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 Motion for Fees

Union's Motion for Summary Judgment Relating to Liability for Attorney Fees In Re Work GS-10's and Below Positions, and for GS-950-11 and 12 Positions

The Union, by and through its attorneys, Michael J. Snider, Esq., Ari Taragin, Esq., Jeffery Taylor, Esq., Jason Weisbrot, Esq. and Jacob Schnur, Esq. and the Law Offices of Snider & Associates, LLC and Council President, Carolyn Federoff, Esq., requests that the Arbitrator grant its **Motion for Summary Judgment Relating to Liability for Attorney Fees In Re: GS-10 and Below Employees and GS-950-11 and 12 Employees** as a matter of law. The Union further requests that the Parties be ordered to attempt to mediate the actual amount of attorney fees due to the Union for work on GS-10 and below positions/employees and for GS-950-11 and 12 positions/employees and, absent settlement, that the Union be allowed to petition for fees and the Agency be allowed a response.

Applicable Law

Section § 216(b) of the FLSA, provides that "[t]he court . . . shall, in addition to any judgment awarded to the plaintiff [under the FLSA] allow a reasonable attorney's fee to

be paid by the defendant, and costs of the action." Accordingly, a plaintiff who prevails on any claim under the FLSA is entitled to attorney's fees under that Act. ***IFPTE, Local 529***, 57 FLRA 784, 786 (2002).

In the decision underlying ***AFGE Local 446 and US Department of Veterans Affairs Medical Center, Ashville, NC***, 58 FLRA No. 86 (March 4, 2003), the Arbitrator denied the Union's request for fees. The Authority noted that arbitrators may award attorney fees (Id, citing ***AFGE, Local 987***, 57 FLRA 551, 556 (2001); ***NTEU***, 53 FLRA 1469, 1487 (1998); ***United States Dep't of the Treasury, IRS, Wash., D.C.***, 46 FLRA 1063, 1072-73 (1992)). The Authority has repeatedly stated that arbitrators are authorized to apply the attorney fees provision in the FLSA if the issue is properly before them. See ***IFPTE, Local 529***, 57 FLRA at 786.

The Authority found clearly in ***Ashville***:

> "Applying the foregoing precedent, the grievants are entitled to reasonable attorney fees under the FLSA. Accordingly, we conclude that the Arbitrator's contrary conclusion is inconsistent with the FLSA. Consistent with ***IFPTE, Local 529***, 57 FLRA at 786, we remand the portion of the award denying attorney fees to the parties for resubmission to the Arbitrator, absent settlement, to determine the amount of attorney fees that is reasonable."

A plaintiff who prevails on a claim under the FLSA is entitled to "a reasonable attorney's fee." 29 U.S.C. § 216(b). A party "prevails" under a fee-shifting statute, such as the FLSA, if it "succeed[s] on any significant issue in litigation which achieves some of the benefit . . . sought." ***Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.,*** 489 U.S.

782, 792-93 (1989); ***Hensley v. Eckerhart**,* 461 U.S. 424, 433 n.7 (1983); ***Soler v. G & U, Inc**.,* 801 F. Supp. 1056, 1059 (S.D.N.Y. 1992) (applying test to FLSA claim). *See also* Ellen C. Kearns et al., The Fair Labor Standards Act 1103-05 (1999).

The degree of success obtained is not a consideration in determining whether an employee is a prevailing party. ***Farrar v. Hobby**,* 506 U.S. 103, 113-14 (1992)*;* ***AFGE, Local 3310**,* 53 FLRA 1595, 1600 (1998). Consistent with this precedent, the Authority has held that an employee is a prevailing party if the employee receives "an enforceable judgment or settlement which directly benefited [the employee] at the time of the judgment or settlement." ***NAGE, Local R4-6**,* 55 FLRA 1298, 1301 (1999); ***International Federation of Professional and Technical Employees, Local 529 vs. United States Department Of The Army, Army Corps Of Engineers, Memphis District, Memphis, Tennessee***, 57 FLRA No. 174 (May 21, 2002).

