

IN THE MATTER OF ARBITRATION BETWEEN:

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NATIONAL COUNCIL OF HUD :  
LOCALS 222, AFG, AFL-CIO :

Union :

vs

: ISSUES:  
: FLSA EXEMPTIONS

:  
U.S. DEPARTMENT OF HOUSING :  
AND URBAN DEVELOPMENT :

Agency :

:  
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June 26, 2006

RULES ON MOTION EIGHT

*ELITE REPORTING COMPANY*  
*67 Saint Andrews Road*  
*Severna Park, Maryland 21146*  
*410-987-7066 800-734-3337*

1           ARBITRATOR ROGERS: Let me -- Let me give  
2 you a few thoughts right now. One of the  
3 questions that I dealt with when I looked at this  
4 motion was whether or not the motion was within  
5 the scope of this arbitration. And, the parties  
6 agreed on -- in pre-arbitration conference calls,  
7 and also the first day of -- first several days,  
8 on and off, of our meetings together that there  
9 would -- this would be a med/arb effort. It has  
10 evolved more to the arbitration side through 2006  
11 then to the mediation side. But that was always  
12 their understanding.

13           And the settlement came covering the GS-  
14 10s and below during the mediation process. And  
15 for that reason, because the parties agreed from  
16 the very beginning that this process would be a  
17 med/arb process. And, because the settlement  
18 arose as the result of some successful mediation  
19 and -- well, I guess that is as result of the  
20 parties reasonableness. I think that compliance  
21 with that settlement is well within my scope of

1 being able to decide it.

2           It is true that there is no evidence in  
3 front of me that employees GS-10 and below  
4 employees -- let me say this. Every employee I am  
5 talking about now is GS-10 and below, so that I  
6 don't have to keep repeating that. It is true  
7 that there is no evidence that these employees  
8 have not been paid overtime correctly. Today we  
9 have heard about this employee Hancock and that  
10 raises another issue I am going to get to in a  
11 minute.

12           So, therefore, the issue that I see in  
13 front of me is whether or not certain personnel  
14 records have been corrected. And, both the Union  
15 and the employer are certainly entitled to the  
16 benefits and the burdens arising out of that  
17 settlement agreement, which includes an obligation  
18 to correct all the records. It is a lot of  
19 people. It is 900 people. And there are a lot of  
20 records that need to be corrected. But, by  
21 correcting records promptly you reduce the payroll

1 errors, positions are properly coded and the  
2 identification of employees within those positions  
3 are properly coded. It serves to -- correcting  
4 all the records serves to implement the parties'  
5 agreement, both in letter and spirit -- the  
6 settlement agreement. Correcting all the records  
7 in compliance builds trust between the parties,  
8 and it also honors the entire labor relations  
9 process.

10 So, it is important -- I concluded that  
11 it is important that the records be corrected to  
12 show that these employees are non-exempt.

13 The job announcements kind of represent  
14 another problem for me. The job announcements  
15 from the employer says -- are really not the  
16 Union's concern. That the settlement didn't go to  
17 the advertisement of the positions or the  
18 applicants.

19 On the other hand the Union has said that  
20 it is more of the same records issue. That the  
21 correct advertisements are in the interest of the

1 Union and also in the interest of the applicants  
2 who eventually become employees. The  
3 advertisements of the position, it seems to me,  
4 involved a personnel practice or a matter of  
5 effective working condition, because they define  
6 the position from the employers standpoint from  
7 the very day that the position is created. And,  
8 so I think there is an interest there that the  
9 Union has a right to protect.

10 The most troubling thing for me is its  
11 been, as the Union says nine months, and we still  
12 have people who are not coded correctly. The  
13 employer says that they have done all they can,  
14 that it is NFC that has the errors. That the --  
15 that internally the employer has done everything.

16 NFC is nothing more than a vendor of HUD.  
17 HUD hires NFC just as some agencies hire other  
18 agencies to do their payroll. And, I believe  
19 there is a simple agency relationship -- agency  
20 with a small "a" -- between NFC and HUD. And, so  
21 HUD is responsible for the conduct of NFC. And I

1 know from my experience as an arbitrator, but also  
2 my experience in the Federal sector that dealing  
3 with NFC can be daunting, but it is still the  
4 Agency's obligation to have NFC correct records.  
5 The Agency is responsible for NFC's conduct and it  
6 is irresponsible to say that is NFC, it is not  
7 HUD. That is not getting very far with me.

8           On the other hand, the Agency has not had  
9 much opportunity to show its' compliance, at least  
10 here, in this miniature hearing. And I am  
11 interested in whatever this guidance was that went  
12 out. And, as I understand we are now at a point  
13 where 32 positions are not properly coded and the  
14 Union has raised another problem. That is the  
15 offering -- the employees under the Fair Labor  
16 Standards Act -- these employees are under the  
17 Fair Labor Standards Act have the right to make a  
18 choice between overtime pay or in comp time. And  
19 if they are not properly coded and their  
20 supervisors aren't aware of their rights, then the  
21 Agency is not complying with the settlement

1 agreement.

