

IN THE MATTER OF ARBITRATION BETWEEN:

NATIONAL COUNCIL OF	)		
HUD LOCALS 222, AFGE, AFL-CIO,	)		
	)		
Union,	)	Issues:	Fair Labor Standards Act
	)		Exemptions, Overtime,
and	)		Comp Time, etc.
	)		
U.S. DEPARTMENT OF HOUSING	)	Arbitrator:	Sean J. Rogers, Esq.
AND URBAN DEVELOPMENT,	)		
	)		
Agency.	)		
_____	)		

**Union’s Motion to Compel**

The Union, through Counsel, moves for an Order compelling the Agency to produce properly requested information or, in the alternative, for an adverse inference.

**Background**

Sunday Travel FLSA Grievance

On June 18, 2003, the Union filed a Grievance of the Parties (“GoP”)(**Attached**) over a pattern and practice of management directed travel by employees during non-duty hours without compensation. The Union alleged violations of the HUD/AFGE Agreement, law, rule and regulation.

In the GoP, the Union requested certain information pursuant to 5 USC §7114(b), including:

“Please provide a list of all persons who traveled on May 4, [2003] including their name, position, series, grade and FLSA status, and advise if they were compensated for non-duty hour travel. If any person is GS-11 or below and the agency has determined that s/he is FLSA exempt, please provide a copy of the person’s position description.

...

For the last three years, please provide a complete list of all employees who traveled during non-duty hours;

...

For each employee identified, please provide his/her name, position, series, grade and FLSA status, and advise if s/he was compensated for non-duty hour travel. If any person is GS-11 or below and the agency has determined that s/he is FLSA exempt, please provide a copy of the person’s position description.”

On March 8, 2004 and April 15, 2004, the Union reiterated its §7114 request for information (attached).

### GoP FLSA Overtime

On December 24, 2003, the Union filed a Grievance of the Parties on behalf of all bargaining unit employees, claiming failure to properly classify employees under the overtime provisions of the FLSA, and failure to properly and fully compensate employees for overtime work (**Attached**).

Also included in the FLSA Overtime GoP was a Request for Information pursuant to §7114(b), which requested, *inter alia*:

“Please provide the following information prior to the Grievance meeting in this case, but in no case later than fifteen (15) calendar days from the date this Grievance is filed:

1. A list of all bargaining unit employees represented by the Union, including first and last name, position title, Agency position number, job series, grade and step, FLSA exempt or non-exempt status, email address, business phone number and business address (in hard copy **and electronic format**)
2. A copy of each employee’s position description.
3. A copy of one SF-50 for each employee since 12/24/00.
4. A copy of all information relied upon to classify each bargaining unit employee.
5. A copy of any FLSA worksheets for each employee since 1/1/90.
6. The name of the individual(s) who made the determination to exempt each FLSA exempt employee, the date the decision was made, and a copy of all information relied upon to make the determination.
7. A copy of any Agency FLSA consistency review since 1980.
8. A list of all overtime worked by each bargaining unit employee since January 1, 1999, by employee.
9. A list of all comp time worked by each bargaining unit employee since January 1, 1996.”

The Agency has at no time refused to provide any of the information based upon failure to provide particularized need, or produced any countervailing interest to production of the information.

The Agency provided the Union with a list of employees, effectively a “snapshot” of the bargaining unit, in paper form only. The Agency stated that it cannot provide a list of overtime hours worked or comp time hours worked. The Agency stated to the Union that it relied upon grade to classify employees, and based upon that representation the Union temporarily withdrew its request for position descriptions. Recently, the Agency provided FLSA worksheets dated August 2004 which stated that they relied upon Position Descriptions (attached). The Union requested that the Agency provide those PDs and received Position Descriptions classified in April 2005 (Attached). Obviously the Agency is withholding information.

The Agency to date has not provided any other information requested, including “The name of the individual(s) who made the determination to exempt each FLSA exempt employee, the date the decision was made, and a copy of all information relied upon to make the determination.” Nor has the Agency provided a list of which of the exemptions provided for in the FLSA and OPM/DOL regulations it is relying upon in its defense.

### **Union’s Need for Information**

In accordance with the above, the Union presented a statement of particularized need, which was never challenged by the Agency.

Nevertheless, the need for the information is obvious. Although the Agency has stipulated that it relied upon grade to classify HUD employees as FLSA exempt, it now claims that it relied upon PDs in making its ex post facto exemption rationalizations. Although relying upon PD is also an invalid and insufficient basis for FLSA classifications, the Union needs the PDs in order to determine the Agency’s basis and whether it may even approach a good faith attempt at compliance.

The Union clearly needs to know which exemption the Agency is relying upon to claim that exempt employees are properly exempt. The Agency must either provide an exemption or cede the employee(s). An exemption is an affirmative defense which must be raised by the Agency, and pled specifically. Without that information, the Agency cannot defend its case. Further, allowing the Agency time to come up with ex post facto rationalizations and to construct a case when there really is no case prejudices the Union and its bargaining unit.

### **Agency’s Failure to Produce Information is Prejudicial and Unwarranted**

The Agency has had over two years to produce the information requested in the Sunday Travel Grievance. The Agency has had 1 year, 10 months to produce the information requested in the FLSA overtime Grievance. That is sufficient time to gather the

information, sufficient time to evaluate the necessity of the information and sufficient time to produce the information.