. **Applicable Facts**

As of today, the Agency has ceded approximately 60 GS-950-11 and 12 employees plus approximately 350-450 GS-10 and below employees through the Grievance/Arbitration process (**See**, e.g., Employee Lists, 2000-2005; GS-10 and Below Partial Settlement Agreement; Agency Agreement to Cede GS-950-11 Employees 2/21/06; Arbitrator Email Dated February 28, 2006 Re: Agency Agreement to Cede GS-950-12 Employees).

These settlements have directly benefited hundreds of HUD employees, in that they will now earn uncapped overtime (as opposed to “capped” overtime under Title V), are entitled to overtime pay and, at their election, compensatory time off (instead of having no choice under Title V Overtime) and are now entitled to suffered or permitted overtime (instead of having to have overtime ‘ordered and approved,’ as under Title V).

These are significant benefits to the employees, among others (ie, FLSA exempt employees who earn comp time, but do not use it, eventually lose it; non-exempt employees who do not use their earned comp time have it converted after a certain time period to overtime pay; see, e.g., CBA at **Section 18.04 - Accumulation of Compensatory Time**: “If an FLSA nonexempt employee does not request or take compensatory time within the established time periods, the unused compensatory time will be paid at the overtime rate in effect for the work period in which it was earned.”).

Argument

A prevailing Plaintiff/Union under the FLSA is entitled to attorney fees. Here, the Union is a prevailing party, as it has accomplished through litigation two settlement agreements which have substantially forwarded the litigation and have entitled hundreds of employees to, at a minimum, prospective FLSA pay. Since the Union is a prevailing party, it is entitled to attorney fees under the Statute and FLRA precedent.

At this time, the Union only asks for a finding regarding liability for fees, not an award as to the amount of fees. The Union requests that the Parties be ordered to attempt to

mediate the actual amount of attorney fees due to the Union for work on GS-10 and below positions/employees and for GS-950-11 and 12 positions/employees and, absent settlement, that the Union petition for fees and the Agency be allowed a response.

The Union only requests fees for work performed on this case in furtherance of the liability portions of the GS-10 and below positions and GS-950-11 and 12 positions. The Union does not at this time request fees for any work on any other grade or series, or work on any damages cases. Due to the nature of the case, certain work that is not divisible among particular grades or attributable to any particular job series would be included, at least on a pro rata basis, in the Union's fee request.

Conclusion

Undisputably, the Agency has ceded all GS-10's and below, and GS-950-11's and 12's (ie, the entire 950 series). The Union is a prevailing party on these issues and is entitled to an award of attorney fees at this time. We ask for an Order awarding liability for attorney fees as a matter of law, since the facts are undisputed.

Respectfully Submitted,

___/s/_____
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Attorney for the Union

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

Certificate of Service

I certify that a copy of the foregoing was served upon the Agency and Arbitrator via email and/or via first class mail.

Date: March 24, 2006

___/s/_____
Michael J. Snider, Esq.

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May 12, 2006

VIA EMAIL

Sean J. Rogers, Esquire
Arbitrator
1100 Gatewood Drive
Alexanderia VA 22307

Re: **Premature Award of Attorney Fees**
In the Matter of Arbitration Between:
AFGE Council 222 and U.S. Department of Housing and Urban Development

Dear Mr. Rogers:

Pursuant to your instructions, the U.S. Department of Housing and Urban Development ("HUD" or "Agency") is providing this informal response to the Union's "Motion for Summary Judgment Relating to Liability for Attorney Fees." We understand that, in the event the Arbitrator is inclined to grant the Union's motion, HUD will first be given the opportunity to brief the issue more completely.

Discussion

A finding at this stage of the arbitration that HUD will be liable for attorney fees would be premature. The only reason this question even arises at this point is that the parties agreed informally to bifurcate the proceeding and address liability and damages separately. Since only rarely are wage and hour cases in the courts bifurcated, any finding of liability ordinarily comes at the end of the proceeding. That is not the case here. In agreeing to bifurcation, HUD never consented to separate determinations of attorney fees for each stage. And, nothing in the Collective Bargaining Agreement ("CBA") serves as a basis for a determination of liability for attorney fees at this juncture. In fact, the only mention of attorney fees awards in the CBA relates to awards under the Back Pay Act. CBA ¶23.10(2). Attorney fee awards under the Fair Labor Standards Act ("FLSA") are not mentioned in the CBA.

