

LITIGATION UPDATE

JANUARY - FEBRUARY 2016

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D.C. CIRCUIT

1. ***NTEU v. FLRA***, 15-1122 NTEU File # 5503
Attorney(s): O'Duden/Wilson/Giles

Issue: Whether the FLRA erred in holding as contrary to law, and thus non-negotiable, a Union proposal requiring the agency to provide notice to the Union before using a “crediting plan or similar rating guide” to evaluate applicants for merit promotions.

Status: The FLRA issued its decision finding the Union’s proposal non-negotiable on March 6, 2015. NTEU filed a petition for review of that decision on June 4, 2015 with the U.S. Court of Appeals for the District of Columbia. NTEU filed its opening brief on August 7, 2015. The FLRA filed its opposition September 9, 2015, and NTEU filed its reply September 22, 2015. Oral argument was held January 19, 2016. On January 29, 2016, the D.C. Circuit dismissed NTEU’s petition for review. The court held that it lacked jurisdiction to consider this matter because NTEU had not sufficiently made (and had therefore waived) its arguments about the legality of the crediting plans proposal before the FLRA.

2. ***DHS v. FLRA***, 15-1293 NTEU File # 5509
Attorney(s): O'Duden/Adkins/Shah

Issues: Whether the FLRA correctly upheld an arbitrator’s award that, as a “make-whole” remedy, requires DHS to make payments to its employees under provisions of the Back Pay Act. (NTEU intervenor).

Status: On August 27, 2015, DHS filed a petition for review of two favorable FLRA decisions affirming an arbitrator’s award of back pay to CBP legacy INS employees. Employees’ established work assignments were changed without adequate notice and in a way that failed to ensure that their schedules included: (1) consistent start and stop times for each regular workday in a basic workweek and (2) two consecutive days off outside the basic workweek. Based on these failures, an arbitrator held that CBP’s scheduling changes violated 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121. A back pay calculation process was ordered, which CBP has resisted to date.

On September 25, 2015, NTEU filed an unopposed motion to intervene in this action, which was granted the same day. On October 2, the FLRA filed a motion to dismiss the petition for lack of jurisdiction, as the underlying FLRA decisions do not involve an unfair labor practice. Briefing on the FLRA's motion concluded on January 11, 2016. We are awaiting a decision.

3. **DHS v. FLRA**, 15-1342 NTEU File # 5512
Attorney(s): O'Duden/Wilson/Ross

Issue: Whether the FLRA erred by ordering DHS to pay retroactive mass-transit subsidies to qualified bargaining unit employees. (NTEU intervenor)

Status: On June 23, 2014, an arbitrator found that CBP violated a collective bargaining agreement with NTEU when it did not provide retroactive transportation subsidies to qualified bargaining unit employees. DHS/CBP filed exceptions to the arbitrator's award with the FLRA, arguing that the award was contrary to law. The FLRA denied DHS's exceptions on February 9, 2015. In a July 30, 2015 decision, the FLRA denied DHS's motion for reconsideration. DHS then filed a petition for review of the FLRA decision with the U.S. Court of Appeals for the District of Columbia Circuit on September 28, 2015. On October 27, 2015, NTEU filed an unopposed motion to intervene in the case, which was granted on November 16, 2015.

On November 13, 2015, the FLRA moved to dismiss for lack of jurisdiction. DHS moved for and was granted an extension of time to respond to the FLRA's motion to dismiss. Ultimately, on December 30, 2015, DHS moved to voluntarily dismiss its petition for review, and the court granted the motion and entered an order dismissing the case on January 4, 2016.

4. **IRS v. FLRA**, 15-1341 NTEU File # 5511
Attorney(s): O'Duden/Wilson/Horne

Issue: Whether the FLRA erred by ordering IRS to pay retroactive mass-transit subsidies to qualified bargaining unit employees. (NTEU intervenor)

Status: On January 9, 2014, an arbitrator found that the IRS violated a collective bargaining agreement with NTEU when it did not provide retroactive transportation subsidies to qualified bargaining unit employees. After NTEU and IRS were unable to agree on how to implement this award, the arbitrator issued a supplemental award. IRS filed exceptions to both the initial award and the supplemental award with the FLRA, arguing that they were contrary to law. On July 31, 2015, the FLRA dismissed IRS's exceptions to the initial award as untimely and denied IRS's exceptions to the supplemental award. IRS then filed a petition for review of the FLRA decision with the U.S. Court of Appeals for the District of Columbia Circuit on September 28, 2015. On October 28, 2015, NTEU filed an unopposed motion to intervene in the case.

On November 13, 2015, the FLRA moved to dismiss for lack of jurisdiction. IRS moved for and was granted an extension of time to respond to the FLRA's motion to dismiss. Ultimately, on December 30, 2015, IRS filed a motion for a voluntary dismissal, and on January 4, 2016, the clerk entered an order dismissing the case.

5. *DHS v. FLRA*, 15-1351
Attorney(s): O’Duden/Adkins/Shah

NTEU File # 5510

Issues: Whether the FLRA correctly upheld an arbitrator’s award that, as a “make-whole” remedy, requires DHS to make payments to its employees under provisions of the Back Pay Act. (NTEU intervenor).