Given the status of this case and its being in active litigation, the undue delay has prejudiced the progress of the case and the Union's ability to prepare for hearings. Further delay is definitely unwarranted and will only further prejudice the proceedings as a whole and the Union and its Unit in particular.

### **Conclusion**

The Union requests that the Arbitrator ORDER the Agency to produce the requested information within ten (10) days or that he draw an adverse inference from the Agency's failure to produce the information.

NATIONAL COUNCIL OF HUD LOCALS 222,

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By: Michael J. Snider, Esq.  
Snider & Associates, LLC  
104 Church Lane, Suite 201  
Baltimore, MD 21208  
410-653-9060 phone  
410-653-9061 fax  
[mike@sniderlaw.com](mailto:mike@sniderlaw.com) email

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BY: Carolyn Federoff, President  
P.O. Box 5961  
Boston, MA 02114  
fax - 617/565-7337

## Certificate of Service

I certify that a copy of the foregoing was served upon the following today, via hand delivery:

Arbitrator Sean J. Rogers, Esq.  
Sean J. Rogers & Associates, LLC  
1100 Gatewood Drive  
Alexandria, VA 22307  
Ofc.: 703-768-2794  
FAX: 703-768-2795

Norman Mesewicz, Esq.  
Deputy Director, Labor and Employee Relations Division  
U.S. Department of Housing and Urban Development  
451 7th Street, SW, Room 2150  
Washington, DC 20410

Carolyn Federoff  
c/o HUD  
10 Causeway St.  
Boston, MA 02222-1092

Date: September 28, 2005

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Michael J. Snider, Esq.



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, D.C. 20410-3000

OCT 12 2005

OFFICE OF THE ASSISTANT SECRETARY  
FOR ADMINISTRATION

MEMORANDUM FOR: Michael J. Snider, Esq., Counsel for AFGE Council 222

FROM: Norman Mesewicz, Deputy Director, Labor and Employee  
Relations Division, ARHL

SUBJECT: Agency Response to Union's Motion to Compel – HUD/AFGE Grievance of  
the Parties – Fair Labor Standards Act Exemptions, Overtime, Comp Time etc.

This memorandum is in response to the Union's subject Motion to Compel dated September 28, 2005 (Attachment 1). ( In the interest of expediency, and since all Parties have been served the complete Motion to Compel, its attachments have not been faxed.) In its motion the union addresses data requests associated with two Grievances of the Parties, the Sunday Travel FLSA Grievance, and the GoP FLSA Overtime. Those two grievances have been joined for the purposes of the instant grievance arbitration. The data requests for each of the two grievances are addressed below in order of their appearance on the Motion to Compel.

Sunday Travel FLSA Grievance

1. The Agency responded to this item on April 4, 2004 (Attachment 2).
2. This data is not reasonably available under 5 U.S.C. 7114(b)(4). It would require a manual search of each individual travel order. This response was conveyed to the Union in prior to its filing of the GoP FLSA Overtime. If the Union elects to submit additional justification for its request, Management will reconsider its decision.

With respect to the April 15, 2004 follow-up data request (Attachment to the Union's Motion to Compel) the Agency provides the Email message (Attachment 3) that specified that non-duty travel was not mandatory. The Agency believes that this data was previously provided to the Union.

3. Please see the response to #2 above.

### GoP FLSA Overtime

1. This data was provided to the Union in hard copy in January, 2004 and updated in September 2005.
2. This data is neither reasonably available nor necessary in bulk under 5 U.S.C. 7114(b)(4). The Agency will provide available position descriptions, as appropriate to promote settlement discussions or, alternatively, for the arbitration process. If the union elects to submit additional justification for this request, Management will reconsider its decision.
3. Please see the response to #2 above.
4. This data is not available under 5 U.S.C. 7114 (b)(4)(A) and (B).
5. Available worksheets were provided to the Union prior to the September 28, 2005 mediation session.
6. The names of the individuals who produced the FLSA determinations referred to in #5 above are; Gary Lyman, Ed Silver and Marlene Thrash.
7. This data is not available under 5 U.S.C. 7114 (b)(4) (A). The Agency previously advised the Union of this fact.
8. Please see the response to #7 above.
9. Please see the response to #7 above.

CC: Sean Rogers, Esq., Arbitrator  
Carolyn Federoff, President, AFGE HUD Council

Attachments

IN THE MATTER OF ARBITRATION BETWEEN:

NATIONAL COUNCIL OF  
 HUD LOCALS 222, AFGE, AFL-CIO,  
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Issues: Fair Labor Standards Act Exemptions, Overtime, Comp Time, etc.

Arbitrator: Sean J. Rogers, Esq.

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1. "Please provide a list of all persons who traveled on May 4, [2003] including their name, position, series, grade and FLSA status, and advise if they were compensated for non-duty hour travel. If any person is GS-11 or below and the agency has determined that s/he is FLSA exempt, please provide a copy of the person's position description.
- ...
2. For the last three years, please provide a complete list of all employees who traveled during non-duty hours;
- ...
3. For each employee identified, please provide his/her name, position, series, grade and FLSA status, and advise if s/he was compensated for non-duty hour travel. If any person is GS-11 or below and the agency has determined that s/he is FLSA exempt, please provide a copy of the person's position description."

ATTACHMENT #1.



