

IN THE MATTER OF ARBITRATION BETWEEN:

NATIONAL COUNCIL OF HUD)	
LOCALS 222, AFGE, AFL-CIO,)	
)	
Union,)	Issue: FLSA Overtime
)	FLSA Exemptions
v.)	
)	Union's Motion for Fees
U.S. DEPARTMENT OF HOUSING)	
AND URBAN DEVELOPMENT,)	
)	
Agency.)	
_____)	

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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_____/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.