Since the CBA does not mention attorney fees except in Back-Pay Act cases, any authority that the Arbitrator may have to award attorney fees must come only from the language of the FLSA itself. Accordingly, justice and fairness require focusing on exactly what the FLSA says--especially when the employer is a sovereign.[1] The fee-shifting provision in section 16(b) of the FLSA states:

> The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

29 U.S.C. §216(b) (emphasis added). Since, under the FLSA, an award of attorney fees is "in addition to any judgment," this necessarily requires that there have been a "judgment." If, as is the case here, there has been no judgment, there is no basis for awarding attorney fees.

Here, the Union's motion is expressly based on the fact that the Union has procured two settlement agreements that call for HUD to reclassify certain job titles as exempt. *See* Motion at 3 ("Here, the Union is a prevailing party, as it has accomplished through litigation two settlement agreements which have substantially forwarded the litigation and have entitled hundreds of employees to, at a minimum, prospective FLSA pay.") However, as the language of the FLSA makes clear, a settlement agreement, as opposed to a judgment, does not entitle the plaintiff to attorney fees.

The precedents of the U.S. Court of Appeals for the Federal Circuit also make clear that the term "prevailing party" does not include a party who gets relief through a settlement agreement. Specifically, in *Rice Services, Ltd. V. United States*, 405 F.3d 1017 (Fed. Cir. 2005), the Court said:

> [T]he [Supreme] Court stated that a party cannot be said to "prevail" unless it "received at least some relief on the merits of [its] claim." Furthermore, the Court indicated that "relief on the merits" at least required that the party obtain a court order materially changing the legal relationship of the parties. The Court specifically held that "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." Accordingly, the Court held that the "catalyst theory" could not serve as a basis for a fee award because "it allows an award where there is no judicially sanctioned change in the legal relationship of the parties."

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[1] It is well-established that waivers of sovereign immunity, including fee-shifting statutes, must be construed narrowly. *Carmichael v. United States*, 70 Fed. Cl. 81, 83 (2006).

Id. at 1023-24 (emphasis added; citations omitted). *See also Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health,* 532 U.S. 598 (2001) (voluntary change in one party's behavior does not make the other party a "prevailing party"). The key to "prevailing party" status is a court order--or, in this case, an Arbitrator's order--granting monetary relief on the merits.

Moreover, even if a settlement agreement could make the Union a "prevailing party," these particular settlement agreements did not do so. A party "prevails" under a fee-shifting statute, such as the FLSA, if it succeeds on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989) (emphasis added). The Supreme Court has explained:

> Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the "generous formulation" we adopt today has not been satisfied. [Citations omitted.] The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.

Id. at 792.

On page 1 of its motion, the Union quotes some of this same language, but omits the very important words underlined above--"in bringing suit." The Union's motion proclaims that it has achieved benefits and should be awarded attorney fees. However, by achieving an interim goal, e.g., a settlement agreements stating that a certain job title will be reclassified as non-exempt, the Union has not won any significant issue in litigation which achieves some of the benefit the Union sought in bringing suit. The Union brought this arbitration to win overtime pay (i.e., money). Settling a dispute about a job classification's exempt or non-exempt status does not *per see* get the Union or any employee the benefit the Union sought in bring suit (again, money). Rather, the benefit the Union has achieved through the settlement agreements it cites is "purely technical or *de minimis*," to use the Supreme Court's words. This is the case for several reasons.

First, merely prevailing on an argument that a specific job title is non-exempt does not mean any specific employee will be entitled to overtime wages. The law is crystal clear--a classification or job title alone is insufficient to establish the exempt or non-exempt status of an employee. Rather, the exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the applicable regulations. *See* 29 C.F.R. §541.2 (2005); *Hendricks v. Culligan Water Conditioning, Inc.*, 21 W.H. Cas. (BNA) 1008 (E.D. Wis. 1974). DOL refers to this as a "fundamental concept, equally applicable to all the exemption categories." 69 Fed. Reg. 22,128 (April 23, 2004).

