATION,  
BALTIMORE, MARYLAND,  
Petitioner**

**v.**

**FEDERAL LABOR RELATIONS AUTHORITY,  
Respondent**

**and**

**AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-  
CIO,  
Intervenor**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR  
ENFORCEMENT OF A DECISION AND ORDER  
OF THE FEDERAL LABOR RELATIONS AUTHORITY**

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**BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY**

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**ORAL ARGUMENT SCHEDULED FOR NOVEMBER 22, 1999**

**CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**

**A. Parties and amici**

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (Authority) were the American Federation of Government Employees, AFL-CIO (union) and the Social Security Administration, Baltimore, Maryland (agency). The agency is the petitioner in this court proceeding; the Authority is the respondent; and the union is the intervenor.

**B. Ruling under review**

The ruling under review in this case is the Authority's Decision, Order, and Remand on an Unfair Labor Practice (ULP) case in Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, AFL-CIO, Case No. WA-CA-50573, decision issued on February 26, 1999. The Authority's decision is reported at 55 FLRA (No. 43) 246.

**C. Related Cases**

This case has not previously been before this Court or any other court. Counsel for the Authority is unaware of any cases pending before this Court which are related to this case within the meaning of Local Rule 28(a)(1).

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## GLOSSARY

Act	Back Pay Act, 5 U.S.C. § 5596 (1994 & Supp. III 1997)
Agency	Social Security Administration, Baltimore, Maryland
Authority	Federal Labor Relations Authority
Br.	Brief for the Petitioner/Cross-Respondent
<i>Brown</i>	<i>Brown v. Secretary of the Army</i> , 918 F.2d 214 (D.C. Cir. 1990)
FLRA	Federal Labor Relations Authority
FLSA	Federal Labor Standards Act, 29 U.S.C. §§ 201 et seq. (1994 & Supp. III 1997)
JA	Joint Appendix
<i>Kinney</i>	<i>Kinney v. District of Columbia</i> , 994 F. 2d 6 (D.C. Cir 1993)
OPM	Office of Personnel Management
SSA	Social Security Administration, Baltimore, Maryland
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (1994 & Supp. III 1997)
<i>Testan</i>	<i>United States v. Testan</i> , 424 U.S. 392 (1976)
Union	American Federation of Government Employees, AFL- CIO

## GLOSSARY

(Continued)

ULP

Unfair Labor Practice

*Vaughn*

Arbitrator M. David Vaughn

*Zumerling*

*Zumerling v. Marsh*, 783 F.2d 1032 (Fed. Cir. 1986)

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 22, 1999

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BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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**STATEMENT OF JURISDICTION**

The final decision and order under review in this case was issued by the Federal Labor Relations Authority (“FLRA” or “Authority”) on February 26, 1999, and is

published at 55 FLRA (No. 43) 246. The Authority exercised jurisdiction over the case pursuant to section 7105(a)(2)(G) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (1994 & Supp. III 1997) (Statute).<sup>1</sup> This Court has jurisdiction to review and enforce the Authority’s final decisions and orders pursuant to section 7123(a) - (c) of the Statute.

### **STATEMENT OF THE ISSUE**

Whether the Back Pay Act authorizes the Authority to remedy an unfair labor practice by ordering an agency to pay interest on liquidated damages the agency had improperly failed to pay employees.

### **STATEMENT OF THE CASE**

This case arose as an unfair labor practice (ULP) proceeding under the Statute administered by the Authority. As pertinent here, the Social Security Administration, Baltimore, Maryland (“SSA” or “agency”) conceded that it had committed a ULP by failing to comply with the arbitration award of Arbitrator M. David Vaughn (*Vaughn*), Joint Appendix (JA) 140-175.<sup>2</sup> JA 185. The award found that the agency had wrongfully exempted certain bargaining unit employees from coverage under the Fair

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<sup>1</sup> Pertinent statutory and regulatory provisions are set forth in Addendum A to this brief.