On March 8, 2004 and April 15, 2004, the Union reiterated its §7114 request for information (attached).

### GoP FLSA Overtime

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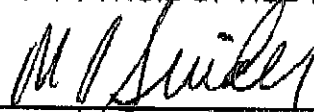
information, sufficient time to evaluate the necessity of the information and sufficient time to produce the information.

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### Conclusion

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NATIONAL COUNCIL OF HUD LOCALS 222,



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104 Church Lane, Suite 201  
Baltimore, MD 21208  
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410-653-9061 fax  
[mike@sniderlaw.com](mailto:mike@sniderlaw.com) email



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Norman Mesewicz, Esq.  
Deputy Director, Labor and Employee Relations Division  
U.S. Department of Housing and Urban Development  
451 7th Street, SW, Room 2150  
Washington, DC 20410

Carolyn Federoff  
c/o HUD  
10 Causeway St.  
Boston, MA 02222-1092

Date: September 28, 2005

  
\_\_\_\_\_  
Michael J. Snider, Esq.

**Norman Mesewicz**

To: Carolyn Federoff/OGC/BOS/HUD@HUD

04/02/2004 02:23 PM

CC:

Subject: SUNDAY TRAVEL DATA

Carolyn,

Into FedEx today went the information we discussed regarding the Council's original Non-Duty Travel Grievance of the Parties.

It consists of the name and duty stations of the PIH employees who were asked to travel on Sunday, and the statement regarding the Sunday travel requirement. Also provided is an Alpha by grade printout of HUD staff and their FLSA codes.

Norman

---

ATTACHMENT # 2



George K. Dickey  
06/19/03 01:20 PM

To: Norman Mesewicz/ADMIN/HHQ/HUD@HUD  
cc:  
Subject: RHIP Training--Travel on Sunday

Norman: Here is the message from Laure. She was very involved in the planning etc. for the training in question. This should address request a and b for PIH.

She has also included a spreadsheet which shows who the participants were. As discussed, an NFC run could showing grade, series and other information requested.

Should you need anything more from PIH, please let me know!  
----- Forwarded by George K. Dickey/PIH/HHQ/HUD on 06/19/03 01:21 PM -----



Laure Rawson  
06/19/03 11:00 AM

To: George K. Dickey/PIH/HHQ/HUD@HUD  
cc: Patricia S. Arnaudo/PIH/HHQ/HUD@HUD, David R. Ziaya/PIH/HHQ/HUD@HUD, Christine Jenkins/PIH/HHQ/HUD@HUD  
Subject: RHIP Training--Travel on Sunday

George--

Attached is the final list of PIH participants from the May 5th RHIP Training. In answer to your question about the direction that was given to the field about traveling on Sunday, I can paraphrase what I said on a Director's conference call 2-3 weeks before the training: Training participants are expected to be at the training from 8:00 am Monday morning until Noon on Friday. If you are not able to make that commitment then let your Director know, and someone else can be sent in your place.

Please let me know if you need anything else. I will be back in the office on July 7th. Thanks.

Laure



PIH\_Final\_Attendee

**ATTACHMENT #3**

**BEFORE  
SEAN J. ROGERS  
ARBITRATOR**

In the Matter of Arbitration between:

**AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES,  
COUNCIL 222, AFL-CIO**

*Union*

**and**

**DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT**

*Agency.*

**DECISION AND ORDER  
ON  
UNION'S MOTION TO COMPEL DISCOVERY**

**APPEARANCES:**

**On behalf of the American Federation of Government Employees, Council 222:**

Michael J. Snider, Esq., Snider & Associates, LLC – *representing the Union and the Grievants.*

**On behalf of the Department of Housing and Urban Development:**

Norman Mesewicz, Esq., Deputy Director of Labor Relations – *representing the Employer.*

**I. PROCEDURAL BACKGROUND**

On June 18, 2003, pursuant to the collective bargaining agreement between the parties, the American Federation of Government Employees, Council 222, AFL-CIO (AFGE or Union) filed a Grievance of the Parties (GoP) challenging the Department of Housing and Urban Development's (Agency or HUD) alleged pattern and practice of directing bargaining unit employees to travel during non-duty hours without compensation (Travel grievance). As part of the Travel grievance and pursuant to 5 USC § 7114(b), the Union

bargaining unit employees to travel during non-duty hours without compensation (Travel grievance). As part of the Travel grievance and pursuant to 5 USC § 7114(b), the Union requested information which the Union believed would support its Travel grievance claims. On March 8, 2004 and April 15, 2004, the Union reiterated its Travel grievance information request.

On December 24, 2003, the Union filed a second GoP on behalf of all bargaining unit employee claiming that HUD failed to properly classify the bargaining unit employees under FLSA overtime provisions, and failed to properly and fully compensate these employees for overtime work (FLSA grievance). As part of the FLSA grievance and pursuant to 5 USC § 7114(b), the Union requested information which the Union believed would support its FLSA grievance claims.

The parties were unable to resolve the Travel and FLSA grievances through their collective bargaining agreement grievance process. The Union invoked arbitration and the parties agreed to join the two grievances for resolution by arbitration. I was selected as the Arbitrator to resolve the disputes from a panel of neutrals maintained by the parties.