Second, prevailing on an argument that a specific employee is non-exempt does not mean that employee will be entitled to overtime wages. The Union still has to show that: (1) the employee worked overtime; (2) the work was "suffered or permitted;" and (3) the employee was not already compensated in some other form such as Credit Hours, Compensatory Time-Off, etc.[2] Before the Union can be entitled to attorney fees, it first has to receive some monetary award of overtime wages to show for its efforts. After receiving a monetary award--if that happens, which is not a foregone conclusion--the parties might agree that the Union is the "prevailing party." If not, the Union can re-file its motion at that time. Thereafter, it could submit its documentation of its "reasonable" attorney fees. On the other hand, it is possible that the overtime wages that the Union will collect will be relatively small compared to its claimed attorney fees, thus rendering the fees unreasonable. Entitlement to attorney fees simply is not an issue that lends itself to summary judgment.[3]

As far as the Agency can tell, the issue presented here has never been addressed by the Federal Labor Relations Authority ("FLRA") in the context of the FLSA. However, in the context of the Back Pay Act, the FLRA has stated unequivocally:

> [D]eterminations as to whether a grievant is a prevailing party and whether backpay is a legally authorized remedy cannot be made until an award becomes final and binding. Therefore, it would be premature for an arbitrator to decide requests for attorney fees before an award becomes final and binding.

Allen Park Veterans Administration Medical Center and American Federation of Government Employees Local 933, 34 F.L.R.A. 1091 (Feb. 28, 1990) (emphasis added). *See also Philadelphia Naval Shipyard and Philadelphia Metal Trades Council*, 32 F.L.R.A. 417 (June 20, 1988).

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[2] This second point will be discussed in greater detail in the Agency's Motion in Limine Regarding Damages, which HUD will file within the next week.

[3] Moreover, a ruling that the Union is already entitled to attorney fees would reduce any incentive for the Union to keep its incurred costs reasonable. Counsel for the Union has intimated that his fees are already "in the millions." However, the Supreme Court has recognized that the reasonableness of a fee request is directly related to "the degree of the plaintiff's overall success." *Tex. State Teachers Ass'n, supra* 489 U.S. at 792. Applying that standard, the Arbitrator ultimately may find that the Union's fees were excessive. For instance, the Union was represented at the Series 904 hearing held earlier this week by between five and seven attorneys at different times. Also, on more than one occasion, counsel for the Union has demanded that HUD's undersigned counsel "cc" every member of Union counsel's law firm on every email. Thus, there is good reason to closely scrutinize any demand for attorney fees that the Union eventually submits. (Union counsel has asserted that his associates participate solely for their educational benefit, and that the Union would not seek fees for their attendance.)

The FLRA went on to note that fee petitions may be submitted at any time; they just cannot be ruled on prematurely. The award has to be "final and binding." In contrast, when all there has been is a partial settlement agreement addressing one issue in the case, there has been no final and binding award.

Here, the Union has turned the process on its head. It has submitted no fee petitions. Neither the Agency nor the Arbitrator knows what the Union plans to seek in attorney fees--although counsel has floated a number in excess of $1,000,000. And, most importantly, no one, not even the Union, knows whether the Union will ever be the "prevailing party." Nevertheless, the Union wants the Arbitrator to decide now that the Union will be entitled to attorney fees before any award is made, let alone before it is "final and binding." It simply is premature to make that determination.

The United States Supreme Court has addressed circumstances similar to those presented here, albeit in the context of a suit under the Civil Rights Act. In *Farrar v. Hobby*, 506 U.S. 103 (1992), the Court taught that—

> to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement.

Id. at 111. Although the Union's motion speaks of potential benefits that newly reclassified employees may receive down the road, for example, the opportunity to earn additional pay if they work overtime, that benefit is speculative and indirect. The employees covered by the partial settlement agreement in which HUD agreed to reclassify their positions received no direct benefit at the time of the partial settlement agreement, which is the Supreme Court's standard. Even if there had been an arbitral finding that the Agency violated the FLSA, which there was not, the Supreme Court has said:

> To be sure, a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party. Of itself, "the moral satisfaction [that] results from any favorable statement of law" cannot bestow prevailing party status.

