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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
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Shlomo D. Katz

Counsel for the Agency

Enclosures

cc: Michael J. Snider, Esquire
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