IN THE MATTER OF ARBITRATION BETWEEN:

THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 222, AFL-CIO, UNION, And THE NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1450 v. US DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, AGENCY. _____	)	ISSUE: FLSA Overtime ARBITRATOR SEAN ROGERS

UNION'S MOTION TO INCLUDE PRIOR BARGAINING UNIT EMPLOYEES

The Union moves for an **Order** including prior bargaining unit employees as Grievants in this case, and in support states:

This Grievance was filed on behalf of "all bargaining unit employees" and, if called to testify, Ms. Federoff would confirm that the Union intended to include "past employees" in the Grievance. Past employees include those who retired, were reassigned or promoted, or who took assignments with other Agencies outside of the bargaining unit but who were in the AFGE Council 222 or NFFE Local 1450 Bargaining Unit during the "relevant time period" covered by the Grievance.

Numerous courts have held that collective bargained agreements include employees as long as the action in question arose while the stated agreement was in effect. Here, the

Union seeks to represent in its Grievance any person in the bargaining unit at any time since June 2000, regardless of whether they were in the bargaining unit at the time the Grievance was filed, as long as the employee was in the bargaining unit at the time the FLSA claim arose.

A good faith effort was made to resolve this issue with the Agency. It was not resolved.

Caselaw and Argument

The Grievance Should Include Employees Who Were Members of the Union's Bargaining Unit During the Back-Pay Period.

Persons who were not in the AFGE bargaining unit on the date that the grievance(s) was/were filed; (June 18, 2003 and December 23, 2003) , but who were employed in the bargaining unit positions during the applicable recovery period, should be included, for back-pay purposes, in the FLSA Grievance/Arbitration. If an employee was a member of the AFGE Council 222 or NFFE Local 1450 HUD bargaining unit from June 19, 2000, through June 18, 2003, the employee should not be barred from receiving back-pay because he or she was a) promoted or reassigned out of the bargaining unit before the grievance was filed, b) retired or c) otherwise was in the bargaining unit but was not in the unit as of the date of filing of the Grievance.

This position is consistent with the strong presumption favoring eligibility. As provided by the Supreme Court in **Nolde Bros., Inc. v. Local No. 358 Bakery & Confectionary Workers Union, AFL-CIO**, 430 U.S. 243, 254-5,

> [T]o be consistent with congressional policy in favor of settlement of disputes by the congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration…[a]n order to arbitrate the particular agreement should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

Moreover, the Supreme Court has made clear that in determining whether a claim is covered under a negotiated agreement, the primary consideration is when the claim arose. See, e.g., **Nolde Bros. Inc.**, 430 U.S. at 255, and **Litton Financial Printing Div. v. NLRB**, 111 S. Ct. 2215 (1991).

Following the Court's reasoning the United States District Court in **Muniz v. U.S.**, 972 F.2d 1304 (Fed. Cir. 1992), addressed jurisdictional concerns of a retired employee's suit in Federal District Court regarding claims for FLSA overtime payments owed to him for time worked during employment. The court ruled that the district court was not the proper venue for this matter because the retired employee still had the arbitration and grievance procedures available to him for claims of rights that accrued and vested during employment. Specifically, the court stated that "[w]hen the dispute in question involves a claim which arose during employment, that dispute can only be removed from the grievance and arbitration processes by the explicitly and unambiguously declared intention of the parties."

The Federal Circuit addressed this issue in **Aamodt v. U.S.**, 976 F. 2d 691, 692-93 (Fed. Cir. 1992):

> The United States correctly points out that, in accordance with the rationale of Hess v. Internal Revenue Service, 892 F.2d 1019 (Fed. Cir. 1989), it is the claimant's status at the time the claim accrues that controls the availability of the grievance procedure. Thus Federal employees whose claims were grievable when they arose continue to have access to the grievance procedures after the employee leaves the bargaining unit provides otherwise. Muniz, 972 F. 2d at 1312 (citing Nolde Bros., Inc. v. Local No. 358 Bakery & Confectionery Workers Union, AFL-CIO, 430 U.S. 243 (1997)). Conversely, the federal agency and union may not forbear to entertain such grievances on behalf of former employees, with respect to the claims that accrued while in employee status. This effectuates the comprehensive scheme intended in Carter v. Gibbs and Muniz v. United States.

