IN THE MATTER OF ARBITRATION BETWEEN:

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

UNION'S SUPPLEMENTAL REPLY BRIEF TO AGENCY'S OPPOSITION TO UNION'S MOTION FOR SUMMARY JUDGMENT RELATING TO LIABILITY FOR CERTAIN GS-11, 12, 13 AND 14 POSITIONS AND UNION'S MOTION FOR SUMMARY JUDGMENT ON CERTAIN DAMAGES FOR ALL GS-10'S AND BELOW AND FOR CERTAIN GS-11, 12, 13 AND 14 POSITIONS

Introduction

The Agency, having retained counsel, was given an additional opportunity to address the Union's Motion for Summary Judgment, which it did via a **Supplemental Opposition** on April 3, 2006. Essentially the Agency has reiterated the same arguments made in its March 24, 2006 **Opposition**. We address each in turn.

Edwards' affidavit was a sham, created by the Epstein, Becker and Green law firm for her signature. The arguments in the Agency Brief and Edwards affidavit conflict with the facts on the ground and must be discounted accordingly. The Agency, having reclassified – on its own – thousands of employees' positions as non-exempt, must now bite the bullet and actually reclassify the employees themselves.

Historical Background

In September, October and November 2005, the Union asked the Agency repeatedly which FLSA Exemption was relied upon for each and every employee. For example, on September 27, 2005, the Union requested:

> We also now request that the Agency identify which exemption it relied upon to classify each employee as Exempt from the FLSA at the time the decision was originally made to do so, and which exemption it now relies upon for each and every exempt employee/position.

(See **Attached** 9/27/05 Email). At about the same time, the Agency apparently decided to perform some actions to evaluate its potential defenses, and did some FLSA Evaluations on employee PDs. When these were produced, in September 2005, the Union again requested, and the Agency agreed to provide, the PD for each employee:

> Please consider this a **reiteration** of our original 7114 Request for information.
>
> The Union requested the following information, and requests it again now:
>
> Please provide the following information in no case later than fifteen (15) calendar days:
>
> … A copy of each employee's position description.

In response, the Agency began to produce a huge number of Position Descriptions to the Union. Attached to the front of each and every PD was a document labeled "HUD FLSA Evaluation," which went through each of the potential exemptions to the FLSA and checked off which exemption applied, if any. When the Union asked the Agency the meaning of the FLSA Evaluation sheets, we were told by Mr. Mesewicz that "you asked for which exemption we are relying on, and this is it." In other words (unlike the

litigation position taken by Epstein, Becker & Green), HUD made a decision in the Fall of 2005 to classify dozens of positions as FLSA Nonexempt.

Despite the fact that it did so, the Agency has not, to date, reclassified any of the incumbents in those PDs. Nor has it issued a new PD to a single employee. Nor has it made any effort to evaluate the accuracy of any of the PDs. All of which points to one thing: HUD knows that its employees are non-exempt, admits they are non-exempt but has not yet reclassified them as nonexempt. We therefore ask the Arbitrator to ORDER HUD to do this ministerial task.

Every single GS-11 position came back from HUD as FLSA Nonexempt. Every single one (except the GS-904, but that was not done until March 2006). The Union has moved for Summary Judgment on liability on those positions that HUD "Evaluated" as non-exempt. This is not a major issue, not a large question or an unclear matter – it is a clearcut, undisputed fact. Now the Agency has admitted that it "chose" to treat these employees as non-exempt "going forward," but still somehow insists that they are non-exempt. That is ludicrous. If they are non-exempt going forward, and their duties did not change at all, then they are non-exempt going backwards as well. That is clear and logical. The Agency must be ordered to do that which it will not do on its own – reclassify the incumbents as non-exempt in accordance with its own FLSA Evaluations.

HUD has failed to produce any other facts, evidence, affidavits or genuine dispute. Summary judgment is appropriate, therefore, as a matter of law.

