

**IN THE MATTER OF ARBITRATION  
BEFORE ARBITRATOR SEAN J. ROGERS**

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THE AMERICAN FEDERATION OF	:	
GOVERNMENT EMPLOYEES, COUNCIL 222,	:	ISSUE: ARBITRATOR'S
AFL-CIO, <i>et al.</i>	:	WITHDRAWAL
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Unions,	:	
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- and -	:	
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U.S. DEPARTMENT OF HOUSING AND URBAN	:	
DEVELOPMENT,	:	
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Agency.	:	
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**UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT'S  
MOTION FOR WITHDRAWAL OF ARBITRATOR SEAN J. ROGERS**

The United States Department of Housing and Urban Development (“Agency” or “HUD”), through counsel, respectfully moves Arbitrator Sean J. Rogers (the “Arbitrator”) to withdraw from further proceedings in the above-captioned matter. The basis for this motion is the Arbitrator’s failure to comply with the terms of his appointment as defined in the parties’ collective bargaining agreements and with the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the Federal Mediation and Conciliation Service (“Arbitrator’s Code of Professional Responsibility”). In support of its motion, the Agency states as follows:

**Introduction**

1. The parties' collective bargaining agreements specifically require arbitrators to render decisions within 30 days after the close of the record on a matter. In this case, the Arbitrator delayed 478 days in issuing his first decision (GS-360s liability), and he so far is 139 days late in issuing a decision regarding GS-360's

damages, whose record closed this past spring. The Arbitrator also has not yet ruled on a major motion on which briefing was complete 13 months ago. At the same time, instead of working to complete the tardy decisions, the arbitrator is seeking to schedule further hearings on other matters which will interfere with his ability to complete the work needed on pending motions and issues, as is his duty to the parties. It is for these reasons that the arbitrator should withdraw from this matter.

### Discussion

2. On June 18, 2003, the American Federation of Government Employees, AFL-CIO ("AFGE"), one of the unions representing HUD employees, filed a Grievance of the Parties entitled "Non-duty hour travel."

3. On December 24, 2003, AFGE filed a second grievance, this one entitled "FLSA Overtime Grievance."

4. On or about July 18, 2005, AFGE filed a demand for arbitration of the above-mentioned grievances.

5. In or about August 2005, HUD and AFGE selected Mr. Sean J. Rogers to serve as the arbitrator. Mr. Rogers is a member of the panel of the Federal Mediation and Conciliation Service ("FMCS").

6. On October 19, 2005, the other union representing HUD employees, the National Federation of Federal Employees, Local 1450 ("NFFE"), filed a grievance entitled "FLSA Overtime Grievance." This grievance was filed on behalf of all bargaining unit members in HUD Region IX.

7. On or about December 23, 2005, NFFE invoked arbitration.

8. On November 14, 2006, the parties informed the Arbitrator that they had agreed to consolidate the AFGE and NFFE grievances.

9. Section 23.17 of the Agreement between U.S. Department of Housing and Urban Development and American Federation of Government Employees, AFL-CIO (the "AFGE Contract") states:

Conditions. To be considered for selection to the panels, arbitrators must agree to hear a case within forty-five (45) days of referral and to render their decision within thirty (30) days of the closing of the record.

10. Section 10.11 of the Labor-Management Agreement between U.S. Department of Housing and Urban Development, Region IX and National Federation of Federal Employees, Local 1450 (the "NFFE Contract") states:

The Parties will request that the arbitrator hear the case within 30 days of referral, and render his/her decision within 30 days of the closing of the record.

11. Both agreements state that time limits in arbitrations may be extended only by "mutual written consent" of the parties. (AFGE Contract § 23.21; NFFE Contract § 10.11.C.)

12. HUD has never consented to extend the deadlines for the Arbitrator to render decisions.

13. Beginning on or about September 29, 2005, the Arbitrator held hearings regarding the exempt status of HUD Equal Opportunity Specialists (the "GS-360s Liability Phase").

14. On February 24, 2006, the record in the GS-360s Liability Phase closed.

15. The Arbitrator failed to render a decision in the GS-360s Liability Phase within 30 days of the closing of the record, *i.e.*, on or before March 26, 2006.

16. In March 2006, HUD retained outside counsel. AFGE and the Arbitrator graciously agreed to postpone certain scheduled proceedings and deadlines to permit

HUD's new counsel to read in to the case. Upon information and belief (see ¶ 19 below), the Arbitrator did not use the days that he had already set aside for this matter to work on a decision on the GS-360s Liability Phase.

17. On August 29, 2006, the Arbitrator opened hearings on the potential damages to which Equal Opportunity Specialists allegedly would be entitled if the Arbitrator were to find that those employees were non-exempt (the "GS-360s Damages Phase")

18. HUD objected on the record to opening the GS-360s Damages Phase before the Arbitrator had rendered a decision on the GS-360s Liability Phase. Transcript (August 29, 2006), at 5. Without providing any well-reasoned explanation on the record, the Arbitrator overruled HUD's objection. However, the Arbitrator acknowledged that:

Our original plan had been to do only the question of liability before we moved into the question of, of liquidated damages and double damages and also the back pay issue. That was our original plan. The plan, the plan had, had to be modified.