Status: On October 15, 2015, DHS filed a petition for review of two favorable FLRA decisions affirming an arbitrator’s award of back pay to CBP legacy Customs employees. Employees’ established work assignments were changed without adequate notice and in a way that failed to ensure that their schedules included: (1) consistent start and stop times for each regular workday in a basic workweek and (2) two consecutive days off outside the basic workweek. Based on these failures, an arbitrator held that CBP’s scheduling changes violated 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121. A back pay calculation process was ordered, which CBP has resisted to date.

On October 29, 2015, NTEU filed an unopposed motion to intervene that was granted on February 25, 2016. On November 30, 2015, the FLRA filed a motion to dismiss the petition for lack of jurisdiction, as the underlying FLRA decisions do not involve an unfair labor practice. On January 13, DHS responded to the FLRA’s motion to dismiss and also filed a cross-motion to hold the case in abeyance pending resolution of #2 above. Briefing on the FLRA’s motion and DHS’s cross-motion concluded on January 27, 2016. We are awaiting a decision.

6. *DHS v. FLRA*, 15-1388
Attorneys: O’Duden/Adkins/Horne

NTEU File # 5515

Issue: Whether the FLRA erred by requiring DHS/CBP to stop denying union representatives’ requests for official time during night shifts, to stop rescheduling the requesting officers to day shifts, and to compensate officers who would have received night pay but for these violations with back pay. (NTEU intervenor)

Status: On December 19, 2014, an arbitrator found that CBP violated the parties’ collective bargaining agreement and the Labor Management Relations Statute when it denied Customs officers’ requests for official time during their regularly scheduled night shifts and required those officers to switch to day shifts in order to use official time. DHS/CBP filed exceptions to the award with the FLRA, arguing that it was contrary to law. On August 26, 2015, the FLRA denied DHS’s exceptions. DHS filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit on October 26, 2015. On November 24, 2015, NTEU filed an unopposed motion to intervene in the case.

As in the above cases, this case involves the issue of whether the court lacks jurisdiction over an appeal from an FLRA decision that did not involve or implicate an unfair labor practice. On December 11, 2015, the FLRA filed a motion to dismiss the petition for lack of jurisdiction. After receiving a 30-day extension to determine how to respond to the FLRA’s motion, DHS filed a motion for a voluntary dismissal. The case was dismissed on January 26, 2016.

7. **IRS v. FLRA**,15-1433 NTEU File # 5517
Attorneys: O’Duden/Wilson/Ross

Issue: Whether the FLRA correctly upheld an arbitrator’s determination that IRS committed an unfair labor practice when it failed to bargain over the outsourcing of work normally performed by bargaining unit employees; whether the status quo ante remedy ordered by the arbitrator and upheld by the FLRA was contrary to law. (NTEU intervenor)

Status: On August 26, 2013, an arbitrator found that the IRS violated the parties’ collective-bargaining agreement and committed an unfair labor practice by not bargaining with NTEU over the impact and implementation of a private contract governing work normally performed by bargaining unit employees. In exceptions filed with the FLRA, IRS challenged the arbitrator’s findings regarding both the timeliness and the merits of the grievance, as well as the status quo ante remedy that the arbitrator ordered. On September 30, 2015, the FLRA dismissed in part and denied in part IRS’s exceptions. IRS filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit on November 30, 2015. On December 22, 2015, NTEU filed an unopposed motion to intervene in the case, which was granted on January 19, 2016. The IRS’s brief is due on March 23, 2016. The FLRA’s response is due on April 22, 2016, and NTEU’s intervenor brief in support of the FLRA’s decision is due on April 29, 2016.

8. **CBP v. FLRA**,15-1471 NTEU File # 5518
Attorney(s): O’Duden/Adkins/Shah

Issue: Whether the FLRA correctly upheld an arbitrator’s award that, as a “make-whole” remedy, requires DHS to make payments to its employees under provisions of the Back Pay Act. (NTEU intervenor).

Status: On December 18, 2015, CBP filed a petition for review in the D.C. Circuit challenging two FLRA decisions upholding back pay awards to NTEU members. These members were found by an arbitrator to have been adversely affected by CBP’s implementation of RNIAP and subsequent changes to local assignment policies at various ports without proper notice or opportunity to bargain over the resulting changes to work schedules. These unilateral changes were found to have reduced affected employees’ overtime opportunities, and CBP was ordered to make the employees whole for any lost wages. On January 25, 2016, CBP moved to voluntarily dismiss its petition for review. On January 26, the Court granted its motion and dismissed the case.

FEDERAL CIRCUIT

9. **Reddick v. FDIC**,14-3188 NTEU File # 5496
Attorney(s): O’Duden/Wilson/Shah

Issue: Whether the arbitrator erred as a matter of law when he held that FDIC’s cancellation of the final two years of Mr. Reddick’s extended term appointment was not a “removal” within the meaning of 5 U.S.C. § 7512 and that, therefore, Mr. Reddick was not entitled to the procedural protections contained in 5 U.S.C. § 7513.

Status: A petition for review of a portion of the arbitrator’s decision was filed on August 25, 2014. Briefing concluded on March 3, 2015. Oral argument was held on May 8. An adverse decision was issued on January 8, 2016.