Applicable Law and Argument

In order to avoid Summary Judgment, the non-moving party cannot rely (as it does here) on mere speculation or argument, but must rather produce **evidence** that supports their position. In this case, the Agency **has not produced a shred of evidence** in support of its **Opposition** to Summary Judgment or its **Supplemental Opposition**. Accordingly, summary judgment for the Union is appropriate.

Summary judgment **shall be granted** if the responding party (the Agency) does not generate a genuine dispute through affidavits, documents, depositions, answers to interrogatories and admissions on file, together with other declarations, if any. It is incumbent upon the Agency to demonstrate that there is a **genuine** issue as to **material** fact and that the moving party is not entitled to judgment as a matter of law. See FED. R. CIV. P. 56(c). The Rule states in its entirety:

> **Rule 56. Summary Judgment**
>
> **(a) For Claimant.**
>
> A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> **(b) For Defending Party.**
>
> A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion.

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

> **(f) When Affidavits are Unavailable.**
>
> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.
>
> **(g) Affidavits Made in Bad Faith.**
>
> Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

The **Rule** itself provides that "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." The Rule is very clear that the **Opposition** must contain evidence, not mere argument:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

On a motion for summary judgment, the **non-moving party's opposition must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for trial**. See FED. R. CIV. P. 56(e); **Celotex Corp. v. Catrett**, 477 U.S. 317, 324 (1986).

The non-moving party is "required to provide **evidence** that would permit a reasonable [fact finder] to find" in its favor. **Laningham v. United States Navy**, 813 F.2d 1236, 1242 (D.C. Cir. 1987)(emphasis added). If the non-movant's evidence is "merely colorable" or "not significantly probative," summary judgment may be granted. **Anderson v. Liberty Lobby, Inc.**, 477 U.S. at 249-50.

To defeat summary judgment, the non-moving party must have more than "a scintilla of evidence to support [its] claims." **Freedman v. MCI Telecommunications Corp.**, 255 F.3d 840, 845 (D.C. Cir. 2001); see **Ben-Kotel v. Howard University**, 319 F.3d 532, 536 (D.C. Cir. 2003).

The "[Agency's] own naked opinion, without more, is not enough to establish a … case." **Goldberg v. B. Green and Co., Inc.**, 836 F.2d 845, 848 (4th Cir. 1988)(citing **Locke v. Commercial Union Ins. Co.**, 676 F.2d 205, 206 (6th Cir. 1982)(per curiam); **Kittredge v. Parker Hannifin Corp.**, 597 F. Supp. 605, 609-10 (W.D. Mich. 1984)). *See also* **Williams v. Cerberonics, Inc**., 871 F.2d 452, 456 (4th Cir. 1989)(assertions are in and of themselves insufficient). "[C]onclusory assertions that [the defendants'] state of mind and motivation are in dispute are not enough to withstand summary judgment." **Goldberg**, 836 F.2d at 828 (citing **Zoby v. American Fidelity Co.**, 242 F.2d 76, 80 (4th Cir. 1957)).

Moreover, self serving and/or conclusory affidavits cannot overcome summary judgment. *See, e.g.,* **Evans v. Technologies Applications & Service Co.**, 80 F.3d 954, 952 (4th Cir. 1996); **United States v. Urbanek**, 39 F.3d 1179 (Table), 1944 WL 589614 at * 4 (4th Cir. 1994).

In this case, in which the ***burden of proof*** is upon the Agency, its failure to introduce credible evidence that shows a genuine dispute of material fact must result in a decision on the evidence alredy before the factfinder.