On September 12, 2005, the parties and the Arbitrator participated in an initial pre-hearing conference call (IPHC) to agree on procedures for the orderly processing of the grievances through arbitration. On September 28 and 29, 2005, as a result of the IPHC, combined mediation session and arbitration hearing (med-arb) were held on the grievances. The parties agreed to devote September 28, 2005 to a mediated settlement effort and, failing resolution of the grievances, September 29, 2005 was to be devoted to an evidentiary hearing. Following these first two days of med-arb, the parties agreed to devote October 11, 2005 to med-arb as well. No resolution of the grievance was reached on October 11, 2005 and the parties agreed continue med-arb to November 3 and 4, 2005.

During the September 28, 2005-mediation session, the Union reiterated its information requests in both grievances. At the close of the mediation session, the Union submitted a Motion to Compel discovery of the requested information to the Agency and the Arbitrator.

On October 12, 2005, the Agency responded to the Union's Motion to Compel.

## **II. APPLICABLE STATUTORY PROVISIONS AND CASE PRECEDENT**

The Union's information requests are based on 5 USC § 7114(b) which states, in pertinent part:

The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation –

\* \* \*



(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data –

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding and negotiations of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advise, counsel, or training provided for management officials or supervisors, relating to collective bargaining . . .

Federal Labor Relations Authority (FLRA) and Federal court precedent applying 5 USC § 7114(b) establish that an exclusive representative must show a particularized need for the information requested to trigger the agency's statutory duty to furnish that information.<sup>1</sup> An exclusive representative's information request must be stated with sufficient clarity to permit an agency to make a reasoned judgment whether the information must be disclosed under 5 USC § 7114(b). The exclusive representative must do more than assert that the information is relevant or useful. To establish particularized need for the information, the exclusive representative must establish the information is actually required for it to fulfill its representational responsibilities. The exclusive representative assertions of particularized need must establish that the information is required for it to adequately represent bargaining unit employees.<sup>2</sup> When an agency denies an information request, it must assert and establish countervailing disclosure interests and conclusory or bare assertions will not satisfy the agency's burden.

When investigating an agency's refusal to furnish information requested by an exclusive representative, the FLRA has articulated standards for establishing particularized need as follows:

1. Exactly why did the union need the requested information;
2. What would the union have used the requested information for if it had been furnished; and
3. How would that use of information relate to the union's role as the exclusive representative.<sup>3</sup>

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<sup>1</sup> *Internal Revenue Service, Washington, DC and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri*, 50 FLRA No. 86, 50 FLRA 338 (1995).

<sup>2</sup> *Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, Dallas, Texas*, 51 FLRA No. 49, 51 FLRA 545 (1995).

<sup>3</sup> *Guidance on Investigating, Deciding and Resolving Information Disputes*, January 5, 1996

When investigating an agency's claim of countervailing disclosure interests supporting its refusal to furnish information despite the exclusive representative's particularized need, the FLRA has articulated standards as follows:

1. Whether the agency informed the union in response to the request that it was asserting a countervailing anti-disclosure interest; and
2. Whether the agency has established such an anti-disclosure interest.<sup>4</sup>

### III. THE UNION'S INFORMATION REQUESTS AND HUD'S RESPONSES

#### A. Travel Grievance

The Union's information requests and HUD's responses are as follows:

##### **Request 1.**

The Union requests:

[A] list of all persons who traveled on May 4, [2003] including their name, position, series, grade and FLSA status, and advise if they were compensated for non-duty hour travel. If any person is GS-11 or below and the agency has determined that s/he is FLSA exempt, please provide a copy of the person's position description.

HUD responds as follows:

The Agency responded to this item on April 4, 2004 (Attachment 2).

##### **Request 2.**

The Union requests:

For the last three years, . . . provide a complete list of all employees who traveled during non-duty hours.

HUD responds as follows:

This data is not reasonably available under 5 U.S.C. 7114(b)(4). It would require a manual search of each individual travel order. This response was conveyed to the Union prior to it filing of the GoP FLSA Overtime. If the

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<sup>4</sup> *Ibid.*

Union elects to submit additional justification for its request, Management will reconsider its decision.

### **Request 3.**

The Union requests:

For each employee identified, . . . provide his/her name, position, series, grade and FLSA status, and advise if s/he was compensated of non-duty hour travel. If any person is GS-11 or below and the agency has determined that s/he is FLSA exempt, . . . provide a copy of the person's position description.

HUD responds as follows:

This data is not reasonably available under 5 U.S.C. 7114(b)(4). It would require a manual search of each individual travel order. This response was conveyed to the Union prior to it filing of the GoP FLSA Overtime. If the Union elects to submit additional justification for its request, Management will reconsider its decision.

## **B. FLSA Grievance**

### **Request 1.**

The Union requests:

A list of bargaining unit employees represented by the Union, including first and last name, position title, Agency position number, job series, grade and step, FLSA exempt or non-exempt status, e-mail address, business phone number and business address (in hard copy **and electronic format**)

HUD responds as follows:

The data was provided to the Union in hard copy in January, 2004 and updated in September 2005.

### **Request 2.**

The Union requests:

A copy of each employee's position description.

HUD responds as follows:

This data is neither reasonably available nor necessary in bulk under 5 U.S.C. 7114(b)(4). The Agency will provide position descriptions, as appropriate to promote settlement discussions or, alternatively, for the arbitration process. If the union elects to submit additional justification for this request, Management will reconsider its decision.

