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November 6, 2008

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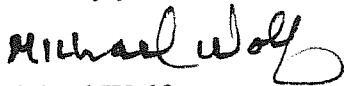
Michael J. Snider, Esq.
Snider & Associates, LLC
104 Church Lane
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RE: FMCS Case 07-52363

Dear Messrs. Cantlon and Snider:

Enclosed please find my preliminary award addressing the Agency's Motion to Dismiss.

Sincerely yours,



Michael Wolf

Enc.

FEDERAL MEDIATION AND CONCILIATION SERVICE
CASE # 07-52363-a
GRIEVANT: Class

IN THE MATTER OF THE ARBITRATION

between

U.S. SMALL BUSINESS ADMINISTRATION,
Employer.

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 228,
Union,

Arbitrator:	Michael Wolf
Employer Advocate:	James Cantlon, Esq.
Union Advocate:	Michael Snider, Esq.

DATE: 11/6/08


MICHAEL WOLF

PRELIMINARY AWARD

Currently at issue in this case is the “Agency’s Motion to Dismiss All Classifications Because No *Prima Facie* Evidence of improper Exemptions Has Been Presented.” The Union has filed a timely opposition to the Motion.

A hearing was held on September 4, 2008, at which the Union was required to present its *prima facie* case with respect to employees who the Union claims have been exempted improperly from the provisions of the Fair Labor Standards Act (FLSA). The Union’s evidence at the hearing consisted largely of multiple rosters of Agency employees covering different time periods. The Agency did not oppose the admission of these rosters into evidence. The Union further introduced into evidence a spreadsheet prepared by a paralegal for Union counsel, who represented that the spreadsheet contained data entries derived from the employee rosters, although presented in a different format. I accepted the employee rosters into evidence based on the lack of objection from the Agency. I also accepted the spreadsheet into evidence as a demonstrative exhibit, with the understanding that the Agency could raise an objection at a later hearing if it determined that this exhibit did not accurately reflect the contents of the other exhibits.

The employee rosters in evidence contain the following information for each employee: name (first and last), job series, job title, position number, grade/step, and location. In addition, and most critically, each employee is designated as exempt or non-exempt for purposes of the FLSA.

Pursuant to an agreed-upon trial schedule, the Agency was not required to present its defense at the hearing on September 4, 2008. Rather, the parties agreed to resume the hearing in November 2008, at which time the Agency would be required to present evidence in support of its affirmative defense that the FLSA-exempt employees were indeed properly classified. In advance of those hearing dates, the Agency has filed the instant Motion to Dismiss.

The Agency raises several arguments in support of its Motion, the first of which is that the Union has merely presented allegations, rather than *prima facie* evidence. The employee rosters admitted as Union exhibits, however, have been identified as Agency records and have been accepted into evidence without objection. Those rosters are not merely allegations. They qualify as “evidence” relevant to the issues in this case. The Agency cites no precedent to support the notion that this type of official Agency documentation should be deemed merely allegations, rather than probative evidence. It cites no precedent in which such rosters have been rejected as *prima facie* evidence in an FLSA case challenging the exempt status of large numbers of employees, as alleged in this case. I therefore reject the argument that the Union has failed to present “evidence” to support its *prima facie* case.

The Agency also alleges that the Union’s submissions in this case do not satisfy the requirements set forth in an OPM guidance for the filing of FLSA claims by non-bargaining unit employees. That guidance clearly does not govern this case, however, since it explicitly states that it does not cover employees working under a collective bargaining agreement that includes a grievance

procedure broad enough to permit the filing of FLSA claims. The latter employees are required to pursue their contractual grievance procedure. The Agency cites no law or regulation stating that bargaining unit employees or Unions must follow the procedures applicable to non-bargaining unit employees who opt to file a claim with OPM. I find that the Union has followed the contractual grievance procedures in an appropriate manner in this case. Accordingly, this argument by the Agency is also rejected.

Finally, the Agency contends that it will be deprived of “fundamental due process” if the Motion to Dismiss is not granted. It argues that a failure to grant the motion will require “the Agency to prove its affirmative defense before the Union has even offered any evidence of a violation.” Motion at 4. The initial fallacy with this argument is the assumption that the exhibits in evidence do not constitute “evidence.” As stated above, the employee rosters are indeed evidence sufficient to support the Union’s *prima facie* case. Moreover, the relevant regulation at 5 CFR §551.202 states as follows:

In all exemption determinations, the agency must observe the following principles:

- (a) Each employee is presumed to be FLSA nonexempt unless the employing agency correctly determines that the employee clearly meets the requirements of one or more of the exemptions of this subpart and such supplemental interpretations or instructions issued by OPM.
- (b) Exemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.
- (c) The burden of proof rests with the agency that asserts the exemption....

The Agency's burden is in the nature of an affirmative defense. Corning Glass Works v. Brennan, 417 U.S. 188 (1974).

The Agency does not dispute that it has the burden of proving the factual and legal basis for its exemption of employees under the FLSA. The information contained in the Union's exhibits has been made known to the Agency months before the hearings at which the affirmative defense is to be presented. The Union's exhibits are sufficient to give the Agency adequate notice of the type of evidence it will need to present as its affirmative defense. The information contained in the Agency's own employee rosters, now in evidence in this record, ensure that the Agency will not be denied due process.

Based on the foregoing, I am denying the Agency's Motion to Dismiss. I conclude that the Agency has not established as a matter of law that the evidence presented by the Union on September 4, 2008 failed to satisfy its *prima facie* burden.