Edwards' Affidavit is a Sham at Worst, and is Self Serving and/or Conclusory at Best

Ms. Edwards, declaring "under the penalty of perjury," attempts to make a mockery of this tribunal and her oath. It is clear that her attorneys prepared the Affidavit for her. First, compare her Declaration at paragraphs 1-3 with her profile on the HUD website found at http://www.hud.gov/offices/adm/about/bedwardsbio.cfm :

> Barbara Edwards is currently the Deputy Assistant Secretary for Human Resource Management. Her portfolio consists of the Office of Human Resources and the HUD Training Academy. She is a primary leader in Human Capital matters for the Department.
>
> Prior to her current position, Ms. Edwards served as Deputy Assistant Secretary for Resource Management, where she was responsible for administering a $142 million budget. Her responsibilities included delivery of support for national initiatives, providing policies and guidelines, and strategic planning for the Office of Administration's services, e.g., human resources, to include staffing and classification and human resources related services; space management; building operations; furniture and equipment; mail; telephones; printing; visual arts; and records and directives management.
>
> Ms. Edwards also held positions in HUD as Deputy Assistant Secretary for Technical Services, Director and Deputy Director of Human Resources, and Director of Labor and Employee Relations.

They are nearly verbatim. Next, compare the Agency's **Supplemental Opposition** at page 15 with Edwards' actual **Declaration**:

> "Here, many of the jobs that the Agency has treated as exempt appear to parallel jobs that the Department of Labor and/or OPM consider exempt. HUD's classification system has been in place for a long time. See Edwards Declaration ¶ 7."

Edwards, of course, says no such thing at ¶ 7, or at any other place in her **Declaration**. The document is a fabrication made up as a bogus defense by Epstein, Becker & Green. The attorneys making up her Declaration, making up the Agency's defense, and making up facts, simply forgot to put this "fact" into Ms. Edwards' Declaration.

Further, Edwards does not actually attest to ***any facts*** about which she has first hand knowledge. She claims to have been "personally involved" in formulating positions and actions, but does not state anywhere that she has personal knowledge of the HUD FLSA Evaluation program, the decisions made by the HUD FLSA Evaluators or what they based their decision to find all GS-11 positions to be non-exempt.

Even if not a sham, Edwards' Declaration is self-serving and conclusory, not factual and material. She does not profess to have first hand knowledge of the actual decisions made, the reasons for the decisions or anything else truly relevant to this case.

Agency Supplemental Opposition and Opposition Help the Union

Here, the Agency has not produced a *shred* of evidence to support its **Opposition**. If anything, the **Opposition** and **Supplemental Opposition** support the Union's **Motion**: The **Opposition** states that "the agency is not precluded from revisiting the FLSA determinations of the GS-11-14 positions herein." (**Opposition** at 3). By stating that it is not "precluded from revisiting" its determination, the Agency admits that it has found the positions (and all incumbents therein) to be FLSA non-exempt.

Further, **in connection** with her discussion of the dozens of positions that HUD has recently classified as FLSA Non-exempt, Ms. Edwards stated that "HUD **has begun** treating all questionable cases as non-exempt on a going-forward basis." (Emphasis added). This statement must be formalized, since HUD is vacillating on this issue. Either the positions are non-exempt (and we urge the Arbitrator to so find, and to so order), or they are exempt. The Agency cannot have it both ways. Since Edwards admits that all of the GS-11, 12, 13 and 14 Positions that were classified as non-exempt are "questionable," then there is absolutely no reason to not reclassify all of the incumbents accordingly, especially since the Agency itself stated in black and white that it was "treating" them "as non-exempt on a going-forward basis." All we ask is that the Arbitrator formalize this admission and commitment into a binding Order.

To the extent that the PDs are accurate, the Agency has ceded those employees/positions as non-exempt. That is all the Union is seeking – a declaratory

judgment that those employees are non-exempt. To the extent that the incumbents perform duties of a similar nature in a similar way to the now-Nonexempt PDs, they are also entitled to be non-exempt. See ***DOD, Navy, Naval Explosive Ordinance Disposal Technology Division, Indian Head, MD and AFGE, Local 1923,*** 56 FLRA 280 (April 28, 2000)(**attached**).