<sup>2</sup> The Authority remanded a portion of the case concerning a different arbitrator’s award (the *Segal* award) to the FLRA Regional Director for further processing. JA 192-93. That aspect of the case is not at issue in this proceeding and will not be further discussed.

Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* (1994), and consequently had wrongfully denied them overtime pay. The award required the agency to make the employees whole for the illegal loss of overtime pay through back pay and the greater of interest under the Back Pay Act, 5 U.S.C. § 5596 (1994 & Supp. III 1997) or FLSA liquidated damages.

The agency conceded that it had committed a ULP, and the parties settled all issues in the ULP case with the exception of one remedy question. This question, “whether interest on liquidated damages paid under the . . . award is legally required” (JA 17, 185 n.3), the parties presented to the Authority based on a stipulation. The Authority answered the question in the affirmative, and the agency’s petition for review followed. The Authority has filed a cross-application to enforce its remedial order.

## **STATEMENT OF THE FACTS**

### **I. Background**

#### **A. The *Vaughn* Award**

The *Vaughn* award issued on January 10, 1995. It held that SSA illegally exempted certain categories of employees from coverage under the FLSA and thus improperly denied the employees overtime pay. JA 187. The award ordered SSA to remove the exemption, pay back pay to the employees, and pay the greater of either interest under the Back Pay Act or liquidated damages under the FLSA. *Id.*

SSA did not contest the award by filing exceptions with the Authority, and the award became final and binding on February 10, 1995. *Id.* Nevertheless, as the agency has acknowledged, it did not comply with the award. JA 17, 192.

## **B. The Stipulation**

As a result of the agency's delay in paying the money owed employees under the *Vaughn* award, the American Federation of Government Employees, AFL-CIO (union) filed a ULP charge against the agency alleging failure to comply with the award. The FLRA's General Counsel issued a ULP complaint against the agency on October 24, 1995. Subsequently, on February 16, 1996, the parties entered into a settlement agreement in which the agency agreed, in relevant part, to "make whole the employees who had been improperly exempted from FLSA overtime[, and] to post notices indicating that it [would] remove the exemptions of these employees from FLSA coverage." JA 188. Thereafter, on March 5, 1996, and May 21, 1996, the agency paid the employees the ordered back pay and liquidated damages under the FLSA. JA 16, 187.

The parties' settlement agreement left one remedial issue unresolved. The parties submitted this issue to the Authority. In this connection, the settlement agreement provided that "the issue as to whether interest on liquidated damages paid under the [*Vaughn*] award is legally required, based [o]n SSA's failure to timely

comply with Arbitrator Vaughn’s final and binding award, will be presented to the Authority.” JA 185 n.3; *see also* JA 17.

## **II. The Authority’s Decision**

The Authority held that the agency had admitted that it failed to comply with the *Vaughn* award in violation of section 7116(a)(1) and (8) of the Statute. JA 192. Accordingly, the Authority proceeded to resolve the stipulated remedy issue: “[W]hether the [agency] is required to pay interest on the funds withheld in this unjustified or unwarranted personnel action.” JA 191.

In resolving the sovereign immunity question invoked by the stipulated issue, the Authority determined that “[t]he Back Pay Act, including its interest provision, is the appropriate basis to remedy the violation.” JA 195-6. Quoting the Back Pay Act, the Authority explained that “an employee who is found to have been ‘affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of . . . the pay, allowances, or differentials of the employee,’” is thereafter “entitled to receive, among other things, ‘an amount equal to all or any part’ of the lost benefits.” JA 193 (quoting 5 U.S.C. § 5596(b)(1)). Such amounts, the Authority further explained, “are payable with interest.” *Id.* (quoting 5 U.S.C. § 5596(b)(2)).

