

IN THE MATTER OF ARBITRATION BETWEEN

The U.S. Department of Housing and Urban Development
And
The American Federation of Government Employees
National Council of HUD Locals 222, AFL-CIO

Before Arbitrator Sean J. Rogers

HUD/AFGE FLSA Overtime Grievance

Agency Opposition to Union's Renewed Motions for Summary Judgment Relating to
Liability for GS-360 Employees and Union's Motion for Summary Judgment on All
Remaining Exempt Employees

The agency requests that the union's Motions for Summary Judgment in this matter be denied in their entirety. In support of its request, the Agency submits the following:

Standard For Summary Judgment

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. A fact is material if it might significantly affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 248 (1986).

The party moving for summary judgment bears the burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the non-moving party must set forth evidence of specific facts showing the existence of a genuine issue for trial. *Anderson*, 477 U.S. at 242, 248-250. Only facts that may affect the outcome of the case under governing law are "material" *Anderson* 477 U.S. at 248.

The Arbitrator must resolve any doubts about factual issues in favor of the party opposing summary judgment. All favorable inference must be drawn in favor of the party opposing summary judgment. At the summary judgment stage, the arbitrator's function is not to weigh the evidence and render a determination as to the truth of the matter, but only to determine whether there exists a genuine factual dispute. *Anderson*, 477 U.S. at 248.

Union's Renewed Motion for Summary Judgment Regarding GS-360 Employees

The union has utterly failed to demonstrate that there are no genuine issues of material fact in this case. In fact, the union's motion ignores this (its) initial burden entirely. Accordingly, under *Anderson, supra.*, there is no burden to shift to the agency, and the

union's motion must be found to fail at the outset. Nonetheless, a review of the record in this matter is instructive.

The record clearly demonstrates that there are genuine issues of material fact concerning the FLSA status of the GS-360 positions. There are almost 500 pages of testimony taken over three days. Witnesses of the union and management contradict each other on key points related to the propriety of FLSA exemptions. Specifically, there is contradictory testimony in the record regarding production work versus administrative work, and the level of discretion and independence exercised by employed by GS-360 employees. A cursory review of the testimonies of agency witnesses Floyd May, Candace Tapscott and James Sutton versus the testimonies of union witnesses Nernie Mathis, Peggy Johannsen, Martin Kiebert and Barbara Knox make this plain. These are issues of material fact because they constitute, in part, the criteria by which FLSA status determinations are made. Thus, summary judgment is not appropriate in this case. Rather, a decision by the arbitrator based on the record and post hearing briefs is required.

As noted above, the union ignored, and failed to meet, its initial burden in seeking summary judgment. Its motion simply skips to a series of assertions in support of the position that the agency has not met its burden of proving the GS-360 FLSA exemptions. Thus, the union's submission is actually more of a post hearing brief rather than a valid motion for summary judgment. The assertions, as appropriate, will be addressed in order of appearance.

The union suggests that there is no evidence regarding the GS-11, 14 and 15 positions. In so suggesting it argues that the GS-360-13-15 position descriptions should be ignored by the arbitrator based on a technicality. The agency submits that those position descriptions are properly before the arbitrator, and, accordingly, should be granted their proper weight in this matter. The union also claims that management should be held culpable for not entering evidence for the preceding five years regarding the GS-360 jobs. Management produced the best evidence available.

The union then returns to its tired old mantra that an FLSA determination by grade is a *per se* violation of the statute, and then, somehow, reaches the conclusion, without citing any relevant authority¹, that the agency is foreclosed for all time from mounting any defense of itself in this case. Contrary to the union's position, the method of FLSA classification utilized by the agency is not the ultimate issue in this arbitration. The parties do not dispute that the wrong method was used. But we do dispute whether nonexempt employees were incorrectly classified as exempt. This fact is clearly material to determining if there was no harm. The union has not brought this grievance concerning classification just for classification sake. The right to overtime that is tied to the classification is the ultimate issue. If the wrong method was used, but a position was correctly exempted, there is no remaining issue regarding whether they were properly compensated for overtime work.

¹ Twice in its motion the union cites *AFGE v. OPM*, but this case is inapposite. It does not address the question of wrong method correct result.