"Retroactive" Liability for GS-10's and Below

During the meeting with the Union and Arbitrator on Thursday, April 6, 2006, the Agency has retracted its allegations in its Opposition at pp. 8-9, that the GS-10 and below settlement was not "retroactive." Daniel Abrahams admitted that the Settlement was in fact retroactive to either 2000 or 2001. Therefore we will not address these contentions.

Agency's Treatment of GS-10s and Below (Reclassification as FLSA Non-exempt) is "Similar" to the GS-11, 12, 13 and 14 Positions the Agency Found to be Nonexempt

FLSA exemptions are an affirmative defense that must be pleaded and proved by the defendant. Fife v. Harmon , 171 F.3d 1038 (5th Cir. 1999); Jones v. Giles, 741 F.2d 245, 248-49 (9th Cir. 1983). Here, HUD has ceded FLSA liability for these positions.

The Agency's **Supplemental Opposition** and Edwards' Declaration state that, just like the GS-11 through 14 positions, the Agency was treating and has been treating the GS-10 and below employees as "non-exempt going forward." The Agency used terms like "Similarly" (Edwards Declaration at par. 9):

9. Similarly, with regards to GS-10s and below, HUD did not intend the Partial Settlement Agreement between HUD and the Union dated September 28, 2005 to be an admission that any individual employee is non-exempt. In paragraph 1 of that agreement, the Department agreed to identify by October 21, 2005 any employees at GS-10 or below that the Department considered to be exempt. HUD further agreed that—

> If the Agency does not identify an employee as described in paragraph 1 and provide the information described in paragraph 2 for an employee/position, that employee/position will be reclassified to FLSA non-exempt status effective the beginning of the first full pay period after October 21, 2005.

10. This provision gave HUD 15 working days to review more than 20 job classifications consisting of approximately 250 individual employees. Again, consistent with OPM's rule that cases of reasonable doubt should be resolved in favor of finding the employee non-exempt, HUD decided to treat all GS-10s and below as non-exempt on a prospective basis.

and this statement:

> "HUD's voluntary prospective reclassification of certain GS-11, 12, 13 and 14 positions from exempt to non-exempt…"

(**Supplemental Opposition** at 6, bold heading #2). These statements are conclusive and binding – the Agency has indisputably classified these positions, and by extension all incumbents therein, as FLSA non-exempt.

Then the Agency engages in lawyerspeak: "HUD is not precluded from revisiting all its voluntary reclassifications, particularly of positions GS-11s and higher, as applied to an individual employee." (Supplemental Opposition at 6).

This, of course, is the lawyers' attempt at mitigating the actions of the client. That it cannot do. The Agency has "voluntarily reclassified" "positions GS-11 and higher" and now must deal with that reality. The Union provided the Arbitrator the facts – the hard evidence, in the form of documents provided by the Agency – admissions that HUD found these positions to be Nonexempt. That is true for the PD, for the position and for the incumbents, unless and until HUD comes forward with solid evidence that the PDs are inaccurate – which it has not done.

HUD could have provided affidavits from supervisors that the Nonexempt GS-11, 12, 13 and 14 PDs were inaccurate – and it did not.

HUD could have provided affidavits from the classifiers themselves who signed the HUD FLSA Evaluation sheets disclaiming their applicability – and it did not.

HUD could have produced real evidence, rather than mere hyperbole and a sham affidavit, to generate a genuine dispute of material fact – and it did not.

HUD could have avoided summary judgment, but it cannot and has not.

Subsequent Measures

The Agency claims that it's change to a few dozen PDs and attaching a statement labeled "HUD FLSA Evaluation" concluding "FLSA Non-Exempt" is not an admission of liability for those positions. While trying not to laugh, this argument is hard to take seriously.

