

IN THE MATTER OF ARBITRATION BETWEEN:

NATIONAL COUNCIL OF HUD)	
LOCALS 222, AFGE, AFL-CIO,)	
and NFFE Local 1450)	
)	
Union,)	Issue: FLSA Overtime
)	FLSA Exemptions
v.)	
)	
U.S. DEPARTMENT OF HOUSING)	
AND URBAN DEVELOPMENT,)	
)	
Agency.)	
_____)	

Union's Reply to Agency's Response (sic) to Union's Motion to Enforce Compliance with GS-10 and Below Settlement Agreement

Agency's new counsel has submitted an opposition to the Union's Motion to Enforce Compliance with GS-10 and Below Settlement Agreement by which they claim that the Union's Motion is unnecessary, in that after the Union filed its motion, the agency has paid most of the remaining grievants, and so has "substantially complied with the Agreement." See *Agency response at 1* The Agency supports this claim with statements from Norman Mesewicz and Yvonne Matthews. The agency further begs indulgence for the delay, claiming bureaucratic difficulties which surfaced in April, 2007. The Union's Motion is very necessary at this writing: by the Agency's own admission, it is **still** not in complete compliance with the Settlement Agreement or Paragraph 2 of the Non-Compliance agreement.

Argument

The Union is very happy that the Agency is attempting to approach compliance with paragraph 2 of the Non-Compliance Agreement. But the Agency's Opposition itself testifies to three facts: 1. The Agency has **still** not processed payment for three of the original affiants. 2. The Agency only processed payments for 57 of the original affiants after the filing of the Union's motion. 3. The Agency did not process any payments between February 1, 2007, and April 13, 2007, when it claims that the bureaucratic difficulties surfaced.

The Agency has still not paid three of the original Affiants

Cynthia Carter, Michele Noel, and Linda Stewart all submitted timely affidavits that they were denied comp-time election. The Agency claims that it needs additional documentation to confirm the actual amount of comp time that Ms Carter and Noel worked, and that they must research the regulations for proper payment of Ms. Stewart, who has different COLAs because she is not in a defined pay locality. These claims are a continuation of the obfuscation and delay that HUD has brandished throughout these proceedings.

The Agency was presented with the names of these three affiants on January 18, 2007. On February 18, 2007, the Agency confirmed that there was no dispute that they were denied comp time election. The most recent FLSA payment update was sent to the ESC on September 18, 2007. The Agency's opposition was filed on October 10, 2007. From February 18, 2007, when the claims were accepted, to September 18, 2007, when the most recent payment information

was sent, was 212 days. From February 18, 2007, when the claims were accepted, to October 10, 2007, when the Opposition was filed, was 234 days. There should have been sufficient time to gather the appropriate documentation. Even if, as the Agency claims, they could not make payments between April 13, 2007 and September 13, 2007, nothing prevented the Agency from researching the amount owed to the grievants during that period.

The Agency neglects to mention that the three unpaid affiants were among the 38 affiants whose names the Agency lost and who had to be resubmitted on August 22, 2007. Perhaps if the Agency had invested more effort in complying with Paragraph 2 of the Non-Compliance Agreement, the names would not have been lost and the necessary documentation and research could have been collected in a more timely manner.

It is frankly surprising to the Union that the Agency asks for extra time to pay Linda Stewart. Linda Stewart was subject to Paragraph one of the Non-Compliance, and was paid in a timely manner. The Union does not understand why the Agency could not calculate Ms. Stewart's Comp Time rate from the same base rate that it calculated her Title V Overtime and FLSA Overtime rates.

The Agency only processed payments for 57 of the original affiants after the filing of the Union's motion

The Agency claims to have submitted payments for 57 affiants for processing on September 18, 2007. The Agency claims that this delay was due to OCFO not knowing the source of the funds.

Whether OCFO knew the source of funds or not is not relevant to the Union's motion. The Agency agreed to pay the affiants whom it had wronged. Had the Agency complied with the original Settlement Agreement and offered comp-time election, a second Agreement would not have been necessary. In the Non-Compliance Agreement, Barbara Edwards, on behalf of the Agency, agreed to right that wrong. These proceedings have been plagued with a steady stream of Agency excuses as to why agreements could not be kept. After all of the excuses, the fact remains that the agreement has not been kept.

According to Mr. Mesewicz's declaration, he submitted the names of 38 affiants to the ESC on September 6, 2007, two days after the Union filed its motion and ten days after they were re-provided to the agency. It is perhaps an interesting coincidence that two days after receiving a motion from the Union, the Agency acted to begin to right the wrong it had committed. It is also interesting that two weeks after receiving a motion from the Union, the OFCO was able to determine the proper source of funding, and that five days before the Agency's response was due, all but three of the affiants were paid.

The Agency did not process any payments between February 1, 2007, and April 13, 2007, when it claims that the bureaucratic difficulties surfaced

The Agency relies on the excuse provided by OFCO's inability to provide a funding source. But by the Agency's own admission, this problem only surfaced on April 13, 2007. Before April 13, 2007, the Agency was able to process payments, as seen from the fact that payment for 28 grievants was in fact processed. Even given that the Agency was not sure whether the claims of the

60 unpaid affiants were disputed until February 18, 2007, had the Agency diligently processed the payments starting on February 18, 2007, there would have been ample time to pay at least some of the grievants before the problem surfaced. In March 2007, the union began inquiring about the payments, but instead of addressing these inquiries, the Agency continued its pattern of delay and obfuscation, and the “funding source” problem arose, delaying payment to the affiants for another five months.

Conclusion

The Agency is still not in compliance with Paragraph 2 of the Non-Compliance agreement. Three affiants have still not been paid. While the Union applauds the Agency’s belated attempts to come into compliance by paying the full remedy to most of the affiants¹, the long delay in payment (which could have been avoided had the Agency acted more promptly and not lost the names of 38 affiants) once again indicates that the only way to bring the Agency into full compliance with Paragraph 2 of the Non-Compliance agreement and with the Settlement agreement is through an order from the Arbitrator.

¹ It must be noted that no evidence of payments being made or received was noted: the Agency only provided an in-house tracking spreadsheet to support its claims of payment.

Remedy

The Union seeks a declaratory judgment finding noncompliance, an Order that the Agency immediately comply with the Settlement Agreement and the Non-Compliance Agreement by a date certain, that the Agency cease and desist from failing to comply with the Settlement Agreement and the Non-Compliance Agreement, that the Agency pay certain damages to the affected employees, and that reasonable fees, costs and expenses be awarded for this action.

Respectfully Submitted,

_____/s/_____
Michael J. Snider, Esq.
Ari Taragin, Esq.
Snider & Associates, LLC
104 Church Lane, Suite 100
Baltimore, MD 21208
Attorney for the Union

_____/s/_____
Carolyn Federoff
President, AFGE Council 222

Certificate of Service

I certify that a copy of the foregoing was served upon the Agency via email.

Date: October 16, 2007

_____/s/_____
Hershel Goodwin
Paralegal