This line of reasoning was adopted by the FLRA in **International Ass'n of Fire Fighters, Local 13 Panama Canal Comm'n gen. Services Bureau Balboa, Republic of Panama**, 43 FLRA No: 85, 43 FLRA 1012 (1992). **Panama Canal** involved the FLSA claims of present and former employees. The Agency appealed the arbitrator's ruling that the FLSA claims of former employees were valid for the time they were valid for the time they were in the unit. The FLRA rejected the Agency's Appeal:

> We conclude that the Agency's argument that the grievance can only cover bargaining unit employees who were actually employed at the time the grievance was filed is without merit. The authority has held that the grievance can cover employees who were in a bargaining unit at the time the matter complained of in the grievance occurred but who had subsequently left the unit. The grievance in this case concerns the Union's claim that past and present employees are entitled to over time pay they were denied. The Agency has not shown that the arbitrator exceeded his authority by awarding relief to past employees who were denied the overtime pay to which they were entitled. Those employees were in the bargaining unit at the time the violations complained of occurred and they are entitled to relief under the Arbitrators award.

See also **Bureau of Indian Affairs and the National Federation of Federal employees, Local 243**, 25 FLRA 902, 906 (1987); and, **Social Security**

Administration, Mid-America Program Service Center, and American Federation of Government Employees, Local 1336; 26 FLRA 292 (1987).

Arbitrator Van N. Dorr III adopted the same reasoning in his opinion and award on remedy issues in **Department of Navy and AFGE Local 22**, FMCS No. 92-14200 (Sept. 21, 1994). He pointed out that under the **Panama Canal** and **Aamodt** decisions, if the agreement does not exclude the representation of former employees, they are covered by the grievance/arbitration process for claims that pertain to the time period during which they were in the bargaining unit. **AFGE Local 22**, at pgs. 8-9.

More recently, the same reasoning was adopted in a Decision on this exact issue in an FLSA OT case at INS by Arbitrator Samuel Vitaro in **AFGE National Immigration and Nationalization Service Counsel and US Immigration and Naturalization Service** (Vitaro, S)(March 23, 2000)(Attached).

Here, the applicable collective bargaining agreements do not specifically exclude former employees' claims. Thus, consistent with the Federal Circuit's ruling in Aamodt and the FLRA's decision in Panama Canal, former employees' FLSA claims what accrued during the time they were in the bargaining unit are entitled to the same consideration as the FLSA claims by employees who are currently in the bargaining unit.

This clearly demonstrates that the right to overtime pay was specifically stated in the Agreement; that the above excluded employees were part of the bargaining unit at the

time that this claim for rights accrued and vested; and that the Agreement allowed for these employees' rights to be taken through grievance and arbitration procedures.

For the above stated reasons the excluded employees should be properly included in this matter.

WHEREFORE, in light of the above caselaw, argument and facts, the Union respectfully requests that the honorable Arbitrator ORDER that all employees who were in the bargaining unit during the time period June 18, 2000 to present be included in the Grievance.

Respectfully Submitted,

_____/s/_____

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 email

Counsel for the Union

Carolyn Federoff
President, AFGE Council 222

Certificate of Service

I certify that a copy of the foregoing was delivered via email to the Agency's Attorneys and the Arbitrator:

Date: ____October 23, 2006_____ _____

Michael J. Snider, Esq.

IN THE MATTER OF ARBITRATION BETWEEN:

THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 222, AFL-CIO, UNION, And THE NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1450 v. US DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, AGENCY.	)	ISSUE: FLSA Overtime ARBITRATOR SEAN ROGERS

ORDER GRANTING UNION'S MOTION TO INCLUDE PRIOR BARGAINING UNIT EMPLOYEES

On October 23, 2006, after conferring with the Agency and not reaching agreement, the Union moved for an **Order** including prior bargaining unit employees as Grievants in this case. On November 13, 2006, the Agency indicated that it does not oppose the Union's Motion. Therefore, upon consideration of the Union's Motion it is hereby ORDERED that:

1. The Grievances filed by AFGE Council 222 and NFFE Local 1450 include "past employees."

2. "Past employees" include those who retired, were reassigned or promoted, or who took assignments with other Agencies outside of the bargaining unit but who were in the AFGE Council 222 or NFFE Local 1450 Bargaining Unit at any time during the "relevant time period" covered by the Grievances.

3. The "relevant time period" is to be determined.

11/14/06
Date

Arbitrator Sean Rogers