

# STATUS CALL

VOL. XXIX, NO. 1

DECEMBER 2016 – FEBRUARY 2017

## NTEU Wins Overtime Protection for More HHS Employees

NTEU has had yet another success in ensuring that HHS employees are properly classified under the Fair Labor Standards Act (FLSA) and that they receive proper compensation for their overtime work. With NTEU's latest success, more than 650 additional HHS employees have been or will be covered by the FLSA's protections.

On February 10, 2017, Arbitrator Robert Creo issued a favorable decision in connection with the union's April 1, 2016, FLSA grievance. NTEU's grievance alleged that HHS improperly classified approximately 30 program specialists in the Office of Refugee Resettlement (ORR) as exempt from, or not covered by, the FLSA. ORR specialists ensure that unaccompanied minors who come into the country illegally receive appropriate care until they can be transferred to a responsible relative.

After reviewing the evidence submitted by the agency and the union, the Arbitrator agreed with NTEU and ordered HHS to classify the ORR program specialists as covered by the FLSA. He further held that the covered employees are entitled to back pay for improperly compensated

overtime hours worked. The Arbitrator deferred ruling on the length of the recovery period for these employees and whether they could recover, as damages, amounts in addition to back pay. The parties will now discuss next steps, which may include settlement. In the event that settlement is not reached, NTEU is prepared to present the union's remedial case to the Arbitrator.

Progress also continues with respect to the implementation of other pending NTEU-HHS FLSA settlements. As announced in July 2016, HHS sent covered Head Start Program Specialists payments for back pay and liquidated damages based on overtime and compensatory time earned by the specialists during the recovery period. In mid-February 2017, HHS began sending out a second round of statements to more than 150 Head Start specialists, itemizing additional amounts owed to employees for credit hours that were improperly used by the agency in lieu of overtime. Pursuant to the settlement, if an employee disagrees with HHS's calculations concerning back pay or damages, they can file a claim with the agency for reconsideration.



## Hatch Act Guidance Regarding President Trump's 2020 Candidacy

The Office of Special Counsel (OSC)—the federal agency responsible for implementing the Hatch Act — issued guidance on February 7, 2017, concerning permissible activity in connection with President Trump's presumed candidacy in 2020. While not officially declaring his candidacy, President Donald Trump has already filed paperwork with the Federal Election Commission that establishes he is a candidate for purposes of the Federal Election Campaign Act for the 2020 election.

Under the Hatch Act, federal employees may not engage in partisan political activity while on duty, in uniform, in a government

building, or in a government car. The Hatch Act's rules apply, however, only to partisan political activity: that is, activity directed toward the success or failure of a political party or candidate.

The OSC has explained that because the 2020 election is still more than three years away, at this time not all expressions of support for or opposition to President Trump or his administration constitute prohibited "partisan political activity" under the Act. Federal employees are thus permitted to wear or display pictures or other items or engage in communications, that express their approval or disapproval

of President Trump and his policies or actions in the workplace. But employees' actions, in the workplace, cannot be specifically directed at the success or failure of President Trump's reelection in 2020. For example, a federal employee would not be permitted to hang a sign or send an e-mail stating "Reelect Trump 2020" or "Defeat Trump 2020."

Once President Trump officially announces his candidacy, the Hatch Act will apply to prohibit federal employees from engaging in any activity in the workplace aimed at his success or failure in the election.

# NEWS BRIEFS

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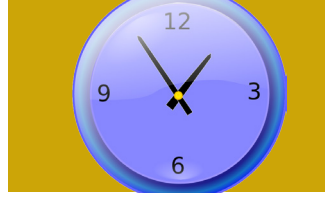
**Favorable Ruling on 2013 Shutdown Pay:** The Court of Federal Claims recently issued a favorable decision in a class action lawsuit brought on behalf of FLSA-covered employees who

were required to work during the October 2013 shutdown. Martin et al. v. United States, No. 13-834, U.S. Court of Federal Claims. Employees were paid approximately two weeks late for work done during the period of October 1–5, 2013. The lawsuit, which is being handled by a private law firm, seeks a remedy for the government's late payments to employees.

In 2014, the Court of Federal Claims ruled that the government's late payment of wages for work performed during the shutdown violated the FLSA. That ruling set the stage for legal briefing on the issue of whether liquidated damages were warranted for the late payment of minimum wage and overtime earned during the shutdown.

On February 13, 2017, the Court ordered the government to pay individual plaintiffs, as damages, an amount equal to any minimum wage or overtime pay that they earned during the shutdown but did not receive on their regularly scheduled payday. It remains to be seen if the government will appeal the Court's February 13 decision to the U.S. Court of Appeals for the Federal Circuit.

Details about the case, including information about how the court has, to date, defined the employees who may have a claim, can be found at a web site (<http://www.shutdownlawsuit.com>) established by the plaintiffs' attorneys.



**Notices Sent for 2009 IRS Night Differential Grievance:** In May 2016, NTEU entered into an agreement with IRS to settle a January 30, 2009 national grievance concerning IRS's failure

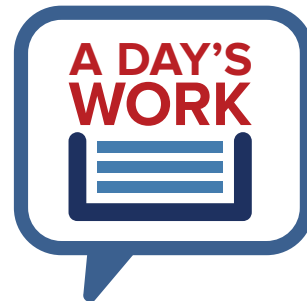
to properly pay night differential. The settlement allows employees to request compensation for night differential they should have received when using religious compensatory time or time-off awards (TOAs) or when taking leave. Pursuant to the settlement, IRS is required to send, via U.S. Mail, a notice and claim form directly to current and former employees who worked in the campuses (including call sites) and computing centers and used religious compensatory time or time off awards during the 2003-2009 recovery period — the employees most likely to have been affected by IRS's failure to properly pay night differential.

Due to administrative complications, the mailing of those notices was delayed. On February 15, 2017, IRS confirmed to NTEU that the notices have now been sent out. Employees will have 120 days from the date the notices are sent to file a claim. Claims can be filed for night differential wrongfully withheld between January 30, 2003 and January 31, 2009.



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