10. ***Rhymes v. IRS***,15-3050 NTEU File # 5498
Attorney(s): O’Duden/Wilson/Ross
- Issue:** Whether an arbitrator erred as a matter of law by imposing a time-served suspension without providing any reasoned explanation for the length of the suspension.
- Status:** On December 10, 2014, NTEU attorneys petitioned the U.S. Court of Appeals for the Federal Circuit to review an arbitrator’s decision in a grievance challenging the IRS’s proposed removal of Ms. Rhymes. The arbitrator had agreed with NTEU that removal was an overly harsh penalty. But in mitigating the penalty from a removal to a suspension, the arbitrator imposed a time-served suspension (about 390 days) without providing any reasoned explanation for the length of the suspension. After months of settlement discussions, Ms. Rhymes and IRS entered into a settlement agreement on November 25, 2015. NTEU attorneys filed a motion to voluntarily withdraw the appeal on November 25, and the court granted the motion on November 30, 2015. The parties are now coordinating to implement the settlement.
11. ***Klees-Wallace v. FCC***,15-3067 NTEU File # 5499
Attorney(s): O’Duden/Adkins/Giles
- Issue:** Whether an arbitrator erred as a matter of law when she failed to provide any relief for an employee despite finding that the employee had been improperly removed by the agency in violation of due process protections.
- Status:** NTEU attorneys filed a petition for review of the arbitrator’s decision on January 9, 2015. The opening brief was filed by NTEU attorneys on June 19, 2015. FCC filed its opposition brief on August 10, and NTEU attorneys filed the reply on August 26, 2015. The Federal Circuit issued an order on November 24, asking the government to file the complete record with the court by December 2, which it did. Oral argument was held on December 11, 2015, and we await a decision.
12. ***Gage v. IRS***,15-3181 NTEU File # 5505
Attorney(s): O’Duden/Wilson/Shah
- Issues:** Whether the arbitrator erred as a matter of law by failing to provide a basis for the length of Ms. Gage’s time served suspension; whether the arbitrator erred as a matter of law by failing to provide an explanation for his back pay ruling.
- Status:** On June 25, 2015, NTEU attorneys filed a petition for review of the arbitrator’s decision, which, without explanation, denied back pay in its entirety despite mitigating Ms. Gage’s removal to a suspension. On October 13, Ms. Gage and IRS filed a joint motion seeking a remand to the arbitrator limited to the issue of whether back pay should be issued. The motion further sought briefing on the back pay issue prior to the arbitrator’s reconsideration of the issue, and a stay of briefing pending resolution of the motion. On November 18, the Federal Circuit granted the motion, remanding the case to the arbitrator. On February 1, 2016, the arbitrator issued a decision on the remanded back pay issue. On February 16, Ms. Gage moved to voluntarily dismiss her petition for review. That motion was granted on February 23.

FOURTH CIRCUIT

13. *DHS v. FLRA*, 15-2502 NTEU File # 5514
Attorney(s): O’Duden/Adkins/Shah

Issues: Whether the FLRA correctly upheld an arbitrator’s award that, as a “make-whole” remedy, requires DHS to make payments to its employees under provisions of the Back Pay Act. (NTEU intervenor).

Status: On November 25, 2015, DHS filed a petition for review of an FLRA decision affirming an arbitrator’s award of back pay for CBP Customs officers and agriculture specialists. Employees’ established work assignments were changed in a way that failed to ensure that their schedules included: (1) consistent start and stop times for each regular workday in a basic workweek and (2) two consecutive days off outside the basic workweek. Based on these failures, an arbitrator held that CBP’s scheduling changes violated 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121. A back pay calculation process was ordered, which CBP has resisted to date. NTEU filed an unopposed motion to intervene in this action, which the court granted on December 15.

On December 21, the FLRA filed a motion to dismiss the petition for lack of jurisdiction, as the underlying FLRA decision does not involve an unfair labor practice. Briefing on the FLRA’s motion concluded on February 9, 2016. We are awaiting a decision.

TENTH CIRCUIT

14. *AFGE Local 1592 v. FLRA*, 15-9542 NTEU File # 5508
Attorney(s): O’Duden/Wilson/Ross

Issue: Whether the FLRA erred as a matter of law when it found that an entity excluded from coverage under 5 U.S.C. § 7103(b)(1) cannot be a “representative of an agency” within the meaning of the Weingarten right. (NTEU amicus)

Status: On April 16, 2015, the FLRA upheld an Administrative Law Judge decision dismissing an unfair labor practice complaint against the Air Force. The FLRA’s Office of General Counsel had brought the complaint alleging that the Air Force had violated the federal labor statute when the Air Force Office of Special Investigations (AFOSI) denied union representation to a bargaining unit employee during an investigative interview. The local union, which represented the employee, petitioned the U.S. Court of Appeals for the Tenth Circuit for review of the FLRA’s decision. The union filed its opening brief on September 21, 2015.

NTEU filed an amicus brief in support of the employee on September 28, 2015. In its brief, NTEU argued that the FLRA misinterpreted both the labor statute and improperly relied on a decision by the D.C. Circuit (in a case litigated by NTEU) when it concluded that AFOSI was not a representative of employer-agency, the Air Force. The FLRA filed its response brief on November 5, 2015, and the union filed its reply brief on November 20, 2015. Oral argument has been scheduled for March 9, 2016.

