

**BEFORE
SEAN J. ROGERS
ARBITRATOR:**

In the Matter of Arbitration Between:

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

Union,

and

**U.S. DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT,**

Agency.

Issue: Compliance with Settlement
Agreement

**AGENCY'S RESPONSE TO THE UNION'S MOTION TO
ENFORCE COMPLIANCE WITH GS-10 AND BELOW
SETTLEMENT AGREEMENT**

The United States Department of Housing and Urban Development ("HUD", "Department" or "Agency"), through its counsel, Epstein Becker & Green, P.C., respectfully submits this response to the Union's Motion to Enforce Compliance with the GS-10 and Below Settlement Agreement. The Union's motion should be denied because it is unnecessary.

Background

The Union filed a grievance on December 24, 2003 seeking reclassification of all improperly classified bargaining unit employees, backpay for uncompensated overtime, and other damages. On September 28, 2005, HUD and the Union entered into a Partial Settlement Agreement under which HUD agreed to reclassify all positions at GS-10 and below as nonexempt effective the first full pay period after October 21, 2005. The Partial Settlement Agreement expressly covers "bargaining unit employees," defined as "any employee in the Agency's Payroll Reports covering the period of June 18, 2000 through October 1, 2005."

The Union now alleges that HUD has not complied with the Partial Settlement Agreement. In support of its allegation, the Union cites two items: (1) employee listings from

the National Finance Center (“NFC”) listing a small number of employees at GS-10 and below as exempt, and (2) “USAJobs” internet vacancy announcements listing positions at GS-10 and below as exempt.

Significantly, the Union does not allege that any specific employee has been denied overtime pay that is due him or her. The Union asserts speculatively that: “The employees who are still Exempt are still being shorted on any overtime they work.” However, the Union does not assert that any specific employee actually has worked overtime for which he or she was not paid properly. **The Union provides no affidavit, declaration, testimony or other documentary evidence that any specific employee is being “shorted.”**

In fact, HUD has taken all necessary steps to reclassify workers and ensure that any employee covered by the Partial Settlement Agreement is paid overtime compensation if that employee is directed to work overtime. As the attached Declaration of Norman Mesewicz indicates, HUD’s review of its internal personnel database performed on May 17, 2006 shows all positions at GS-10 and below classified as FLSA nonexempt.

HUD acknowledges that an NFC report dated May 15, 2006, shows approximately 40 positions at the GS-10 level and below to be FLSA exempt. An earlier version of this report is cited by the Union, and HUD agrees that there continue to be problems with that report. However, as explained in Mr. Mesewicz’s declaration, NFC is not part of HUD. Rather, NFC is part of the U.S. Department of Agriculture and is a contractor to HUD. Thus, HUD’s control over NFC and NFC records is limited. More importantly, although NFC handles HUD’s payroll system, it does not determine entitlement to overtime pay. Thus, an FLSA exempt classification of a position in the NFC system will not block the payment of overtime pay to the incumbent of that position. Instead, NFC pays the employees what HUD tells NFC to pay. And, to the best of HUD’s knowledge, HUD’s instructions to NFC have consistently complied with the Partial Settlement Agreement. The Union does not allege otherwise.

Discussion

The Union's motion should be denied because it is unnecessary. HUD already is in compliance with the Partial Settlement Agreement, whose operative requirement was that HUD reclassify certain employees and positions to FLSA nonexempt effective the first full pay period after October 21, 2005 so that they will be eligible for overtime pay as nonexempt employees. As the attached declarations show, HUD has done this. In a good faith effort to address the Union's concerns in its motion, HUD has taken additional steps to remind HUD managers of the requirements of the Partial Settlement Agreement. For example, at the request of counsel, Deputy Assistant Secretary Edwards sent a reminder to managers just this morning. *See* Exhibit 1. And, as Mr. Mesewicz explains in his declaration, he has consulted the pertinent HUD Personnel Management Specialists, and has been advised that the FLSA status of all positions at the GS-10 level and below will be nonexempt in the NFC report for the pay period ending May 13, 2006. In all respects, HUD is working diligently to resolve the erroneous entries.