2           The evidence of all that -- the evidence  
3 of the failure to comply resulting in employees  
4 losing a choice right under the FSLA and the  
5 employers position that no one has not been paid  
6 incorrectly. I think that is a triple negative.  
7 The Agency's position that everyone has been paid  
8 correctly since the settlement agreement -- I  
9 don't really have much evidence in front of me on  
10 any of that. But I think I have enough evidence  
11 to rule on this motion. And -- at least as to  
12 those 32 employees I find that the Agency is not  
13 in compliance with the settlement agreement.

14           MR. PANKEN: Do you have a list of the 32  
15 employees? Has the Union ever come up with it?

16           MR. SNIDER: Mr Panken --

17           ARBITRATOR ROGERS: Wait a minute. It is  
18 not my responsibility. It is not the Union's  
19 responsibility to track the Agency's employees.  
20 That is something that the Agency is responsible  
21 for. And we just had a -- there is a list that

1 you just exchanged, which I understands includes  
2 32 employees that are not coded correctly.

3 MR. PANKEN: Not this list.

4 MR. MESEWICZ: No, it is the -- that's  
5 off the NFC.

6 MR. PANKEN: Off the NFC report. Okay.

7 ARBITRATOR ROGERS: As I said, you are  
8 responsible for the NFC report.

9 MR. PANKEN: Okay.

10 ARBITRATOR ROGERS: I am not buying into  
11 the concept that it is the NFC, and therefore HUD  
12 is not responsible. That is somebody you have  
13 hired to do the work. Your are responsible to see  
14 that they do the work correctly. They are not  
15 doing the work correctly if the employees are not  
16 coded, then you are responsible. And it has been  
17 -- the evidence shows it has been nine months.  
18 That is too long. That is too long.

19 And I would expect that it might take  
20 awhile. This is a difficult change, but arguably  
21 a ~~see~~ change for the Agency, and it is difficult.

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1 But, nine months is too long.

2 So, I am going to grant the Union's  
3 motion. I am going to order the Agency to be in  
4 full compliance with the settlement agreement to  
5 include all coding within the Agency, all coding  
6 at NFC and all coding of job announcements. And  
7 that is to occur within 30 calendar days from  
8 today, June 26, 2006. And the Agency has to  
9 produce evidence of compliance to me and to the  
10 Union.

11 If the Agency finds anyone has not been  
12 paid properly in that period of time they need to  
13 pay that. If the Union -- they need to make that  
14 pay properly. If the Union knows of anyone who  
15 has not been paid properly then they need to  
16 notify the Agency immediately or a reasonable  
17 period of time -- as soon as they can -- as soon  
18 as practical. As soon as practical. I just gave  
19 you three standards. It is one standard. As soon  
20 as practical.

21 And I am going to defer the question of

1 damages on this motion because I have no evidence  
2 of damages of any kind. I am also going to defer  
3 the question of attorneys' fees on this motion,  
4 which I wouldn't -- even if I were to say anything  
5 about attorneys' fees it would tell you to brief  
6 the matter, because I don't have any evidence on  
7 that as well. I am defer<sup>ing</sup> all that for 30 days --  
8 for that 30 day period that I want the Agency to  
9 get in compliance.

10 And then after that -- once the Agency is  
11 in compliance in terms of records then we will  
12 discuss damages and attorneys' fees.

13 That is my ruling. Are there any  
14 questions about the rules?

15 MR. MESEWICZ: I have a question. Could  
16 the timing of when we need to be in compliance put  
17 in terms of pay periods because that's the way the  
18 system works. You put in the change and then it's  
19 maybe one or two pay periods -- if it's put in  
20 correctly that there is at least one pay period  
21 lag time before the change shows up on the NFC

1 report.

2 ARBITRATOR ROGERS: Mr. Snider, any  
3 thoughts on that? Any reaction?

4 MR. SNIDER: No, that is reasonable, the  
5 end of the next pay period following thirty days.

6 ARBITRATOR ROGERS: What pay period are  
7 we at now? When does the pay period end? Does it  
8 end this Friday or did it just end?

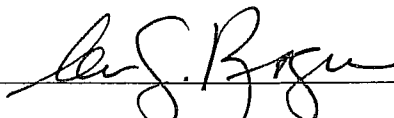
9 MR. MESEWICZ: I don't know.

10 ARBITRATOR ROGERS: <sup>ALL RIGHT</sup>~~Alright~~, then we will  
11 do it this way. If the pay period ended this past  
12 Friday, the 23rd, then I am going to give you  
13 three pay periods to comply. That should be that.  
14 That will give you the current pay period and then  
15 two more. If the pay period ends this Friday, the  
16 30th, then I will give you two pay periods to  
17 comply. So, either way it is going to be a  
18 sufficient time. If you need more time get back  
19 to me, but we have been at this nine months and I  
20 am -- absent extraordinary circumstances or the  
21 Union's agreement I am not inclined to give any

1 extensions.

2 Any other questions?

3 MR. SNIDER: None from the Union.

  
Sean J. Rogers, Esquire  
Arbitrator