U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

15. *NTEU et al. v. Archuleta*, 1:15-cv-01808-ABJ NTEU File # 5506
Attorney(s): O'Duden/Adkins/Shah/Giles

Issue: Whether the Office of Personnel Management (OPM) violated NTEU members' constitutional right to informational privacy by failing to adequately safeguard personal information stored on its various databases.

Status: NTEU's lawsuit was filed on July 8, 2015, in the U.S. District Court for the Northern District of California. On July 29, OPM filed a motion to transfer the case to the U.S. District Court for the District of Columbia and to consolidate NTEU's lawsuit with several other lawsuits regarding the OPM data breach. On August 20, NTEU filed an opposition to the motion. On October 1, NTEU presented oral argument to the Judicial Panel on Multidistrict Litigation opposing OPM's motion to transfer. On October 9, the Panel granted OPM's motion to transfer. The case is now in the District of Columbia before Judge Amy Berman Jackson.

Judge Jackson held the first conference in the case on December 15, 2015. At the hearing, Judge Jackson ordered that all plaintiffs in all of the various lawsuits against OPM, except for NTEU, must enter into a single, consolidated amended complaint that will void each of their earlier lawsuits. NTEU had asked to be excluded from any such consolidated document because of the unique nature of its lawsuit. Judge Jackson granted NTEU's request over OPM's objection. Judge Jackson has issued a schedule for future events in the case. Based on that schedule, OPM's motions to dismiss will be due on May 13, 2016. Oppositions to those motions to dismiss (including NTEU's opposition papers) will be due on June 27. OPM's replies to those oppositions will be due on July 18.

16. *In re OPM Data Security Breach Litigation*, 1:15-mc-01394-ABJ NTEU File # 5506
Attorney(s): O'Duden/Adkins/Shah/Giles

Issue: Whether OPM violated NTEU members' constitutional right to informational privacy by failing to adequately safeguard personal information stored on its various databases.

Status: This action is the consolidated case encompassing all lawsuits stemming from the OPM data breach, including NTEU's lawsuit (**see #15**).

FLRA

17. *NTEU and CBP* Case #: O-AR-4598
NTEU File # 5290-A3/4
Attorney(s): O'Duden/Adkins

Issue: Whether legacy Customs Inspectors and Canine Enforcement Officers (now CBPOs) are entitled to overtime pay under the Customs Officer Pay Reform Act (COPRA) or the Fair Labor Standards Act (FLSA) for time spent performing certain tasks outside regular working hours, including time related to firearms maintenance and certain canine-related tasks.

Status: The FLRA's adverse decision concerning the definition of COPRA's "officially assigned to perform work" standard was issued on July 24, 2012. NTEU's motion for reconsideration of the FLRA decision was filed on August 8, 2012. CBP filed an opposition to NTEU's motion for reconsideration on August 22, 2012. NTEU filed a reply on September 4, 2012. The FLRA denied NTEU's motion for reconsideration on February 14, 2014. NTEU is in discussions with CBP concerning the impact of the FLRA's decision on the underlying arbitration award. (See #s 30 & 31)

GRIEVANCES & ARBITRATIONS

18. *NTEU and CFPB* NTEU File # 5519
Forum: Grievance
Attorney(s): O'Duden/Wilson/Horne

Issue: Whether CFPB violated the Federal Employees Flexible and Compressed Work Schedules Act (WSA), the Fair Labor Standards Act and/or the Federal Employees Pay Act when it enforced a policy requiring employees on flexible schedules to work credit hours in lieu of receiving overtime pay or compensatory time off; whether CFPB violated the WSA, FLSA or FEPA by requiring employees to work a schedule that, in reality, constitute a compressed work schedule, while administering it as if it were a flexible schedule.

Status: On February 24, 2016, NTEU filed a national grievance challenging CFPB's practice of requiring employees to work credit hours instead of earning overtime or compensatory time.

19. *NTEU and CBP* NTEU File # 5504
Forum: Grievance
Attorney(s): O'Duden/Adkins/Ross

Issue: Whether CBP violated the Federal Employee Pay Act by failing to compensate Supply Chain Security Specialists for irregular or occasional overtime work.

Status: On June 3, 2015, NTEU filed a national grievance challenging CBP's failure to compensate Supply Chain Security Specialists for certain overtime work. Until August 24, 2014, CBP authorized Specialists to receive Administratively Uncontrollable Overtime (AUO) payments. Specialists who demonstrated that they worked, on average, at least three hours of irregular or occasional overtime hours per week could qualify for AUO and thereby receive, in each paycheck, additional AUO pay that reflected a percentage of their annual pay. Effective August 24, 2014, CBP deauthorized the Specialist position for AUO. Prior to the deauthorization, however, CBP required some Specialists who sought to qualify (or re-qualify) for AUO to work uncompensated overtime for a period of time to attain the requisite average weekly hours of irregular or occasional overtime work to qualify. NTEU alleged in the grievance that CBP's failure to pay the Specialists for their overtime work violates the Federal Employee Pay Act. CBP denied the grievance on August 31, 2015. NTEU invoked arbitration on September 18, 2015. As this grievance substantially overlaps with NTEU's FLSA grievance on behalf of Supply Chain Security Specialists (See # 20), NTEU is attempting to negotiate a settlement that will resolve both grievances.