Transcript (August 29, 2006), at 12.

19. In an off the record discussion on August 29, 2007, the Arbitrator explained that he had failed to render a decision in the GS-360s Liability Phase for personal reasons (not connected with illness).

20. On or about March 28, 2007, the record in the GS-360s Damages Phase closed.

21. The Arbitrator failed to render a decision in the GS-360s Damages Phase within 30 days of the closing of the record, *i.e.*, on or before April 27, 2007.

22. On May 31, 2007, the Arbitrator promised he would render a decision in the GS-360s Liability Phase in June 2007. However, the Arbitrator failed to render a decision in June 2007. Had he rendered a decision in June 2007, that decision would have been approximately fifteen months overdue.

23. Subsequently, the Arbitrator promised he would render a decision in the GS-360s Liability Phase on or about July 9, 2007. However, the Arbitrator failed to render a decision by that date.

24. On or about July 17, 2007, the Arbitrator issued a decision in the GS-360s Liability Phase. Instead of being issued with 30 days of the closing of the record, this decision was issued **508 days -- almost 17 months -- after the closing of the record.**

25. In the belated GS-360s Liability Phase decision, the Arbitrator exceeded his authority. Specifically, as phrased by the Arbitrator on page 2 of the July 17<sup>th</sup> Opinion and Award, "This Award is to be based on a . . . hearing strictly limited to whether the Agency's exemption call was correct or not." Notwithstanding that stipulation, and notwithstanding the Arbitrator's acknowledgment that "Neither HUD nor AFGE presented evidence regarding the day-to-day duties of GS-360 EOS, grade 14 and 15" (Opinion and Award at 48), the Arbitrator purported to rule that those employees are non-exempt. Since the "hearing [was] strictly limited to whether the Agency's exemption call was correct or not," the Arbitrator had no authority to make an award regarding a position as to which neither party presented evidence.

26. On August 15, 2007, the Arbitrator wrote to the parties that:

I am now working on the 360 Damages Award. The record developed by the Parties is extensive and requires organization. Based on my initial work, I believe there may be exhibits which have not been sent to me. However, I may be

wrong and I have all the exhibits. When we last met, I asked Mr. Mesewicz to send me all the exhibits for the 360 Damages case. I had organized the exhibits by cases. While it may be that I have all the exhibits, I request that HUD representatives examine the exhibits in the hearing room and send me any exhibits in the 360 Damages case or advise me that I have all the exhibits. I organized the exhibits in boxes by case. Any 360 Damages exhibits still in the hearing room should be clearly marked.

The above implies that, as of August 15, 2007, ***139 days after the record closed, the Arbitrator had not yet done any substantive work on the GS-360s Damages Phase.***

27. The Arbitrator's August 15, 2007 email letter contained no projected date when the Arbitrator would issue a decision on the GS-360s Damages Phase.

28. The Arbitrator's August 15, 2007 email directed the parties to schedule more hearings and indicated that the Arbitrator was available as soon as September 4, 2007.

29. By letter dated August 20, 2007, HUD wrote to the Arbitrator in part as follows (emphasis in original):

We respectfully ask you to reconsider the accelerated scheduling of the future hearings. The basis for HUD's request has been noted before--HUD is entitled to have you focus on the work already in the pipeline rather than spend your time at hearings and build up an additional back log of work. We assume you are not available for work except on the days you indicate are available for hearings; so that if the hearings are scheduled to fill in those times, it is not likely you will be able to spend the time necessary to decide the GS-360 damages and pending motions.

This would be contrary to the specific provisions found in the parties' collective bargaining agreements ("CBAs") which address the timing of rulings. Article 23.17 of the AFGE CBA states: "To be considered for selection to the panels, arbitrators must agree to . . . render their decision within thirty (30) days of the closing of the record." Under Article 23.21, this time limit

may be modified only by **mutual written consent** of the parties, and HUD has never provided that consent. The NFFE CBA Article 10.11 contains a similar provision. These provisions mandate an arbitral decision in 30 days.

30. On August 27, 2007, the Arbitrator issued a "Scheduling Order" in which he directed the parties to schedule more hearings. The Arbitrator's order disregarded the requirements of the AFGE Contract and the NFFE Contract that he issue decisions within 30 days.

31. In his August 27, 2007 "Scheduling Order," the Arbitrator referred to certain procedural agreements that the parties had entered into early in the proceedings. Like the contracts, those procedural agreements, to the extent they are still in effect, expressly called for the Arbitrator to issue decisions within 30 days.

32. As noted above, the Arbitrator's appointment was conditioned upon his agreement to render decisions within 30 days. The Arbitrator in this matter has failed to honor that condition of his appointment.