The Authority concluded that the Back Pay Act's requirements were satisfied in the circumstances of the case. Consistent with Authority precedent,<sup>3</sup> the Authority held that the agency's "failure to comply with the Arbitrator's award . . . constituted an unwarranted and unjustified personnel action." JA 194. The Authority further determined that "[b]ut for such action," employees would not have been "deprived . . . of use of their overtime pay and liquidated damages recovered under the FLSA ." *Id.*

The last point in the Authority's analysis of the Back Pay Act's coverage concerned whether the Act encompassed FLSA liquidated damages. Noting that the agency did not contest the issue, the Authority held that liquidated damages are "contained in the broad definition of pay, allowances or differentials" promulgated by the Office of Personnel Management (OPM) at 5 C.F.R. § 550.803. *Id.* Section 550.803 defines "pay, allowances, or differentials" as "monetary and employment benefits to which an employee is entitled by statute or regulation by virtue of the performance of a Federal function."

Finally, the Authority rejected the agency's argument that the sovereign immunity analysis should be confined to the FLSA. The agency argued that because the FLSA provides the basis for the monetary payments awarded by the arbitrator, the FLSA is the only statute that could waive sovereign immunity for interest due to a

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<sup>3</sup> The Authority cited *Letterkenny Army Depot*, 35 FLRA 113, 127 (1990). JA 194.

delay in making those payments. Citing this Court's *Brown* decision,<sup>4</sup> the Authority found it "well established that the requisite express waiver of sovereign immunity not contained in a given statute can be supplied by a separate statute." JA 194-5.

In sum, because the Back Pay Act's requirements were satisfied, and because "the Back Pay Act explicitly provides that [ULP] remedies shall be payable with interest" (JA 195), the Authority determined that the Back Pay Act operates as an explicit waiver of sovereign immunity. Accordingly, the Authority concluded that "interest for the [agency's] failure to comply with the *Vaughn* award of liquidated damages" should be awarded to remedy the agency's ULP. JA 196.

### **STANDARD OF REVIEW**

Generally speaking, "the language of the [Statute] exudes a broad congressional delegation of discretion to the FLRA to fashion appropriate remedies for unfair labor practices" to which reviewing courts "accord[] the utmost deference." *FDIC v. FLRA*, 977 F.2d 1493, 1498 (D.C. Cir. 1992). Thus, where a remedy is within the Authority's remedial discretion, the courts have "no grounds to dispute [the Authority's] remedial choice." *NTEU v. FLRA*, 910 F.2d 964, 970 (D.C. Cir. 1990) (*en banc*).

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<sup>4</sup> *Brown v. Secretary of the Army*, 918 F.2d 214, 216 (D.C. Cir. 1990) (*Brown*).

As for the Authority's interpretation of the Back Pay Act, it should be given "respect." See *West Point Elementary Sch. Teachers Ass'n v. FLRA*, 855 F.2d 936, 940 (2d Cir. 1988). This Court has stated that when the Authority interprets statutes other than its own, the Court "will, of course, follow [the Authority's] reasoning to the extent that [the Court] deem[s] it sound," even though it does "not defer." *National Ass'n of Gov't Employees v. FLRA*, 179 F.3d 946, 950 (D.C. Cir. 1999) (quoting *Department of Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988)).

### **SUMMARY OF ARGUMENT**

The Authority properly remedied the ULP committed by the agency by ordering the agency to pay interest on the liquidated damages owed to employees under the arbitrator's award. In making this determination, the Authority correctly relied upon the Back Pay Act which expressly waives sovereign immunity for the payment of interest so long as its three basic requirements are satisfied.

The requirements of the Back Pay Act are satisfied in this case because the agency's failure to comply with the arbitrator's award was an unjustified or unwarranted personnel action; the agency's noncompliance with the award resulted in a reduction or withdrawal of the employees' pay, allowances, or differentials; and but for the agency's noncompliance, no withdrawal or reduction in the employees' pay, allowances, or differentials would have occurred. Of these three factors, the agency

challenges only the Authority's holding that the liquidated damages at issue here constitute pay, allowances, or differentials under the Back Pay Act.