**Request 3.**

The Union requests:

A copy of one SF-50 for each employee since 12/24/00.

HUD responds as follows:

This data is neither reasonably available nor necessary in bulk under 5 U.S.C. 7114(b)(4). The Agency will provide position descriptions, as appropriate to promote settlement discussions or, alternatively, for the arbitration process. If the union elects to submit additional justification for this request, Management will reconsider its decision.

**Request 4.**

The Union requests:

A copy of all information relied upon to classify each bargaining unit employee.

HUD responds as follows:

This data is not available under 5 U.S.C. 7114(b)(4)(A) and (B).

**Request 5.**

The Union requests:

A copy of any FLSA worksheets for each employee since 1/1/90.

HUD responds as follows:

Available worksheets were provided to the Union prior to the September 28, 2005 mediation session.

**Request 6.**

The Union requests:

The name of the individual(s) who made the determination to exempt each FLSA exempt employee, the date the decision was made, and a copy of all information relied upon to make the determination.

HUD responds as follows:

The names of the individuals who produced the FLSA determinations referred to in #5 above are; Gary Lyman, Ed Silver and Marlene Thrash.

**Request 7.**

The Union requests:

A copy of any Agency FLSA consistency review since 1980.

HUD responds as follows:

This data is not available under 5 U.S.C. 7114(b)(4)(A). The Agency previously advised the Union of this fact.

**Request 8.**

The Union requests:

A list of all overtime worked by each bargaining unit employee since January 1, 1999, by employee.

HUD responds as follows:

This data is not available under 5 U.S.C. 7114(b)(4)(A). The Agency previously advised the Union of this fact.

**Request 9.**

The Union requests:

A list of all comp time worked by each bargaining unit employee since January 1, 1996.

HUD responds as follows:

This data is not available under 5 U.S.C. 7114(b)(4)(A). The Agency previously advised the Union of this fact.

#### IV. THE UNION'S PARTICULARIZED NEED; HUD'S RESPONSES; AND DISCUSSION AND FINDINGS

The record establishes that AFGE's June 18, 2003 Travel grievance stated that it had a particularized need for the information as follows:

in order to determine the full extent of the problem, including the possibility of additional violations [and] . . . to establish that this is part of a pattern and practice and . . . to secure monetary relief . . .

The record further establishes that HUD did not provide the requested information and AFGE repeated its request in writing on March 8 and April 15, 2004.

AFGE's December 24, 2004 FLSA grievance stated that it had a particularized need for the information as follows:

to prove the underlying facts and contentions in its Grievance. In particular, the Union needs the information to show that the Agency improperly exempt many bargaining unit employees under the FLSA, underpaid or failed to pay proper overtime to those employees, and illegally offered comp time in lieu of overtime. The position descriptions are needed to show the critical, essential and grade-controlling duties of the positions, to show that the job duties have not changed and to show that the Grievants are and were improperly exempted. The Union needs a list of the individuals who denied the overtime to call them as witnesses and a list of employees effected to call them as witnesses.

The SF-50's will show that the Grievants are improperly exempted and the Agency's exemption pattern was arbitrary, capricious and/or violative of the Agreement. Finally, the Union needs the rosters, overtime rosters and printouts of overtime worked to show damages to the Grievants. The requested information will further enable the Union to fulfill its representational duties to represent employees under the statute. If the Agency is unable to fulfill any request in full, please fulfill it in any non-objectionable part, and explain any denial in detail.

The record establishes that HUD did not provide the requested information. Although, HUD provided AFGE with a bargaining unit employee list dated February 11, 2004 prior to the first med-arb session and then provided AFGE with an updated the list dated September 5, 2005 on or about October 10, 2005. HUD's response appears to satisfy AFGE's FLSA grievance information **Request 1.**, particularly as the Union has converted that list to an electronic format.

For its part the record establishes that HUD has not asserted that the Union has failed to assert a particularized need for the requested information and HUD has not asserted any countervailing interest against disclosure of the requested information.

Based on the record developed by the parties, the Arbitration finds that the Union has stated: exactly why it needs the requested information; what the Union will use the requested information for when it has been furnished; and how the use of information relates to the Union's role as the exclusive representative. The Arbitrator also finds that HUD has not informed the Union that it was asserting a countervailing anti-disclosure interest; and HUD has not established such an anti-disclosure interest.

## V. DECISION AND ORDER

Based on the record developed by the parties and for the reasons discussed above, the Union Motion to Compel Discovery of the information requested in the Travel and FLSA grievances is granted, except as regards AFGE's FLSA grievance **Request 1**, which HUD's has satisfied.

The record establishes that HUD responded to AFGE's FLSA grievance information **Request 5**, and **6**, (concerning FLSA worksheet and the names of the individuals who made the determinations on the worksheet) stating that "[a]vailable worksheets were provided to the Union prior to the September 28, 2005 mediation session" and identifying three individuals who prepared those work sheets. HUD's response to AFGE information request is incomplete and refers only to recently prepared FLSA worksheet and the individuals who made the determinations. Arguably, these FLSA worksheets were prepared in expectation of litigation and lack material and probative value.