20. ***NTEU and CBP*** NTEU File # 5502
Forum: Grievance
Attorney(s): O’Duden/Adkins/Ross

Issue: Whether CBP violated the Fair Labor Standards Act by improperly exempting Supply Chain Security Specialists (GS-1801) from FLSA coverage.

Status: On April 13, 2015, NTEU filed a national grievance on behalf of roughly 120 Supply-Chain Security Specialists who recently joined NTEU’s CBP bargaining unit as a result of a successful unit clarification petition. CBP denied the grievance on July 2, 2015, and NTEU invoked arbitration on July 15. In January 2016, NTEU sent CBP a settlement proposal that would resolve both this grievance and NTEU’s FEPA grievance on behalf of Supply Chain Security Specialists (**See # 19**). The case has been assigned to an arbitrator and, if settlement efforts fail, will be heard on July 28-29, 2016.

21. ***NTEU and SEC*** NTEU File # 5491
Forum: Grievance
Attorney(s); O’Duden/Wilson/Ross

Issue: Whether the SEC breached the terms of a 2008 Fair Labor Standards Act settlement agreement and 2009 FLSA Memorandum of Understanding by reclassifying covered employees as FLSA exempt.

Status: In 2002, NTEU filed a national grievance against the SEC alleging that it had incorrectly classified employees in a number of positions as FLSA-exempt. After reaching several partial settlements and proceeding to arbitration regarding the Securities Compliance Examiner position, the parties ultimately signed a settlement agreement in 2008 and a subsequent MOU in 2009 that resolved the FLSA status of all of the positions covered by NTEU’s grievance. Under the terms of the agreements, the SEC agreed to reclassify a total of 27 different positions as FLSA non-exempt.

NTEU learned in late 2013 that approximately 300 employees whose positions were covered by the 2008 settlement agreement had been reclassified by the SEC as FLSA-exempt. NTEU filed a national grievance and information request with SEC on January 9, 2014. After reviewing the SEC’s responses to NTEU’s information requests and holding several meetings to discuss settlement, NTEU sent the SEC a proposed settlement agreement on August 6, 2014 and sent a revised proposal on November 18, 2014. Despite repeated requests for, and promises of, a response to that November 2014 proposal, SEC still had not provided one. NTEU invoked arbitration on February 24, 2015, and an arbitration hearing was scheduled for January 26, 2016. Shortly before the hearing was to take place, NTEU and SEC reached a settlement in principle. The parties are currently finalizing the details of the settlement.

22. ***NTEU and CFPB*** NTEU File # 5490
Forum: Grievance
Attorney(s); O’Duden/Wilson/Horne

Issue: Whether CFPB violated the FLSA by exempting employees in the following positions: Administrative Operations Assistant; Consumer Financial Protection Analyst; Consumer Financial Protection Compliance Officer; Consumer Response Specialist; Examiner; Legal Assistant; and Paralegal Specialist

Status: NTEU filed a national grievance and information request with CFPB on November 27, 2013. The parties reached a favorable settlement agreement on December 31, 2014. CFPB has reclassified all employees in the covered positions. Under the settlement's terms, eligible employees who were improperly compensated for their overtime work will receive back pay plus an additional 80% in liquidated damages. Back pay statements were sent to eligible employees in May 2015. Employees who did not challenge the statement calculations received payments on November 20. CFPB has issued decisions on all challenged claims. The deadline for requesting NTEU reconsideration of denials has now passed. NTEU met with CFPB on February 29, 2016, to discuss these appeals.

23. ***CBP and NTEU***

NTEU File # 5463-A2

Form: Grievance

Attorney(s): O'Duden/Adkins/Ross

Issue: Whether CBP Officers who attended CBP's Unified Canine Training Program performed uncompensated overtime work under the COPRA or the FLSA.

Status: After the FLRA denied CBP's exceptions to an arbitrator's favorable award in an earlier grievance (**See # 24**), CBP and NTEU entered into a remedial agreement to implement the arbitrator's decision on November 18, 2013. As part of the remedial agreement, CBP and NTEU agreed to permit employees who attended classes between April 2012 and November 2013 to file claims for compensation for time spent studying outside regular duty hours. Approximately 75 employees filed claims covering classes 461, 462, 463, 464, 465 and 466. On February 18, 2015, CBP issued a blanket denial of all of these claims. CBP provided copies of the claims to NTEU in November 2014. After reviewing the claims, NTEU determined that compensation was owed to the claimants.

On February 24, 2015, NTEU filed a national grievance challenging CBP's blanket denial of the claims and seeking a remedy for officers who attended classes beginning November 2013 or later who may also have been required to study outside regular working hours without compensation. CBP denied the grievance on May 11, 2015, and NTEU invoked arbitration on May 21. The parties intend to reschedule the hearing for June 2016.

24. ***NTEU and CBP***

Case #: 0-AR-4802

NTEU File # 5463-A1

Attorney(s): O'Duden/Adkins

Issue: Whether CBP Officers who attended CBP's Unified Canine Training Program performed uncompensated overtime work under the COPRA or the FLSA.