It may be true that some subsequent measures are not a concession to other conclusions (like in the ***Dennis*** case), here we are not asking for a conclusion from fact A to fact B (although we could; see below). We are asking that Fact A be recognized for what it is – Fact A. In other words, the Agency has found that the positions at issue are non-exempt. No amount of good lawyering (or good dancing) can escape the conclusion that those positions have been ceded for liability purposes.

Furthermore, the FLRA has clearly and unambiguously found that an Arbitrator may indeed view Settlement Agreements and other probative actions by the Agency (ie, reclassifying PDs) as binding and an admission. See ***DOD, Navy, Naval Explosive Ordinance Disposal Technology Division, Indian Head, MD and AFGE, Local 1923,*** 56 FLRA 280 (April 28, 2000)(**attached**). The Agency there, much like the Agency here, argued that each and every individual employee's duties must be examined to

determine their proper exempt or nonexempt status. The Authority flatly rejected that argument:

> As previously mentioned, the Arbitrator concluded that the eight Equipment Specialists were nonexempt based on her specific findings that the knowledge requirements, supervisory controls and duties performed by the designated representatives were the same or virtually the same as other specialists who the Agency conceded did not meet the professional exemption criteria in § 551.207. Accordingly, we defer to the Arbitrator's findings as a sufficient basis for concluding that the employees at issue did not meet the criteria in § 551.207.

(**Attachment** at 8).

Liability for Ceded Positions and Incumbents

Notably, both the **Opposition** and **Supplemental Opposition** agree that the GS-11, 12, 13 and 14 positions that the Agency itself has classified as FLSA Non-exempt are, in fact, non-exempt and therefore ceded.

The **Opposition** states that

> Thus, the agency is not precluded from revisiting the FLSA determinations of the GS-11-14 positions herein. A consideration of duties actually performed, either through further management review or an arbitration hearing, may result in FLSA exempt determinations

(Opposition at 3). By stating that it is not "precluded from revisiting" the determination finding the positions (and all incumbents therein) FLSA non-exempt, the Agency is agreeing, as hard as it is for it to do so, that it has found the positions and incumbents to be, in fact, FLSA non-exempt.

Damages

The issue of damages is even more straightforward. The employees at issue, having been wrongfully exempted from the FLSA for decades, are now entitled to certain standard remedies that Arbitrators and the FLRA have repeatedly, consistently and without exception awarded. But for the Agency's failure to properly classify these individuals, they would have been paid time and a half overtime, for instance, rather than "capped" overtime. The same goes for compensatory time damages and suffered/permitted damages (which will have to be measured in more detail) and attorney fees.

Moreover, the Agency has not produced any caselaw contradicting that provided by the Union. Despite its proclamations that the Union's caselaw is not dispositive, the Agency has failed thus far to provide a single case to support its position. The Union's caselaw, in contrast, is directly on point.

Conclusion

The Agency has the burden of proof in this case. The Union moved for Summary Judgment on the current record before the Arbitrator. The record is full of admissions – binding admissions – that the Agency has classified the positions at issue as FLSA Nonexempt. The Agency had a full and fair opportunity to provide information in conjunction with its Opposition to Summary Judgment.

The Agency:

1. **failed** to provide any such information,
2. **failed** to rebut with competent evidence any of the Union's arguments regarding its evidence already in the record,
3. **failed** to raise any new defenses besides those provided to the Arbitrator and Union, and
4. **failed** to explain how there is any genuine dispute of material fact.

The Agency has not presented any evidence, testimony, ***or to provide any other credible evidence***. The Union requests judgment in its favor.

Respectfully Submitted,

April 10, 2006
Date

____/s/_____
Michael J. Snider, Esq.
Snider & Associates, LLC
104 Church Lane, Suite 201
Baltimore, MD 21208
410-653-9060 phone
410-653-9061 fax

____/s/_____
Carolyn Federoff, President
AFGE Council of HUD Locals, 222

Certificate of Service

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

April 10, 2006

_____/s/_____
Michael J. Snider