All the Union alleges are certain bureaucratic paperwork and computer glitches, which HUD does not deny. However, these paperwork glitches have no impact on the pay status of covered employees. Thus, they are not a proper basis for a motion to enforce the Partial Settlement Agreement, especially when no evidence is proffered that either the Union or a bargaining unit member has been harmed by these glitches.

The Union also complains that certain job announcements have been posted on the internet listing jobs at GS-10 or below as exempt. However, the Partial Settlement Agreement does not cover internet advertising and/or employees who have not yet been hired. The Partial Settlement Agreement expressly covers "bargaining unit employees," specifically, "any employee in the Agency's Payroll Reports covering the period of June 18, 2000 through October 1, 2005." Obviously, an employee who has not been hired yet would not have been in the

Agency's Payroll Reports covering the period of June 18, 2000 through October 1, 2005, and also is not a member of the bargaining unit.

In any case, the fact that a position is listed as exempt in a job announcement does not affect the pay of the individual that is hired to fill that position. Since the job is classified as nonexempt in HUD's internal systems, the employee will be treated as nonexempt. As an added precaution, however, Ms. Edwards explains in her attached declaration that she has instructed the Director of the Office of Human Resources to ensure that vacancy announcements issued by Headquarters Human Resources staff for all positions at the GS-10 level and below in place on October 21, 2005 identify those jobs as FLSA non-exempt. She also has asked the Deputy Assistant Secretary for Operations to ensure the same for vacancy announcements issued by Field Human Resources staff over which she has authority. As already noted, she reminded them again this morning. *See* Exhibit 1.

Conclusion

As the foregoing demonstrates, HUD has complied with the Partial Settlement Agreement and is taking extra steps to confirm that compliance. To the best of HUD's knowledge, any GS-10 or below employee who should be receiving overtime pay is receiving it. HUD is not aware that either the Union or a specific employee has complained of an instance where such pay was denied improperly.¹ For all of these reasons, the Union's motion is unnecessary and should be denied.

¹ Indeed, HUD finds it disturbing that the Union is incurring attorneys fees to file this type of motion and wasting the arbitrator's time to resolve it. In the event that the Union is aware of a specific employee as to whom the Partial Settlement Agreement has not been implemented, the Union is encouraged to communicate with the undersigned in order to resolve any lingering problems.

Dated: May 19, 2006

Respectfully submitted,

EPSTEIN BECKER & GREEN P.C.

/s/

Daniel B. Abrahams
Peter M. Panken
Frank C. Morris, Jr.
1227 25th Street, N.W., Suite 600
Washington, D.C. 20037
(202) 861-1854
Facsimile (202) 861-3554
dabrahams@ebglaw.com
Counsel to the Agency

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Agency's response to the Union's Motion to Enforce Compliance with GS-10 and Below Settlement Agreement was sent to counsel for the Union on May 19, 2006 by email to mike@sniderlaw.com and carolyn_federoff@hud.gov.

/s/

Daniel B. Abrahams

DC:629831v1

Barbara J. Edwards
05/19/2006 10:00 AM

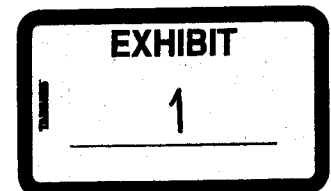
To: dolores_cole@hud.gov, sherman_R_Lancefield
cc: emmett_I_Aldrich@hud.gov
Subject: GS-10 and below vacancy announcements

As you know, the Department has taken the position that the FLSA status of all positions at the GS-10 level and below that were in place on October 21, 2005 is non-exempt.

The union has alleged that certain vacancy announcements for positions at the GS-10 level and below are appearing on USA Jobs as FLSA exempt while they should be non-exempt.

