

IN THE MATTER OF ARBITRATION BETWEEN:

NATIONAL COUNCIL OF	)		
HUD LOCALS 222, AFGE, AFL-CIO,	)		
	)		
Union,	)	Issues:	Fair Labor Standards Act
	)		Exemptions, Overtime,
and	)		Comp Time, etc.
	)		
U.S. DEPARTMENT OF HOUSING	)	Arbitrator:	Sean J. Rogers, Esq.
AND URBAN DEVELOPMENT,	)		
	)		
Agency.	)		
_____	)		

**Union’s Motion to Compel**

The Union, through Counsel, moves for an Order compelling the Agency to produce properly requested information or, in the alternative, for an adverse inference.

**Background**

Sunday Travel FLSA Grievance

On June 18, 2003, the Union filed a Grievance of the Parties (“GoP”)(**Attached**) over a pattern and practice of management directed travel by employees during non-duty hours without compensation. The Union alleged violations of the HUD/AFGE Agreement, law, rule and regulation.

In the GoP, the Union requested certain information pursuant to 5 USC §7114(b), including:

“Please provide a list of all persons who traveled on May 4, [2003] including their name, position, series, grade and FLSA status, and advise if they were compensated for non-duty hour travel. If any person is GS-11 or below and the agency has determined that s/he is FLSA exempt, please provide a copy of the person’s position description.

...

For the last three years, please provide a complete list of all employees who traveled during non-duty hours;

...

For each employee identified, please provide his/her name, position, series, grade and FLSA status, and advise if s/he was compensated for non-duty hour travel. If any person is GS-11 or below and the agency has determined that s/he is FLSA exempt, please provide a copy of the person’s position description.”

On March 8, 2004 and April 15, 2004, the Union reiterated its §7114 request for information (attached).

### GoP FLSA Overtime

On December 24, 2003, the Union filed a Grievance of the Parties on behalf of all bargaining unit employees, claiming failure to properly classify employees under the overtime provisions of the FLSA, and failure to properly and fully compensate employees for overtime work (**Attached**).

Also included in the FLSA Overtime GoP was a Request for Information pursuant to §7114(b), which requested, *inter alia*:

“Please provide the following information prior to the Grievance meeting in this case, but in no case later than fifteen (15) calendar days from the date this Grievance is filed:

1. A list of all bargaining unit employees represented by the Union, including first and last name, position title, Agency position number, job series, grade and step, FLSA exempt or non-exempt status, email address, business phone number and business address (in hard copy **and electronic format**)
2. A copy of each employee’s position description.
3. A copy of one SF-50 for each employee since 12/24/00.
4. A copy of all information relied upon to classify each bargaining unit employee.
5. A copy of any FLSA worksheets for each employee since 1/1/90.
6. The name of the individual(s) who made the determination to exempt each FLSA exempt employee, the date the decision was made, and a copy of all information relied upon to make the determination.
7. A copy of any Agency FLSA consistency review since 1980.
8. A list of all overtime worked by each bargaining unit employee since January 1, 1999, by employee.
9. A list of all comp time worked by each bargaining unit employee since January 1, 1996.”

The Agency has at no time refused to provide any of the information based upon failure to provide particularized need, or produced any countervailing interest to production of the information.

The Agency provided the Union with a list of employees, effectively a “snapshot” of the bargaining unit, in paper form only. The Agency stated that it cannot provide a list of overtime hours worked or comp time hours worked. The Agency stated to the Union that it relied upon grade to classify employees, and based upon that representation the Union temporarily withdrew its request for position descriptions. Recently, the Agency provided FLSA worksheets dated August 2004 which stated that they relied upon Position Descriptions (attached). The Union requested that the Agency provide those PDs and received Position Descriptions classified in April 2005 (Attached). Obviously the Agency is withholding information.

The Agency to date has not provided any other information requested, including “The name of the individual(s) who made the determination to exempt each FLSA exempt employee, the date the decision was made, and a copy of all information relied upon to make the determination.” Nor has the Agency provided a list of which of the exemptions provided for in the FLSA and OPM/DOL regulations it is relying upon in its defense.

### **Union’s Need for Information**

In accordance with the above, the Union presented a statement of particularized need, which was never challenged by the Agency.

Nevertheless, the need for the information is obvious. Although the Agency has stipulated that it relied upon grade to classify HUD employees as FLSA exempt, it now claims that it relied upon PDs in making its ex post facto exemption rationalizations. Although relying upon PD is also an invalid and insufficient basis for FLSA classifications, the Union needs the PDs in order to determine the Agency’s basis and whether it may even approach a good faith attempt at compliance.

The Union clearly needs to know which exemption the Agency is relying upon to claim that exempt employees are properly exempt. The Agency must either provide an exemption or cede the employee(s). An exemption is an affirmative defense which must be raised by the Agency, and pled specifically. Without that information, the Agency cannot defend its case. Further, allowing the Agency time to come up with ex post facto rationalizations and to construct a case when there really is no case prejudices the Union and its bargaining unit.

### **Agency’s Failure to Produce Information is Prejudicial and Unwarranted**

The Agency has had over two years to produce the information requested in the Sunday Travel Grievance. The Agency has had 1 year, 10 months to produce the information requested in the FLSA overtime Grievance. That is sufficient time to gather the

information, sufficient time to evaluate the necessity of the information and sufficient time to produce the information.

Given the status of this case and its being in active litigation, the undue delay has prejudiced the progress of the case and the Union's ability to prepare for hearings. Further delay is definitely unwarranted and will only further prejudice the proceedings as a whole and the Union and its Unit in particular.

### **Conclusion**

The Union requests that the Arbitrator ORDER the Agency to produce the requested information within ten (10) days or that he draw an adverse inference from the Agency's failure to produce the information.

NATIONAL COUNCIL OF HUD LOCALS 222,

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## Certificate of Service

I certify that a copy of the foregoing was served upon the following today, via hand delivery:

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Date: September 28, 2005

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Michael J. Snider, Esq.