33. Furthermore, the Arbitrator's actions have been contrary to the Arbitrator's Code of Professional Responsibility. Section J, "Avoidance of Delays," states in relevant part (bold in original):

**1. It is a basic professional responsibility of an arbitrator to plan a work schedule so that present and future commitments will be fulfilled in a timely manner.**

a. When planning is upset for reasons beyond the control of the arbitrator, every reasonable effort should nevertheless be exerted to fulfill all commitments. If this is not possible, prompt notice at the arbitrator's initiative should be given to all parties affected. Such notices should include reasonably accurate estimates of any additional time required. To the extent possible, priority should be given to cases in process so that other parties may make alternative arbitration arrangements.

**2. An arbitrator must cooperate with the parties and with any administrative agency involved in avoiding delays.**

a. An arbitrator on the active roster of an administrative agency must take the initiative in advising the agency of any scheduling difficulties that can be foreseen.

b. Requests for services, whether received directly or through an administrative agency, should be declined if the arbitrator is unable to schedule a hearing as soon as the parties wish. If the parties, nevertheless, jointly desire to obtain the services of the arbitrator and the arbitrator agrees, arrangements should be made by agreement that the arbitrator confidently expects to fulfill.

c. An arbitrator may properly seek to persuade the parties to alter or eliminate arbitration procedures or tactics that cause unnecessary delay.

**3. Once the case record has been closed, an arbitrator must adhere to the time limits for an award, as stipulated in the labor agreement or as provided by regulation of an administrative agency or as otherwise agreed.**

a. If an appropriate award cannot be rendered within the required time, it is incumbent on the arbitrator to seek an extension of time from the parties.

34. The Arbitrator has failed to adhere to numerous clauses of the foregoing excerpt from the Arbitrator's Code of Professional Responsibility. As already discussed, the Arbitrator has not adhered to the time limits for an award specified in the labor agreement.

35. In addition, upon information and belief, the Arbitrator has not given priority to cases in process, but rather has sought work from other federal agencies.

36. The Arbitrator also has failed to give notices that include reasonably accurate estimates of any additional time required to render decisions.



37. Finally, the Arbitrator's failure to issue timely decisions and his refusal to render decisions on matters already concluded will result in inefficiency and a waste of both parties' resources, and will harm the Agency.

38. First, there currently are numerous motions by the parties outstanding. Without decision on these motions, the parties are unable to prepare efficiently for future hearings.

39. For example, HUD's Motion In Limine Regarding Damages filed on May 23, 2006 (*i.e.*, the "half-time motion") has been fully-briefed since July 20, 2006. Without a decision on that motion, neither party knows whether to prepare witnesses and exhibits relating to half-time for presentation at upcoming damages hearings.

40. Second, the briefs in the GS-360s Damages Phase reveal a fundamental difference between the parties' views on what constitutes sufficient evidence from which the Arbitrator can make a "just and reasonable" inference regarding the amount of overtime pay due, if any. Clearly it is a waste of the parties' resources and the Arbitrator's time to continue to hold damages hearings without a ruling regarding this all-important issue.

41. Third, the parties have disagreed in their briefs regarding the length of the statute of limitations applicable to the Unions' claims. To the extent that the Arbitrator finds any damages due and accepts the Unions' arguments regarding the length of the limitations period, the Agency will be harmed by the delay in issuing decisions because of the lengthening of the damages period. Under the Union's theory (with which HUD disagrees), decisions may potentially be issued years from now awarding damages back to early in this decade.

### **Conclusion**

42. For all of the foregoing reasons, the Agency believes that the Arbitrator has failed to fulfill his duties to the parties and therefore must withdraw from holding further hearings in the above-captioned matter.

43. HUD further states that this motion does not constitute a refusal to participate within the meaning of AFGE Contract § 23.12 and any express or implied similar provision in the NFFE Contract. HUD continues to be prepared to participate in hearings before an Arbitrator who is committed to abiding by the applicable contract terms and other applicable rules.

44. Accordingly, the Arbitrator is not authorized to hold ex parte hearings pursuant to AFGE Contract § 23.12. In the event such ex parte hearings are held, HUD will not consider itself bound by any decisions rendered and will not be liable for any fees or expenses of the Arbitrator.

Dated: September 4, 2007

Respectfully submitted,

EPSTEIN BECKER & GREEN P.C.

/s/ Daniel B. Abrahams

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### **Certificate of Service**

I hereby certify that a copy of this United States Department of Housing and Urban Development's Motion for Withdrawal of Arbitrator Sean J. Rogers was sent to Michael J. Snider, Esquire on September 4, 2007 by email to [mike@sniderlaw.com](mailto:mike@sniderlaw.com) and [carolyn\\_federoff@hud.gov](mailto:carolyn_federoff@hud.gov) and [elizabeth\\_mcdargh@hud.gov](mailto:elizabeth_mcdargh@hud.gov).

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