Status: NTEU filed a national grievance on April 2, 2010. On December 7, 2011, an arbitrator held that CBPOs who attended the Training Program worked uncompensated overtime under both COPRA and the FLSA. The arbitrator ordered CBP to pay CBPOs two hours of COPRA double-time pay per Training Program day, plus interest. On June 25, 2012, the FLRA denied CBP's exceptions. Agreement has been reached concerning the remedy. In January 2014, CBP began paying employees who attended classes conducted between January 2010 and April 2012. Employees attending classes between April 2012 and November 2013 got the chance to file claims for payment. On February 18, 2015, CBP issued a blanket denial of all these claims. NTEU has filed a new grievance challenging CBP's denial. (**See # 23**)

25. *NTEU and CBP*

NTEU File # 5488

Forum: Grievance

Attorney(s): O'Duden/Adkins/Ross

Issue: Whether CBP violated the FLSA by failing to compensate properly certain employees who recently had their positions converted by CBP to FLSA non-exempt status.

Status: NTEU learned that certain employees received letters from CBP in December 2012, stating that the agency has changed the FLSA exemption status of their positions. The letters indicated that CBP will compensate employees for "the balance of your overtime hours earned within the last two years." The actions described in the letters appeared to be related to an October 2012 initiative to reclassify positions in grades 12 and below as FLSA non-exempt, an initiative which was postponed as of October 12, 2012. NTEU had not been notified of CBP's decision to move forward, and CBP did not respond to inquiries made by NTEU after receipt of the October 12 letter.

On January 22, 2013, NTEU filed a national grievance asserting that, by improperly exempting the affected positions from the FLSA and appearing to limit employee recovery for such improper exemption to two years of back pay, CBP has failed to compensate employees properly under the FLSA. NTEU is seeking back pay and liquidated damages in an amount equal to back pay for improperly compensated hours worked by employees in these positions during the three-year period prior to the filing of the grievance. Information provided by CBP shows that many individuals covered by this grievance are also covered by case #25. NTEU and CBP have held several discussions aimed at resolving both grievances and/or narrowing the issues in dispute. On October 21, 2014, NTEU sent CBP a proposed settlement agreement. We met with CBP on March 27, 2015 for further settlement discussions. Having received no response, NTEU invoked arbitration on September 18, 2015. The case has been assigned to an arbitrator and the parties are working to schedule a hearing.

26. *NTEU and CBP*

NTEU File # 5487

Forum: Grievance

Attorney(s): O'Duden/Adkins/Ross

Issue: Whether CBP violated the FLSA by exempting Architect, GS-808; CBP Officer (Program Manager), GS-1895; CBP Officer (CSI Program Manager), GS-1895; CBP Agriculture Specialist (Program Manager), GS-401; Management & Program Analyst, GS-343; Management & Program Analyst (Program Advisor), GS-343; Mission Support Specialist, GS-301; and Program Manager, GS-340 from coverage under that Act.

Status: In 2011, after filing a unit clarification petition, NTEU succeeded in adding approximately 1,500 employees to the bargaining unit. On December 18, 2012,

NTEU filed a national grievance challenging CBP's decision to exempt employees in many of the above positions from the coverage of the FLSA. NTEU met with CBP to discuss this grievance and requested that CBP provide information necessary for its processing. After reviewing the information, NTEU held discussions with CBP aimed at resolving this and another grievance and/or narrowing the issues in dispute. (See #26) On October 21, 2014, NTEU sent CBP a proposed settlement agreement. We met with CBP on March 27, 2015 for further settlement discussions. Having received no response, NTEU invoked arbitration on September 18, 2015. The case has been assigned to an arbitrator and the parties are working to schedule a hearing.

27. *NTEU and HHS*

NTEU File # 5468

Forum: Grievance

Attorney(s): O'Duden/Wilson/Giles/Horne

Issue: Whether HHS violated the FLSA by exempting seventeen positions from FLSA coverage. The positions included in the grievance are: Aging Services Program Specialist GS-101; Budget Analyst GS-0560; Child and Family Program Specialist GS-101; Child Support Program Specialist GS-101; Child Welfare Program Specialist GS-101; Financial Management Specialist GS-501; Financial Operations Specialist GS-501; Grants Management Specialist GS-1101; Head Start Program Specialist GS-101; Health Communications Specialist GS-1001; Paralegal Specialist GS-950; Public Affairs Specialist GS-1035; Public Health Analyst GS-685; Public Health Advisor GS-0685; Regulatory Information Specialist GS-301; Social Science Analyst GS-101; and Technical Information Specialist GS-1412.

Status: NTEU filed a national grievance and information request on March 16, 2012, and invoked arbitration on April 16, 2012. Just prior to hearings on the Head Start Program Specialist position, HHS agreed to settle. Pursuant to the settlement signed January 16, 2015, HHS has reclassified covered Head Start employees as FLSA nonexempt. HHS will compensate employees for overtime hours worked during a two-year recovery period as well as pay 100% liquidated damages. Because of agency delays, NTEU sought and obtained an order from the arbitrator on September 30, 2015, requiring HHS to adhere to certain deadlines. HHS is now in the process of collecting overtime data for Head Start employees.