HUD's responses to these two information requests, as well as many other Agency responses, are incomplete and vague, and arguably, dissembling and evasive. The Arbitrator finds that if HUD does not have the information requested by AFGE; if it does not exist; HUD cannot find it; or, for any reason, the Agency cannot provide the requested information, then the Agency must expressly so state in response to AFGE's information requests. The Arbitrator also finds that HUD's responses to AFGE's instant information requests must be accurate, complete, clearly stated and up-to-date. For these reasons, the Order below requires HUD to respond to some AFGE information requests again even though the Agency may have already responded, albeit only partially and without clarity.

Alternatively, AFGE's Motion to Compel Discovery requests that the Arbitrator draw an adverse inference from HUD's failure to produce the requested information. Since HUD is now being ordered to respond to AFGE's information requests, this evidentiary remedy is premature and denied without prejudice. AFGE may renew its request for an adverse inference, at hearing or in writing, if HUD fails to comply with the Arbitrator's Order.

**ORDER:**

Within 10-calendar days of receipt of this Decision and Order, HUD must provide AFGE with the information requested in the Travel and FLSA grievances, except as regards AFGE's FLSA grievance information **Request 1**.

If the information is not in HUD's possession; does not exist; cannot be found; or, for any reason, HUD cannot provide the information, then HUD must expressly so state in its response to the Union's information requests.

  
Sean J. Rogers, Esq.  
Alexandria, Virginia  
October 19, 2005





U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, D.C. 20410-3000

NOV 11 2005

OFFICE OF THE ASSISTANT SECRETARY  
FOR ADMINISTRATION

MEMORANDUM FOR: Michael J. Snider, Esq., Counsel for AFGE Council 222

FROM: Norman Mesewicz, Deputy Director, Labor and Employee  
Relations Division, ARHL

SUBJECT: Agency Response to Decision and Order on Union's Motion to Compel  
Discovery and Union Supplemental Data Request dated September 27, 2005 submitted  
via Email – HUD/AFGE Grievance of the Parties – Fair Labor Standards Act  
Exemptions, Overtime, Comp Time etc.

This memorandum is in response to the arbitrator's October 19, 2005 Decision and Order on the Union's September 28, 2005 Motion to Compel, and the September 27, 2005 supplemental data request. In his Decision and Order the arbitrator directed that the Agency to respond again to all but request 1 of the Union's FLSA grievance. The data requests are associated with two Grievances of the Parties, the Sunday Travel FLSA Grievance, and the GoP FLSA Overtime. The Agency's response follows.

Sunday Travel FLSA Grievance

1. The Agency responded to this item on April 4, 2004 when it sent to the Union a list of the instant employees and their duty stations along with a report of HUD staff with their FLSA status. The list of employees is provided again (Attachment #1). Non-duty time travel was voluntary. (Attachment #2). In this regard, please see the original response to the Union's Motion to Compel. Any employee who traveled during non-duty hours was compensated in accordance with regulatory and contractual requirements and FLSA status in place at the time in question. The Agency will provide the position descriptions separate from the all employee position description response if the Union still believes it has a need for them at this time. In this regard please see the GoP FLSA Overtime Item #2 response.
2. This data is not reasonably available under 5 U.S.C. 7114(b)(4). It would require a manual search of each individual travel voucher. This was explained to the Union in April 2004 (Attachment #3). To review every travel voucher for a three-year period in order to determine if any travel time occurred during non-duty hours is simply not feasible. The travel and FLSA grievances have been combined. Compensation for non-duty travel by improperly exempted employees should be addressed in the damages phase of this case.

3. Please see the response to #2 above.

### GoP FLSA Overtime

2. The Agency will provide all position descriptions, but could not do so within the ten calendar day time frame, and, accordingly, requests a reasonable extension of time to do so. Alternatively, position descriptions can be provided, as they are needed for any mediation/arbitration sessions or settlement discussions.
3. The Agency does not see this information as necessary for the Union in this case. The only purpose of the SF-50s would be to document the FLSA status of the employees. That information has already been provided to the Union on the bargaining unit employee roster printouts.
4. Assuming this is a request for data relied upon to determine FLSA status, to the best of the Agency's knowledge there is no such information available.
5. Available worksheets were provided to the Union prior to the September 28, 2005 mediation session. These are the only FLSA worksheets in the Agency's possession. They were prepared to assess the merits of the FLSA exempt status of the positions in question.
6. The names of the individuals who produced the FLSA determinations referred to in #5 above are; Gary Lyman, Ed Silver and Marlene Thrash.
7. There are no FLSA consistency reviews in the Agency's possession.
8. On Friday, October 28, 2005, the Agency sent the Union reports of overtime worked by each bargaining unit employee for fiscal years 2000, 2001, 2002, and 2003. Management is searching for an FY 1999 report. The FY 2005 report had been sent previously. Overtime data for FY 2004 must be obtained by reviewing bi-weekly overtime reports maintained by each program office. This review is now ongoing.
9. On Monday October 31, 2005, the Agency sent the Union report of Compensatory time worked for the past two years. At this time, this is all of the compensatory time data the Agency believes it has in its possession.

In its supplemental emailed data request of September 27, 2005 the Union also asked for 1) The exemption originally relied upon by the Agency to exempt positions from FLSA coverage, 2) The exemption now relied upon to exempt positions and 3) Copies of the evening/weekend sign in/out sheets kept at the South entrance.

Management can respond as follows. With respect to the first item, management cannot identify specific exemptions used to exempt positions from FLSA coverage. With respect to the second item, Management relies on the Administrative and/or Professional exemptions. With respect to the third item, Management requests that the Union articulate a particularized need for the sign in/out sheets.