As the Authority found, the FLSA liquidated damages involved in this case fall within the broad regulatory definition of "pay, allowances, or differentials" set forth by the agency charged with interpreting the Back Pay Act, OPM. That is, these liquidated damages are monetary benefits to which the employees are statutorily entitled by virtue of their performance of a federal function. *See* 5 C.F.R. § 550.803. Because liquidated damages are statutorily required by the FLSA as a remedy for the FLSA violation that the agency committed in this case, and because these employees were performing a federal function – overtime work – the liquidated damages ordered by the arbitrator constitute "pay, allowances, or differentials." In addition, the Back Pay Act's "but for" requirement is clearly met.

The agency's narrow interpretation of what constitutes "pay, allowances, and differentials" under the Back Pay Act should be rejected because it is not supported by the Act and is inconsistent with the broad regulatory definition. Further, the cases relied upon by the agency to support its interpretation are distinguishable and/or were decided based upon a previous and significantly different version of the Back Pay Act regulations.

Finally, the agency's arguments regarding the Authority's Statute and its failure to provide the requisite waiver of sovereign immunity are inapposite because the

Authority relied solely upon the Back Pay Act for the waiver. As the Back Pay Act's requirements are satisfied, this Court should enforce the Authority's decision.

## **ARGUMENT**

### **THE BACK PAY ACT AUTHORIZES THE AUTHORITY TO REMEDY AN UNFAIR LABOR PRACTICE BY ORDERING AN AGENCY TO PAY INTEREST ON LIQUIDATED DAMAGES THE AGENCY HAD IMPROPERLY FAILED TO PAY EMPLOYEES**

The agency admits that it committed a ULP. The issue remaining for the Court to review is whether one aspect of the Authority's remedy – its order that the agency pay interest on the FLSA liquidated damages improperly withheld from employees – is authorized by the Back Pay Act.

The agency concedes that the Back Pay Act “waives sovereign immunity by authorizing the payment of interest on certain claims against federal agencies,” but asserts that the Back Pay Act does not apply in this instance. Brief (Br.) at 21. As shown below, the Authority correctly concluded that the requirements of the Back Pay Act are satisfied in this case. The petition for review should therefore be denied and the Authority's decision enforced.

#### **I. The Back Pay Act's Express Waiver of Sovereign Immunity with Regard to Payment of Interest Applies in This Case**

As indicated above, the agency agrees that the Back Pay Act expressly waives sovereign immunity regarding the payment of interest<sup>5</sup> in cases to which it applies. Because the various requirements of the Back Pay Act are satisfied in this case, the Back Pay Act waives the agency's sovereign immunity from the remedy that it pay interest on the liquidated damages it improperly withheld when it refused to comply with the arbitrator's award.

For the Back Pay Act to apply, a number of conditions must be met. As pertinent here, the aggrieved employee must "have been affected by an unjustified or unwarranted personnel action." 5 U.S.C. § 5596(b)(1). Further, there must have been a "withdrawal or reduction of all or part of the [employee's] pay, allowances, or differentials." *Id.* Finally, it must be established that "but for" the action, the grievant would not have suffered the withdrawal or reduction. JA 194; *see* 5 U.S.C.

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<sup>5</sup> The holding in *Zumerling v. Marsh*, 783 F.2d 1032, 1034 (Fed. Cir. 1986) (*Zumerling*), that the FLSA does not waive sovereign immunity for claims of interest, may no longer be correct as a result of the Back Pay Act's interest provision. *Zumerling* was decided in 1986, prior to the Back Pay Act amendment allowing for payment of interest on Back Pay Act remedies. *See* Pub. L. No. 100-202, 101 Stat. 1329 (codified at 5 U.S.C. § 5596(b)(2)). Although the *Zumerling* court considered whether any other federal statute would permit payment of interest, *see* 783 F.2d at 1035, that court did not have the Back Pay Act's interest provision as a consideration. *See Brown*, 918 F.2d at 218 (D.C. Cir. 1990) (*Brown*) (If its requirements are satisfied, the Back Pay Act provides a waiver of sovereign immunity with regard to interest in Title VII cases.).

