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.

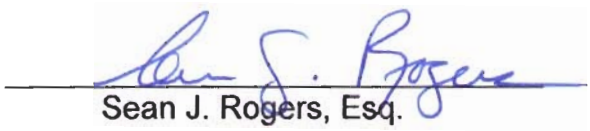
The facts establish that the basis of the Motion is the Parties' settlements of two issues within a dispute that involves over 6,000 bargaining unit employees and as yet unnumbered former-bargaining unit employees. Moreover, the settlements at the foundation of the Motion resolve only the FLSA liability 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.
Leonardtown, Maryland
December 26, 2006