CC: Sean Rogers, Esq., Arbitrator  
Carolyn Federoff, President, AFGE HUD Council

Attachments

Norman Mesewicz

To: Carolyn Federoff/OGC/BOS/HUD@HUD

04/02/2004 02:23 PM

CC:

Subject: SUNDAY TRAVEL DATA

Carolyn,

Into FedEx today went the information we discussed regarding the Council's original Non-Duty Travel Grievance of the Parties.

It consists of the name and duty stations of the PIH employees who were asked to travel on Sunday, and the statement regarding the Sunday travel requirement. Also provided is an Alpha by grade printout of HUD staff and their FLSA codes.

Norman

First	Last	HA
Jane	Adaniya	Honolulu Field Office
Dale	Adler	Anchorage Field Office
Deborah	Alexander	Houston Field Office
Francine	Allen	Ft. Worth Regional Office
Janie	Allen	Little Rock Field Office
Annie	Alston	Greensboro Field Office
Kenneth	Atkinson	Newark Field Office
Sandra	Augustus	San Francisco Regional Office
Judith	Axler	Philadelphia Regional Office
Cheryl	Baltzer	Minneapolis Field Office
Judith	Baumann	Miami Field Office
Lucy Ann	Beckwell	Minneapolis Field Office
Louis	Bell	Ft. Worth Regional Office
Simona	Berrellesa	San Antonio Field Office
Gordon	Black	Cleveland Field Office
Julia Ann	Borders	Charleston Field Office
Ellen	Bradley	Boston Regional Office
Gordon	Brandhagen	Seattle Regional Office
Charles	Brice	HUD Headquartes
Dowun	Byrd	Hartford Field Office
Carolyn	Cain	Cleveland Field Office
Salvatore	Cannizzaro	Newark Field Office
Beverly	Carter	Milwaukee Field Office
Eric	Chambers	HUD Headquartes
Vera	Cheers	Memphis Field Office
Jun	Chung	Honolulu Field Office
Leslie	Ciski	Las Vegas Field Office
Frank	Clower	Richmond Field Office
Ana	Colon	San Juan Field Office
Andrea	Cooper	Birmingham Field Office
Miguel	Correa	San Juan Field Office
Rosa	Cortes	New York Regional Office
Brenda	Crispino	Philadelphia Regional Office
Ricky	Cue	HUD Headquartes
Demetra	Daniel	Memphis Field Office
Frank	Davis	Atlanta Regional Office
Eileen	Davis	HUD Headquartes
Ednasue	Davis	Little Rock Field Office
Donna	Dear	Memphis Field Office
Yvonne B.	DeBose	Birmingham Field Office
Steven	DiPietro	Chicago Regional Office
Doris	Doyle	Atlanta Regional Office
Warren H.	Duff	New Orleans Field Office
Barbara	Finch	Louisville Field Office
Anne	Fisken	Detroit Field Office
Valerie	Francis	Boston Regional Office
Elizabeth	Freeman	Little Rock Field Office
Barbara	Gardsbane	New Orleans Field Office

Anita L.	Gibson	St. Louis Field Office
Maria	Giordani	New York Regional Office
Michele	Gomez	Miami Field Office
Douglas	Gordon	Detroit Field Office
Maria	Granata	HUD Headquarters
Linda	Haigler	San Juan Field Office
Patricia	Hairston	Detroit Field Office
Mary Ann	Harris	St. Louis Field Office
Monica	Hawkins	Philadelphia Regional Office
Mia	Hayes	Philadelphia Regional Office
Karen	Haynes	Nashville Field Office
Debra H.	Headley	Omaha Field Office
Agnes	Henderson	Memphis Field Office
Joni	Hendricks	Omaha Field Office
Lois Darlene	Hodge	San Antonio Field Office
Marguerite	Irby	Cleveland Field Office
Leanna	Jaubert	Ft. Worth Regional Office
Sian	Johnson	Cleveland Field Office
Deborah	Johnson	San Antonio Field Office
Amy	Johnson	Seattle Regional Office
Greg	Jungman	Oklahoma City Field Office
Darlene	Kaholokula	Honolulu Field Office
Charlotte	Keator	Denver Regional Office
Sebastian	King	Los Angeles Field Office
Adrienne D.	Kittrell	Greensboro Field Office
Greg	Kraus	San Antonio Field Office
Keith	Landrum	Detroit Field Office
Gail	Lazo	New York Regional Office
Angela	Left-Foster	Detroit Field Office
Diana	Lewis	Atlanta Regional Office
Elillian	Lewis	Chicago Regional Office
Terry	Lipscomb	Atlanta Regional Office
Bonnie E.	Lovorn	Jackson Field Office
Tinia	Lowman	Newark Field Office
Della	Lucero	Denver Regional Office
Mandy	Marshall	Albuquerque Field Office
Vicky	Martin	Knoxville Field Office
Debra L.	Martin	Pittsburgh Field Office
Chevelle	McCray	Buffalo Field Office
Barbara	McGinnis	Knoxville Field Office
Ebony	McKinney	HUD Headquarters
Cynthia	McKnight	New York Regional Office
Curtis	McMurrin	Baltimore Field Office
Delores	Melvin	New York Regional Office
Sonia	Menendez	San Juan Field Office
LaVerne	Merrill	HUD Headquarters
Belinda L.	Miller	HUD Headquarters
Marilyn	Milne	Atlanta Regional Office
Antonio	Mosqueda	Houston Field Office