§ 5596(b)(1). As the Authority determined, all of these requirements are satisfied in this case.<sup>6</sup>

**A. The ULP committed by the agency – failing to comply with the arbitrator’s award – constitutes an “unjustified or unwarranted personnel action” within the meaning of the Back Pay Act**

It is well established in Authority case law that “[a] violation of the Statute by failing to comply with an arbitrator’s award constitutes an unjustified or unwarranted personnel action” under the Back Pay Act. JA 191; *see also U.S. Customs Service*, 46 FLRA 1080, 1091 (1992) (Agency’s failure to comply with arbitrator’s award was “an unjustified or unwarranted action that resulted in loss of pay.”); *Department of the Air Force Headquarters, 832d Combat Support Group DPCE, Luke Air Force Base, Ariz.*, 32 FLRA 1084, 1095 (1988) (same). The agency does not contest this general proposition. Moreover, the agency has admitted committing such a ULP in this case. Accordingly, this Back Pay Act requirement is satisfied.

The agency’s indirect challenge to the Authority’s holding on this point is flawed. In this connection, the agency erroneously conflates two independent concepts when it argues (Br. 25) there can only be an “unjustified or unwarranted

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<sup>6</sup> In view of the agency’s stipulation that it “fail[ed] to timely comply with [the arbitrator’s] final and binding award” (JA 192), there does not appear to be any dispute that “but for” this unjustified or unwarranted agency personnel action the grievants would not have been deprived of the use of their overtime pay and liquidated damages recovered under the FLSA. Therefore, this aspect of the Authority’s Back Pay Act analysis will not be discussed further.

personnel action” if there has been a withdrawal or reduction of a grievant’s pay, allowances, or differentials. Not only does the agency fail to cite any authority linking these separate Back Pay Act requirements, the agency’s contention is also inconsistent with judicial precedent interpreting and applying the Back Pay Act. *See, e.g., Brown*, 918 F.2d at 216 (Appropriate authority found action was “unjustified or unwarranted personnel action” such that if “the remaining Back Pay Act terms” were met, interest could be awarded under the Back Pay Act.). This agency argument should therefore be rejected.

**B. The liquidated damages required by the FLSA and ordered to be paid employees by the arbitrator, but improperly withheld by the agency, constitute “pay, allowances, or differentials” within the meaning of the Back Pay Act**

The Authority properly relied upon the broad regulatory definition of “pay, allowances, and differentials” set forth at 5 C.F.R. § 550.803 when it found the Back Pay Act applicable to the liquidated damages in this case. According to the regulation, “[p]ay, allowances, and differentials means monetary and employment benefits to which an employee is entitled by statute or regulation by virtue of the performance of a Federal function.” 5 C.F.R. § 550.803.

**1. OPM’s regulatory definition of “pay, allowances, and differentials” is intentionally broad**

The regulations promulgated by OPM are especially pertinent to any Back Pay Act analysis because OPM is the agency directed by Congress to “prescribe regulations to carry out” the Act. 5 U.S.C. § 5596(c); *see Brown*, 918 F.2d at 217; *cf. Lanehart v. Horner*, 818 F.2d 1574, 1578 (Fed. Cir. 1987) (holding that “deference should be given to the interpretative guidance with respect to FLSA issued by OPM”).

In issuing the current Back Pay Act regulations, OPM noted the breadth of its regulatory definition of “pay, allowances, and differentials.” *See* 46 Fed. Reg. 58,271, 58,272 (Dec. 1, 1981). The narrative accompanying the Federal Register publication of the final rule explains that OPM intentionally drafted the definition broadly. *Id.* Commenters had requested that OPM retain its specific definitions of “pay,” “allowances,” and “differentials” in the then-existing regulations. OPM opted instead for a broad, inclusive definition, concluding “that it is impractical and unnecessary to attempt to distinguish among these three terms.” *Id.* Thus, OPM created the current definition which it determined agencies should follow “to determine proper back pay entitlements.” *Id.*