Additional hearings were scheduled for June 4-5, 2015 on Aging Services Program Specialists, and for September 29-October 1, 2015 for certain positions within the Administration for Children and Families (ACF). On September 30, 2015, NTEU and HHS signed two settlements covering: ACF Financial Operations Specialists (GS-13 and below); ACF Financial Management Specialists (GS-13 and below); ACF Child and Family Program Specialists (GS-13 and below); most ACF Child Support Program Specialists (GS-12 and below); most ACF Child Welfare Program Specialists (GS-13 and below); and most ACL Aging Services Program Specialists (GS-13 and below). Pursuant to these two settlements, HHS has reclassified the covered employees as FLSA nonexempt, and is in the process of collecting overtime data for them. These covered employees will be eligible for back pay for overtime hours worked going back to March 16, 2010, plus 100% liquidated damages.

A two-day arbitration hearing was held on September 29-30, 2015, regarding a small number of Child Support and Child Welfare Program Specialists whom HHS claimed should remain FLSA-exempt and should not be included in the September 30 settlements. Post-arbitration briefs were filed December 17, 2015, and we are awaiting a decision by the arbitrator. Additional arbitration hearings are scheduled for March 23, 2016 for Paralegal Specialists, and for May 10-13, 2016 for Public Health Analysts.

28. *CBP and NTEU*

NTEU File # 5438

Forum: Arbitration

Attorney(s): O'Duden/Adkins/Shah

Issue: Whether CBP erroneously determined that it lacked authority to pay any CBP Technicians under the USDA premium pay system for their plant- and animal-related work.

Status: On December 16, 2009, NTEU filed a national grievance aimed at returning legacy Agriculture CBP Technicians to coverage under the USDA premium pay system and also at extending coverage of that system to all CBP Technicians who perform plant- and animal-related work. On January 26, 2010, the Agency denied the grievance. NTEU invoked arbitration on February 4, 2010. On August 8, 2013 the parties executed a settlement agreement that will provide for back pay to affected Technicians. CBP has identified affected Technicians and is determining how to calculate and pay out uncontested amounts of back pay. After those amounts are paid out, claims process will follow for those who believe that they are owed additional monies.

On November 17, 2014, in light of CBP's delays in calculating and issuing back pay, NTEU filed a national grievance seeking enforcement of the parties' settlement agreement. A formal grievance meeting was held on February 18, 2015. CBP denied on the grievance on March 27. NTEU invoked arbitration on April 8. Settlement discussions are progressing and failing settlement, an arbitration date will be set.

29. ***NTEU and IRS*** NTEU File # 5428
Forum: Arbitration
Attorney(s): O'Duden/Adkins/Ross

Issue: Whether the IRS violated the law, the contract, and a prior settlement agreement between the parties by not paying night differential to employees who redeem time off awards and use religious compensatory time and by counting time off awards and religious compensatory time off toward the 8-hour-per-pay-period limit on night differential pay for employees in leave status.

Status: NTEU filed a national grievance on January 30, 2009. IRS produced information relevant to the grievance, and a grievance meeting was held on June 10, 2009. A meeting was held on January 25, 2010, to discuss updated data. Arbitration has been invoked and settlement discussions are currently in progress. NTEU conveyed a comprehensive formal settlement counter-proposal to IRS on July 26, 2013, January 14, 2014, April 10, 2014, and September 30, 2014, January 15, 2015, and June 3, 2015. The parties continued discussion of settlement terms in October and November 2015, and in January 2016.

30. ***NTEU and CBP*** NTEU File # 5290-A3
Forum: Arbitration
Attorney(s): O'Duden/Adkins

Issue: Whether legacy Customs Inspectors and Canine Enforcement Officers (now CBPOs) are entitled under the Customs Officer Pay Reform Act to overtime pay for time spent outside regular working hours, including time related to firearms maintenance and certain canine-related tasks.

Status: The grievance was filed on October 15, 2004. Between October 15 and January 7, 2005, NTEU conducted an online survey among employees potentially affected by this grievance. On December 6, 2004, NTEU invoked arbitration. The case was consolidated for hearing with #31, and a hearing was held on April 4, 2007. Efforts to settle this case and case #31 came to a halt. Post-hearing briefs were filed on June 13, 2008, and reply briefs were filed on June 27, 2008. A favorable decision was issued on October 1, 2008. The parties submitted claims process proposals to the Arbitrator on January 23, 2009,

and met with the Arbitrator on April 1, 2009, to discuss the proposals. Additional submissions were filed on June 12 and July 10. On November 11, 2009, the Arbitrator clarified his interim award on the meaning of “officially assigned” and imposed the claims process proposed by NTEU. CBP filed exceptions to the Arbitrator’s award on December 10, 2010. NTEU filed an opposition to their exceptions on January 14, 2010. The FLRA issued an unfavorable decision on July 24, 2012. The FLRA denied NTEU’s motion for reconsideration of that decision on February 14, 2014. (**See #17**) The parties conferred in September 2015 and NTEU submitted a proposed claims process to CBP in February 2016 to be used in this case and related cases **#31, 32, 33, and 34**.

31. ***NTEU and CBP*** NTEU File # 5290-A4 (legacy Customs)
Forum: Arbitration
Attorney(s): O’Duden/Adkins

Issue: Whether CBP violated the FLSA by failing to classify legacy Customs CBPOs as covered by that statute.