Id. at 113 (emphasis added). Here, too, the Union may have received "moral satisfaction" from the partial settlement agreements, but the Union has not achieved "prevailing party" status entitling it to attorney fees.

Conclusion

For all of the reasons set forth above, the Union's motion is premature. Therefore, the Agency respectfully asks the Arbitrator to deny the Union's "Motion for Summary Judgment Relating to Liability for Attorney Fees."

Respectfully submitted,
/s/ Shlomo D. Katz
Daniel B. Abrahams
Shlomo D. Katz

Counsel for the Agency

Enclosures

cc: Michael J. Snider, Esquire
Carolyn Federoff

DC:585828v2

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
UNION'S MOTION for SUMMARY JUDGMENT
RELATING to LIABILITY for ATTORNEY FEES
In Re WORK GS-10's and BELOW POSITIONS,
and for GS-950-11 and 12 POSITIONS
Motion 7

APPEARANCES:

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

Michael J. Snider, Esq., Ari Taragin, Esq., Jeffery Taylor, Esq., Jason Weisbrot, Esq. and Jacob Schnur, Esq., Snider & Associates, LLC – *representing the Union and the Grievants.*

Carolyn Federoff, Esq., American Federation of Government Employees, Council 222, President – *representing the Union and the Grievants.*

On behalf of the Department of Housing and Urban Development:

Daniel B. Abrahams, Esq. and Shlomo D. Katz, Esq., Epstein, Becker & Green, P.C. – *representing the Agency.*

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

I. PROCEDURAL BACKGROUND

During the arbitration of the American Federation of Government Employees, Council 222, AFL-CIO's (AFGE) June 18, 2003 Fair Labor Standards Act (FLSA) travel, and December 24, 2003 FLSA classification and compensation grievances, the Parties reached two settlements relating to the FLSA classification of GS-10 and below employees, and GS-950-11 and 12 employees.

Based on these settlements, on March 24, 2006, AFGE filed a Motion for Summary Judgment Relating to Liability for Attorney Fees In Re Work GS-10's and Below Positions (Motion), and for GS-950-11 and 12 Positions. On or about May 12, 2006, the Department of Housing and Urban Development (HUD) (collectively, the Parties) filed a letter reply (Reply) to AFGE's Motion.

This Decision and Order is based on the Parties' submissions, the collective bargaining agreement, applicable statutes and case law.

II. AFGE's MOTION

AFGE asserts that it is a prevailing party by virtue of the two settlement agreements. AFGE argues that the settlements have substantially advanced the litigation of the arbitration and entitled hundreds of employees to, at a minimum, prospective FLSA pay. As the prevailing party, AFGE argues that it is entitled to attorney fees under the FLSA and Federal Labor Relations Authority precedent.

AFGE requested a finding regarding liability for attorney fees, not an amount of those fees. The AFGE requests that the Parties be ordered to attempt to mediate the amount of attorney fees due to AFGE for its legal work on the GS-10 and below employees and the GS-950-11 and 12 employees settlements. Absent settlement, AFGE says it will petition for attorneys fees and the Agency will respond.

In conclusion, AFGE asserts that the Agency has ceded all GS-10's and below employees, and GS-950-11 and 12 employees which is the entire 950 series. Therefore, AFGE argues it is a prevailing party on these issues and entitled to an award of attorney fees at this time.

For all these reasons, AFGE asks for an Order awarding liability for attorney fees as a matter of law.

III. HUD's RESPONSE

HUD asserts that a finding of attorney fees liability at this stage of the arbitration is premature.

HUD argues that the Parties agreed to bifurcate the arbitration addressing liability and damages issues separately. In agreeing to bifurcation, HUD says, it never consented to separate determinations of attorney fees at each stage of the proceedings. Therefore, HUD argues, any finding of liability for attorneys fees should come at the end of the proceedings.

HUD asserts that the Parties' collective bargaining agreement (CBA) is silent on attorneys fees, except as relating to the Back Pay Act. Therefore, HUD argues, the FLSA governs the Motion. Specifically, HUD cites the FLSA provision,

> The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fees to be paid by the defendant, and costs of the action. (29 USC § 216(b)).