The agency’s narrow interpretation of what constitutes “pay, allowances, or differentials” under the Back Pay Act (Br. 21-23) is not supported by the Act and is inconsistent with the broad regulatory definition. According to the agency (Br. 22),

“[b]ack pay compensates employees only for amounts that they would ordinarily have received as compensation for performing their jobs.”<sup>7</sup> The Back Pay Act does not contain such restrictive language. Rather, the Back Pay Act provides that employees are entitled to recover “pay, allowances, or differentials . . . which the employee normally would have earned or *received* during the period if the personnel action had not occurred.” 5 U.S.C. § 5596(b)(1)(A) (emphasis added). The term “compensation” is not in the Back Pay Act itself, and thus the agency’s attempt to restrict the monetary benefits recoverable to “compensation” is without merit. Clearly in this case, as shown in subsection 2. below, liquidated damages are monies that the employees were entitled to *receive*.

Moreover, the agency’s narrow interpretation should be rejected because there is no indication in the regulation, or in the accompanying commentary, that OPM intended to limit “pay, allowances, or differentials” to ordinary compensation. Further, the cases cited by the agency in support of this interpretation were decided under the

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<sup>7</sup> In support of this proposition, the agency cites the Supreme Court’s decision in *United States v. Testan*, 424 U.S. 392, 407 (1976) (*Testan*). Br. 22. *Testan* is distinguishable from this case, and the *Testan* language cited by the agency should be considered in the proper context. As this Court recognized in its *Brown* decision, *Testan* involved the application of the Back Pay Act to employees wrongfully denied promotions – or reclassification actions. 918 F.2d at 218. Thus, the Supreme Court’s statement that the Back Pay Act was intended to cover employees “subjected to a reduction in their duly appointed emoluments or position” was in response specifically to the reclassification actions in *Testan*. See *Testan*, 424 U.S. at 407. In light of *Testan*, Congress “specifically exempted reclassification actions from the Back Pay Act’s scope.” *Brown*, 918 F.2d at 219. The instant case involves a ULP and not reclassification actions.

old, narrower Back Pay Act regulations that OPM intentionally broadened when drafting the current regulations. As a result, those cases<sup>8</sup> do not provide any insight into the proper interpretation of the current broad definition of “pay, allowances, and differentials.”

**2. The liquidated damages on which the Authority ordered the agency to pay interest are “pay, allowances, and differentials” under OPM’s broad definition**

As the Authority held, the liquidated damages that the arbitrator ordered, and which the agency admits improperly withholding, constitute pay, allowances, or differentials as defined by OPM. The definition, quoted above, sets forth two relevant requirements. First, the employee must have a statutory or regulatory entitlement to the claimed benefits. Second, the employee’s entitlement must be based on the employee’s performance of a federal function. Both requirements are satisfied in this case.

That there is a statutory entitlement is clear; the requirement that an employer who has acted as the agency did here pay liquidated damages is explicitly stated in the FLSA. In this connection, the FLSA remedy provision states that any employer who

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<sup>8</sup> See *Hurley v. United States*, 624 F.2d 93, 95 (10<sup>th</sup> Cir. 1980) (Under the Back Pay Act, per diem travel allowances are not compensable because such allowances are “not part of the Act” and are “not a part of the supporting regulations.”); *Morris v. United States*, 595 F.2d 591, 594 (Ct. Cl. 1979) (Per diem and commuting expenses “are simply nowhere to be found in the applicable statutory or regulatory provisions.”)

wrongfully exempts employees from FLSA coverage “shall be liable for such legal or equitable relief . . . including without limitation employment, reinstatement, promotion, and the payment of wages lost *and an additional equal amount as liquidated damages.*” 29 U.S.C. § 216(b) (emphasis added).<sup>9</sup> Thus, the liquidated damages to which the arbitrator found the employees in this case entitled have the requisite statutory foundation specified in OPM’s regulations.<sup>10</sup>

It is equally clear that the liquidated damages due employees meet the second requirement of the regulatory definition – that the entitlement be based upon the performance of a federal function. As the arbitrator found and the agency does not

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<sup>9</sup> Although there is a rarely used exception to the FLSA’s liquidated damages requirement, *see* 29 U.S.C. § 260; *Kinney v. District of Columbia*, 994 F.2d 6, 12 (D.C. Cir. 1993) (*Kinney*), it is irrelevant here because the agency did not make the showing required to invoke the exception. JA 172. Moreover, as this Court has stated, “[i]n the compensation scheme of the FLSA, ‘double damages are the norm, single damages the exception.’” *Kinney*, 994 F.2d at 12 (quoting *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7<sup>th</sup> Cir. 1986)).