Please ensure that vacancy announcements issued by your staffs for positions at the GS-10 level and below in place on October 21, 2005 are classified as FLSA on-exempt.

Thanks.



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

Declaration of Barbara J. Edwards

I, Barbara J. Edwards, do hereby state as follows:

1. I am the Deputy Assistant Secretary for Human Resource Management at the U.S. Department of Housing and Urban Development ("HUD" or "Department"). In that capacity, my responsibilities include the Office of Human Resources. I am considered to be the primary leader in Human Capital matters for the Department.
2. Prior to my current position, I served as Deputy Assistant Secretary for Resource Management, where I was responsible for administering a \$142 million budget. My responsibilities included delivery of support for national initiatives, providing policies and guidelines, and strategic planning for the Office of Administration's services, including but not limited to human resources, to include staffing and classification and human resources related services.
3. I have 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.
4. My official duties include responsibility for the Departments recruitment efforts. One way in which recruitment is accomplished is through the issuance of vacancy

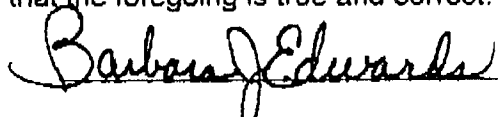
announcements. Each vacancy announcement issued by the Department indicates the FLSA status of the position in question.

5. The union has claimed that certain vacancy announcements for positions at the GS-10 level and below indicate that the position(s) are FLSA exempt while they should be FLSA non-exempt.

6. As in all systems, the Department's personnel information database, and vacancy announcement issuance process are subject to human error during the course of data entry. The fact that a vacancy announcement states a position is FLSA exempt does not necessarily mean that the position will not be treated as non-exempt when it is encumbered.

7. In order to ensure correctness, I have instructed the Director of the Office of Human Resources to ensure that vacancy announcements issued by Headquarters Human Resources staff for all positions at the GS-10 level and below in place on October 21, 2005 identify those jobs as FLSA non-exempt. I have also asked the Deputy Assistant Secretary for Operations to ensure the same for vacancy announcements issued by Field Human Resources staff over which she has authority. I am confident that the actions I requested have been taken.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 19, 2006.


Barbara J. Edwards

**BEFORE
SEAN J. ROGERS
ARBITRATOR:**

In the Matter of Arbitration Between:

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

Union,

And

**U.S. DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT,**

Agency.

Issue: Compliance with Settlement
Agreement

DECLARATION OF NORMAN MESEWICZ

I, Norman Mesewicz, do hereby state as follows:

1. I am the Deputy Director, Labor and Employee Relations Division, for the United States Department of Housing and Urban Development (HUD). In that capacity, I have been the primary point of contact between the Union and the Agency with respect to this arbitration.

2. On September 28, 2005, I executed, on behalf of HUD, the Partial Settlement Agreement that the Union is moving to enforce. As a result of that agreement, HUD agreed to reclassify all positions at the GS-10 and below level to be FLSA nonexempt.

3. HUD has taken all necessary steps to ensure that any covered employee is paid overtime compensation if that employee is directed to work overtime. A review of HUD's internal personnel database performed on May 17, 2006, shows all positions at GS-10 and below as FLSA nonexempt.

4. A National Finance Center (NFC) report dated May 15, 2006, shows approximately 40 positions at the GS-10 level and below to be FLSA exempt. NFC is not part of HUD. Rather, NFC is part of the U.S. Department of Agriculture and is a contractor to HUD. NFC handles HUD's payroll system, but does not determine entitlement to overtime pay. Thus,

an FLSA exempt classification of a position in the NFC system will not block the payment of overtime pay to the incumbent of that position.

5. I consulted the pertinent HUD Personnel Management Specialists, and was advised that the FLSA status of all positions at the GS-10 level and below will be nonexempt in the NFC report for the pay period ending May 13, 2006.

I declare under penalty of perjury that the foregoing is true and correct. Executed on
May 19, 2006.



Norman Mesewicz