This language necessarily requires a judgment and, without a judgment, there is no basis for an attorney fees award, HUD says. HUD argues that, at this juncture, the Motion is based on two settlements which do not entitle AFGE to attorneys fees which may be due at judgment.

HUD asserts that AFGE is also not the prevailing party as claimed by AFGE, since the relief has come through the settlements. HUD argues that AFGE has not "achieve[d] some of the benefit the parties sought in bringing suit" as required by Supreme Court precedent. HUD argues that the benefit AFGE has achieved through settlement is purely technical or *de minimus* for several reasons. First, HUD argues, merely prevailing on a specific job title's FLSA classification does not mean any employees will be entitled to overtime wages. Second, AFGE still has to show that an employee worked overtime; the work was suffered or permitted; and the work was uncompensated in some other way, for example by credit hours or compensatory time. HUD says, for these reasons the entitlement to attorney fees is not an issue that lends itself to summary judgment sought by the Motion.

HUD asserts the issue of attorney fees has never been addressed by the FLRA in the context of the FLSA. HUD argues that the FLRA has held that it is premature to decide a request for attorney fees before an award is final and binding. The Parties' partial settlements are not final and binding awards, HUD says.

HUD argues that since AFGE has not submitted a fee petition the prevailing party is unknown at this time and there is no final and binding award. Therefore, HUD says that AFGE has turned the process on its head. HUD argues that for these reasons, it is simply premature to make a determination on the Motion. HUD says AFGE may have achieved

moral satisfaction of favorable results, but it has not achieved prevailing party status entitling it to attorney fees.

HUD asks the Arbitrator to deny the Motion.

IV. DECISION AND ORDER

The gravamen of HUD's opposition to the Motion is that it is premature. HUD argues in support of its core position that AFGE is not the prevailing party in a final and binding award yet. For its part, AFGE's specific remedy sought in the Motion is stated as follows:

> The Union only requests fees for work performed on this case in furtherance of the liability portions of the GS-10 and below positions and GS-950-11 and 12 positions. The Union does not at this time request fees for any work on any other grade or series, or work on any damages cases. Due to the nature of the case, certain work that is not divisible among particular grades or attributable to any particular job series would be included, at least on a pro rata basis, in the Union's fee request.

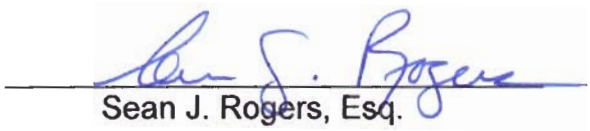
The facts establish that the basis of the Motion is the Parties' settlements of two issues within a dispute that involves over 6,000 bargaining unit employees and as yet unnumbered former-bargaining unit employees. Moreover, the settlements at the foundation of the Motion resolve only the FLSA liability issue regarding bargaining unit employees numbering, according to AFGE, approximately 510 employees. In addition, AFGE acknowledges imprecision in a forthcoming attorneys fees request because "work that is not divisible among particular grades or attributable to any particular job series would be included." AFGE's candor regarding this imprecision is admirable and supports HUD's assertion that an attorneys fees petition is premature.

The Arbitrator is inclined to reject HUD's assertion that AFGE is not the prevailing party as a result of the settlements. However, HUD's assertion that, at this juncture, that the settlements are not final and binding awards has merit sufficient to warrant the dismissal of the Motion now. This is particularly true when considered in relation to the size of the dispute and the resolution processes the Parties still face in the future. However, this conclusion does not reflect on the merit of AFGE's claims for attorney fees. AFGE's claims may be both meritorious and substantial based on the awards cited during these proceedings in similar litigation involving other Federal agencies. In addition, at a later time as the dispute resolution unfolds, AFGE may bring more precision to its attorneys fees claims.

However, at this time and for the reasons stated above, the Motion is premature and for that reason only is dismissed without prejudice.

ORDER:

AFGE's Motion is dismissed without prejudice.



Sean J. Rogers, Esq.
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December 26, 2006