<sup>10</sup> The agency erroneously faults the Authority for “not explain[ing] why an award of liquidated damages amounts to pay, allowances or differentials.” Br. 26 n.6. As discussed previously (*supra*, p. 13), the Authority considered the issue and determined that this Back Pay Act condition was satisfied, citing the pertinent regulation. JA 194. Having completely failed to even mention the issue in its filings with the Authority, it is ironic that the agency should criticize the Authority for not having set forth its analysis at greater length. Because the issue concerns sovereign immunity, the agency’s failure in this regard escapes the jurisdictional bar in section 7123(c) of the Statute that ordinarily prevents a party from raising issues for the first time on judicial review. *See Department of the Army, Fort Benjamin Harrison v. FLRA*, 56 F.3d 273, 275 (D.C. Cir. 1995). However, the agency’s excuse for its failure, *i.e.*, that there was simultaneous briefing (Br. 26 n.6), has been squarely rejected by this Court. *Georgia State Chapter Ass’n of Civilian Technicians v. FLRA*, No. 98-1452, slip op. at 5 (D.C. Cir. August 3, 1999).

dispute, the employees' entitlement to a remedy under the FLSA arose because they had been performing uncompensated overtime work as federal employees. JA 167-170, 173.

## **II. The Agency's Remaining Contentions Are Without Merit**

The agency's remaining contentions do not provide any basis for overturning the Authority's decision in this case. Regarding the general applicability of the Back Pay Act in this case, the agency argues (Br. 21-22) that the Back Pay Act "does not waive immunity for interest on damages awarded under other federal statutes." This agency argument is contrary to the holding in this Court's *Brown* decision. The Court held in *Brown*, in the context of Title VII litigation, that despite the fact that Title VII does not provide for waiver of the government's immunity from interest awards, the requisite waiver could be supplied by a separate statute – there, as here, the Back Pay

Act. *Brown*, 918 F.2d at 216, 218.<sup>11</sup> *Brown* is directly applicable in this case; the agency's argument should be rejected.

In addition, the agency devotes a considerable portion of its brief to the argument that the Authority's Statute does not provide the requisite waiver of sovereign immunity. Br. 30-34. The Authority did not rely upon the Statute for the waiver, but relied solely upon the Back Pay Act. JA 193-196. Therefore, the agency's argument regarding sovereign immunity and the Statute is inapposite.

In sum, the Authority properly determined that the Back Pay Act's requirements are satisfied in this case.<sup>12</sup> It follows that the Back Pay Act provides the requisite

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<sup>11</sup> The fact that the Back Pay Act's requirements were not ultimately met in *Brown* does not detract from the Court's general holding. The Act's requirements were not met in *Brown* because it involved discretionary agency actions that the Court determined, although wrongfully taken, did not result in the withdrawal or reduction of pay, allowances, or differentials that the employee otherwise would have received.