A similarly incorrect technical argument is made by the union in its interpretation of 5 C.F.R. Section 551.201. It argues that, apparently, if an FLSA designation is incorrectly "determined", under that section, i.e., the wrong evaluation process was applied, the resulting "designation" cannot stand. This leads to preposterous results. Namely, that process trumps substance under the FLSA

Citing two FLRA cases, *Naval Explosive Ordinance Disposal Tec. Div Indian Head Md.*, 56 FLRA 280 (2000) and *Navy, Indian Head Md. V. AFGE Local 1923*, 57 FLRA 280 (2001), the union's motion also incorrectly asserts that position descriptions cannot be relied upon to make FLSA exempt status determinations. Rather than prohibit the use of position descriptions, both of those cases endorsed their use for FLSA issues. The underlying assumption was that they be accurate and corroborated by testimony of the incumbents. The agency submits that this is precisely what it has done for the GS-360 series in this case. The position descriptions were produced and their content was verified by relevant supervisory testimony.

Similarly incorrect is the union's allegation that the agency did not properly identify the pertinent FLSA exemption(s) it claims for the GS-360 series. During an off the record discussion in the presence of the arbitrator, the agency advised the union that it relied upon the administrative and/or professional exemptions for all FLSA exempt positions, including the GS-360 series.

Further along, the union simply asserts that the GS-360 series does not perform administrative work within the meaning of the FLSA. This assertion is unaccompanied by any reference to the record in this case. There is reference to an arbitration award, but no nexus between it and this case is drawn.

The union submitted extensive data regarding "analogous" positions in other agencies and their FLSA nonexempt status. Apparently, this is supposed to mean that all of HUD's GS-360 employees must, by definition, also be nonexempt. The union also "concluded" that the compliance work of the GS-360 series at HUD does not support an FLSA exemption. These "conclusions" attempt to substitute the union's judgment for the arbitrator's and do not relate to the question of summary judgment.

The union's reliance on "comparative evidence" is equally tenuous. From a purely analytical standpoint, what happened at other agencies or what they may have posited regarding the FLSA status of certain positions may have some value, but the materiality is certainly highly questionable.

Lastly, the fact that certain GS-360-11 and 12 positions at HUD may have been classified FLSA nonexempt has no probative value whatsoever since individual positions in the same series and grade may differ in their duties and responsibilities.

Union's Motion for Summary Judgment for All Remaining Exempt Employees

This premature motion must be denied. It does not fit into the summary judgment analytical framework. The union cannot to meet its burden as the moving party to demonstrate that there are no issues of material fact. This is not surprising since there, as yet, is no factual record regarding the remaining employees.² Accordingly, this motion, as the earlier one, must be found to fail at the outset, and be denied.

The substance of the motion is just a wearisome rehash of certain assertions made by the union in its renewed motion. It again incorrectly asserts that the agency did not supply the exemptions it relies upon to support FLSA exemptions. As noted above, the union was advised it is the administrative and/or professional exemptions that the agency relies on.

The motion also revisits the old wrong method argument asserting again that use of grade as an FLSA coverage criterion precludes management from mounting any defense whatsoever. Here, again, the union provides no authority for this conclusion.


Lastly, the motion again exalts process over substance and supports the bizarre result of a properly exempt classified as nonexempt because of a procedural error. This cannot be construed as promoting the purposes of the FLSA, and, therefore, must be rejected.

The agency submits that the union's non-substantive, hyper technical, motion cannot be allowed to prevent the development of a factual record for the remaining exempt positions, and, accordingly, must be denied

Conclusion

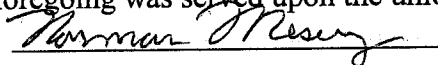
In light of the foregoing facts, the agency requests that the arbitrator deny the instant motions for summary judgment in their entirety.

Respectfully submitted,


Norman Mesewicz
Agency Representative

Certificate of Service

I certify that a copy of the foregoing was served upon the union via Email. January 9, 2006.



² Assuming *arguendo* that a burden had shifted to the agency to demonstrate a genuine issue of material fact, the agency's position would be, as noted above, that an issue of material fact is the correctness of the FLSA exemptions as it runs to the concept of harm.