Status: The grievance was filed in June 2005. Arbitration was invoked, and the case was consolidated for hearing with **#30**. A hearing was held on April 4, 2007. A favorable decision was issued on October 1, 2008. The parties submitted claims process proposals to the Arbitrator on January 23, 2009, and met with the Arbitrator on April 1, 2009, to discuss the proposals. Additional submissions were filed with the Arbitrator on June 12 and July 10. On November 11, 2009, the Arbitrator clarified his interim award on the meaning of “officially assigned” and imposed the claims process proposed by NTEU. On December 10, 2009, the Agency filed exceptions to the Arbitrator’s award. NTEU filed an opposition to the Agency’s exceptions on January 14, 2010. The FLRA issued an unfavorable decision on July 24, 2012. NTEU’s reconsideration request was denied by the FLRA on February 14, 2014. (**See #17**)

32. ***NTEU and CBP*** NTEU File #: 5290-A5 (legacy INS)
Forum: Arbitration
Attorney(s): O’Duden/Adkins

Issue: Whether CBP (1) violated the FLSA by failing to classify legacy INS inspectors who are now Customs and Border Protection Officers as covered by that statute, and (2) violated COPRA by failing to compensate officers properly.

Status: CPB’s reply letter of October 24, 2008, states that it has determined the INS CBPO employees have not engaged in any unpaid COPRA and/or FLSA-covered compensable hours as alleged. NTEU’s grievance was denied. Arbitration was invoked on November 4, 2008. The officers have been converted to dual FLSA/COPRA coverage, but remedial issues remain. This case is being held in abeyance pending the outcome of **#s 30 & 31**.

33. ***NTEU and CBP*** NTEU File # 5290-A6 (Agriculture Specialist)
Forum: Arbitration
Attorney(s): O’Duden/Adkins

Issue: Whether CBP (1) violated the FLSA by failing to classify Agriculture Specialists as covered by that statute, and (2) violated COPRA by failing to compensate officers properly.

Status: CBP's reply letter of October 24, 2008, states that CBP has determined that the employees have not engaged in any COPRA and/or FLSA-covered overtime for which they have not been compensated. NTEU's grievance was denied. Arbitration was invoked on November 4, 2008. The officers have been converted to dual FLSA/COPRA coverage, but remedial issues remain. This case is being held in abeyance pending the outcome of #s 30 & 31.

34. ***NTEU and CBP***

NTEU File # 5290-A8 (July 04 CBA)

Forum: Arbitration

Attorney(s): O'Duden/Adkins

Issue: Whether CBP violated the FLSA or Customs Officer Pay Reform Act (COPRA) by failing to properly compensate CBPOs hired after July 24, 2004.

Status: On May 20, 2010, NTEU filed a national grievance under the new interim CBP collective bargaining agreement claiming that CBO has violated COPRA and/or the FLSA by failing to pay appropriate overtime to CBPOs hired after July 24, 2004. This case is held in abeyance pending the outcome of #s 30 & 31.

35. ***CBP and NTEU***

NTEU File # 5309

Forum: Arbitration

Attorney(s): O'Duden/Adkins/Ross

Issue: Whether CBP violated the FLSA by improperly exempting Auditors (GS-511) from coverage.

Status: An arbitrator ruled that the Auditor position was wrongfully exempted from the overtime provisions of the FLSA and issued a remedial award. CBP filed exceptions with the FLRA, claiming that the arbitrator erred in concluding that the position was FLSA nonexempt. The FLRA denied CBP's exceptions, employees were issued initial payments in 2013 and were given the chance to file claims for supplemental payments. Five employees have requested NTEU's assistance to resolve disputes over CBP's denial of their claims. NTEU met with CBP in April 2015 to discuss these claims. Having heard no response, NTEU contacted the Arbitrator on November 2, 2016 to enlist his assistance in resolving the outstanding claims. A hearing has been scheduled for March 17, 2016.

36. ***HHS and NTEU***

NTEU File # 5507

Forum: Arbitration

Attorney(s): O'Duden/Wilson/Giles

Issue: Whether HHS violated the FLSA by exempting Office of Refugee Resettlement field specialists from FLSA coverage.

Status: NTEU sent HHS an information request on July 8, 2015, and filed a grievance on behalf of these employees on December 1, 2015. NTEU invoked the grievance on December 23, 2015.

Thesaurus

ABEYANCE or STAYED: A case “held in abeyance” or “stayed” means that no further action on that case will be taken until a specific event takes place; usually a decision on a similar case.

AMICUS: An amicus brief is a brief by someone who is not a party in the case but is interested in the issue and will be affected by the outcome. Literally means “friend of the court.”

EN BANC: A request for rehearing en banc means that the entire roster of active judges from a particular court will review the case. Normally in the Court of Appeals, the panel has three judges.

PETITION FOR CERTIORARI: A petition for certiorari is filed in the Supreme Court and is a request for the Court to accept the case for consideration.

MOTION TO INTERVENE: Movant asks the court for permission to participate in a case in which the movant is not a party.

REMAND: Appeals court returns the case to the district court for a new decision in conformance with the appeals court’s opinion.

LEAVE: Asking permission of the court to do some act.

DISCOVERY: Process by which information is shared by the parties for the purpose of educating each party on the strengths and weaknesses of the other party’s case.