*See Brown*, 918 F.2d at 219. Indeed, contrary to the agency's suggestion (Br. 30), the mandatory nature of liquidated damages under the FLSA renders the agency's failure to comply with the arbitrator's award analogous to the agency's failure to comply with a mandatory personnel action that this Court observed in *Brown* would satisfy the Back Pay Act's requirements. *See* 918 F.2d at 219. Because the agency is without discretion with regard to the liquidated damages in this case as in the mandatory personnel action referenced by *Brown*, the employees suffered a withdrawal or reduction of expected pay, allowances or differentials such that the Back Pay Act is applicable. *Id.*

<sup>12</sup> The Authority's conclusion is not only legally sound; it also comports with common sense equitable considerations. A holding that interest cannot be assessed in a case such as this, where an agency had intentionally and improperly failed to comply with an award of monetary relief to employees, would provide a powerful incentive for agencies to continue such behavior in order to reap the economic benefits such behavior would produce, at the expense of the wronged employees. Indeed, the thirteen to fifteen-month delay in payment at issue here (JA 15-16), resulted in both substantial savings to the

(continued...)

waiver of sovereign immunity, allowing payment by the agency of interest on the liquidated damages that the agency improperly withheld. *See Brown*, 918 F.2d at 216 (holding that the Back Pay Act may provide a sovereign immunity waiver absent in the statute under which the principal relief was obtained) . The Authority's decision should therefore be affirmed.

### CONCLUSION

The agency's petition for review should be denied and the Authority's order should be enforced.

Respectfully submitted,

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<sup>12</sup> (...continued)

government and cost to the employees. The Back Pay Act's waiver of sovereign immunity for the payment of interest in such a situation complements the other remedial measures available to the Authority to both correct a statutory violation and prevent future occurrences of similar improper conduct.

**CERTIFICATION PURSUANT TO FRAP RULE 32  
AND D.C. CIRCUIT RULE 28(d) FORM OF BRIEF**

Pursuant to Federal Rule of Appellate Procedure 32 and D.C. Circuit Rule 28(d), I certify that the attached brief is written in a proportionally-spaced 14-point font and contains 4706 words.

September 15, 1999

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I certify that copies of the Brief For The Federal Labor Relations Authority have been served this day, by mail, upon the following:

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September 15, 1999

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**§ 7105. Powers and duties of the Authority**

(a)

\* \* \* \* \*

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

\* \* \* \* \*

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

**§ 7116. Unfair labor practices**

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency

-

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

\* \* \* \* \*

(8) to otherwise fail or refuse to comply with any provision of this chapter.

## **§ 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.



**§ 5596. Back pay due to unjustified personnel action**

\* \* \* \* \*

(b)

(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee -

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect -

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of

1980, shall be awarded in accordance with standards established under section

7701(g) of this title; and

(B) for all purposes, is deemed to have performed service for the agency during that period, except that -

(i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and

(ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

(2)

(A) An amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest.

(B) Such interest -

(i) shall be computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on

a date not more than 30 days before the date on which payment is made;

- (ii) shall be computed at the rate or rates in effect under section 6621(a)(1) of the Internal Revenue Code of 1986 during the period described in clause (i); and
- (iii) shall be compounded daily.

(C) Interest under this paragraph shall be paid out of amounts available for payments under paragraph (1) of this subsection.

- (3) This subsection does not apply to any reclassification action nor authorize the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.
- (4) The pay, allowances, or differentials granted under this section for the period for which an unjustified or unwarranted personnel action was in effect shall not exceed that authorized by the applicable law, rule, regulations, or collective bargaining agreement under which the unjustified or unwarranted personnel action is found, except that in no case may pay, allowances, or differentials be granted under this section for a period beginning more than 6 years before the date of the filing of a timely appeal or, absent such filing, the date of the administrative determination.
- (5) For the purpose of this subsection, "grievance" and "collective bargaining agreement" have the meanings set forth in section 7103 of this title and (with respect to members of the Foreign Service) in sections 1101 and 1002 of the Foreign Service Act of 1980, "unfair labor practice" means an unfair labor practice described in section 7116 of this

title and (with respect to members of the Foreign Service) in section 1015 of the Foreign Service Act of 1980, and "personnel action" includes the omission or failure to take an action or confer a benefit.

- (c) The Office of Personnel Management shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees, or to the agencies specified in subsection (a)(2) of this section.

## § 216. Penalties

\* \* \* \* \*

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid

minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

## **§ 260. Liquidated damages**

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 et seq.), if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