Martha	Murillo	Los Angeles Field Office
Stephen	Murphy	HUD Headquarters
Henry	Nelson	Birmingham Field Office
Migdalia	Nunez	Miami Field Office
Maura	O'Brien	Boston Regional Office
Siri	Ott	Greensboro Field Office
Pedro	Pares	San Juan Field Office
Marilyn	Parmely	Colombia Field Office
Doreen	Pederson	Baltimore Field Office
Rose	Pendelton	Colombia Field Office
Marilou	Perez	Miami Field Office
David	Peters	Portland Field Office
Kelly	Peterson	Newark Field Office
Marcia	Pierce	Indianapolis Field Office
Susan	Platania	San Francisco Regional Office
Althea R.	Prescott	Pittsburgh Field Office
Nathan	Ratner	San Antonio Field Office
Lindsey	Reames	Grand Rapids Field Office
Sonja	Redmon	Louisville Field Office
LaDonna	Reed-Morton	HUD Headquarters
Jean	Robinson	Little Rock Field Office
Deborah	Rodriguez	New York Regional Office
Juan O.	Rodriguez	San Juan Field Office
Lisa	Rogers	Chicago Regional Office
Carol A.	Roman	Denver Regional Office
Oliver	Rosa	New Orleans Field Office
Joseph	Russell	Columbus Field Office
Sonia	Samuels	Jacksonville Field Office
Wendy C.	Sasaki	Omaha Field Office
Garrett	Sauve	Ft. Worth Regional Office
Michael	Scanlan	Indianapolis Field Office
Stephen	Schneller	Louisville Field Office
Sharon A.	Scott	Pittsburgh Field Office
Anita	Short	Salt Lake City Field Office
Magaret	Skiffer	Phoenix Field Office
Judy	Smith	Boston Regional Office
Teresa	Smith	Boston Regional Office
Regina	Smith	Chicago Regional Office
Gloria	Smith	Jackson Field Office
Louella	Snyder	HUD Headquarters
Debra	Soper	Washington DC Field Office
Naomi	Sukimoto	Los Angeles Field Office
Davidson	Taylor	Memphis Field Office
Chandra	Tolbert	Chicago Regional Office
Sharron	Treskunoff	Sacramento Field Office
Chris A.	Valiquette	Pittsburgh Field Office
Craig F.	Vandervort	Kansas City Regional Office
David	Vargas	HUD Headquarters
Rita S.	Vaz	St. Louis Field Office

Ruben	Villanueva	San Antonio Field Office
Sai	Volia	Newark Field Office
James C.	Walker	Birmingham Field Office
Beverly	Washington-Williams	Jackson Field Office
Richard B.	Wears	Detroit Field Office
Carol	Weber	Baltimore Field Office
Melinda	Whitehed	San Francisco Regional Office
Jerry	Wilhoit	Milwaukee Field Office
Kathryn	Winslow	Cleveland Field Office
Kathy R.	Winter	Kansas City Regional Office
Wayne	Woodell	Greensboro Field Office
Linda	Woolever	Minneapolis Field Office
Ronald	Wooster	Grand Rapids Field Office
Robert	Yablonskie	Boston Regional Office
Stacy	York	Albuquerque Field Office
Ray	Young	Indianapolis Field Office





George K. Dickey  
06/19/03 01:20 PM

To: Norman Mesewicz/ADMIN/HHQ/HUD@HUD  
cc:  
Subject: RHIP Training--Travel on Sunday

Norman: Here is the message from Laure. She was very involved in the planning etc. for the training in question. This should address request a and b for PIH.

She has also included a spreadsheet which shows who the participants were. As discussed, an NFC run could showing grade, series and other information requested.

Should you need anything more from PIH, please let me know!  
--- Forwarded by George K. Dickey/PIH/HHQ/HUD on 06/19/03 01:21 PM ---



Laure Rawson  
06/19/03 11:00 AM

To: George K. Dickey/PIH/HHQ/HUD@HUD  
cc: Patricia S. Arnaudo/PIH/HHQ/HUD@HUD, David R. Ziaya/PIH/HHQ/HUD@HUD, Christine Jenkins/PIH/HHQ/HUD@HUD  
Subject: RHIP Training--Travel on Sunday

George--

Attached is the final list of PIH participants from the May 5th RHIP Training. In answer to your question about the direction that was given to the field about traveling on Sunday, I can paraphrase what I said on a Director's conference call 2-3 weeks before the training: Training participants are expected to be at the training from 8:00 am Monday morning until Noon on Friday. If you are not able to make that commitment then let your Director know, and someone else can be sent in your place.

Please let me know if you need anything else. I will be back in the office on July 7th. Thanks.

Laure



PIH\_Final\_Attendee

**Norman Mesewicz** To: Carolyn Federoff/OGC/BOS/HUD  
04/26/2004 11:09 AM CC:  
Subject: NON DUTY TRAVEL TIME

I consulted the OCFO regarding your request for the days and times of non-duty travel by bargaining unit employees for the last three years.

This information is not available absent a manual inspection of each travel voucher.

I will pursue the record of scheduled reviews, training etc. that we discussed the other day.