

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: June 2, 2008


MICHAEL WOLF

PRELIMINARY AWARD

On December 7, 2007, I issued a preliminary award in which I specified generally the proof that the Union would need to offer at the arbitration hearing in order to meet its burden of presenting a prima facie case. In that same preliminary award, I ruled that the hearing would be bifurcated, with separate liability and remedial phases. On December 7, 2007, I issued another preliminary award directing the Agency to produce certain documents included within the Union's requests for the production of documents; I also denied other discovery requests made by the Union.

On January 22, 2008, the Agency filed a Motion for Reconsideration of my ruling with respect to discovery, contending that it should not be required to produce any of the records identified in my December 7, 2007 preliminary award. The Agency also submitted a declaration from a Ms. Adrianna Benedetti relating the substance of discussions she had with the National Finance Center regarding the inability of that entity to produce expurgated records requested by the Union. The Agency's Motion for Reconsideration did not address my other preliminary award with regard to the presentation of evidence, burdens of proof and bifurcation.

On April 7, 2008, I issued another preliminary award denying the Agency's Motion for Reconsideration. I also requested a conference call with an official of the National Finance Center because I did not consider Ms. Benedetti's "declaration to signify a serious effort to comply with the instructions in my December 7, 2007 award." The conference call was conducted on May 6, 2008,

at which time an official of the National Finance Agency stated that Ms. Benedetti's representations in her declaration were inaccurate and that the expurgated records identified in my preliminary award could indeed be produced by accessing that entity's computer data. The Agency stated that it would immediately set about the task of obtaining the information and complying with the Union's request and my preliminary award.

In that conference call, I also advised the parties that I wanted to schedule an opening hearing which would focus only on the employees who the Union contends have been improperly exempted under the FLSA. I indicated, consistent with my December 7, 2007 preliminary award and with prevailing precedent, that the Union's prima facie case on the exemption issue would likely be relatively brief before the burden of proof would shift to the Agency to prove its affirmative defense that the identified employees were properly classified. I also stated that, once the Union offered its evidence into the record at the hearing, I would adjourn to give the Agency time to prepare its defense with respect to the exempted employees.

On May 16, 2008, the Agency sent an email to me and to the Union's counsel stating that it had, so far, been unable to produce "the T&A report that was discussed at the conference call last week." The Agency stated that it would report to me when it had succeeded in obtaining the data. As of this date, the Agency has not reported any success in obtaining the redacted records.

In its May 16, 2008 email, the Agency also stated that it wishes to obtain clarification regarding the procedures to be followed at the initial hearing and the

type of proof that the Union will be presenting as part of its prima facie case. The Agency expressed uncertainty as to the series of employees who are the subject of the Union's claim regarding improper FLSA exemptions. The Agency therefore sought additional information in advance of the initial hearing:

The Agency remains interested in obtaining the specifics about which specific series the Union is really challenging and which employees, however classified, that the Union is alleging were not properly compensated and the basis for that compensation, i.e. type of overtime and date and hours worked, to enable the Agency and Union to explore settlement possibilities, and if not resolved, to prepare for an orderly hearing where the specific issues (actual duties and alleged overtime worked but not properly compensated) as they relate to individual employees are identified and can be expeditiously litigated.

We request that it is now time for the Arbitrator to rule on the Agency's information request to require the Union to specify in earnest which particular series it will be presenting evidence on as being improperly classified and which specific employees worked what type of overtime and which was not properly compensated. [Email dated May 16, 2008.]

The Union opposes the Agency's request, characterizing it as another Motion for Reconsideration. The Union contends that the "motion" is untimely and that there is no legal basis for the Agency to demand discovery from the Union.

I agree with the Union that the Agency's email is tantamount to a request for reconsideration, since the issues it raises were previously addressed by the parties and by my preliminary award of December 7, 2007. I also agree that this "motion" comes far too late and without any substantive justification. If the Agency had concerns about my December 7, 2007 preliminary award and the types of evidence required for a prima facie case, it could have raised them in its January 22, 2008 Motion for Reconsideration. It did not do so. Moreover, the

Agency has not acted with anything approaching deliberate speed in complying with the discovery directives in my December 7, 2007 preliminary award. It first submitted a declaration that was patently inaccurate with regard to the unavailability of certain computer records. Even now, more than three weeks after the telephone conference with the National Finance Center, the Agency has not produced the requested records. Instead, it repeats its request for discovery from the Union.

The Agency has known from the very first pre-hearing conference hearing in this case (on May 16, 2007) which series of jobs the Union had identified as being exempted for purposes of the FLSA. At that conference, the Union produced a spreadsheet identifying those employees. The Union represented that the information in the spreadsheet was derived from information produced by the Agency in response to a FOIA request. The Agency can hardly express surprise now about the Union's likely presentation of proof at the initial hearing with respect to exempt employees. While the Union may choose to proceed with respect to less than all of the job series previously identified, there is no indication that it intends to expand the job series that will be in issue.

Nor is it appropriate for me to give either party additional guidance as to the precise evidence that will be deemed sufficient to constitute a prima facie case. I have already given general guidance in my December 7, 2007 preliminary award. It is now up to the Union to decide how much or how little evidence it believes is necessary to satisfy its initial burden of proof. The Agency

can then move to dismiss the case if it believes the evidence is inadequate to meet the Union's initial burden.

The Agency's demand for information is not only untimely, but in some respects premature. It will learn at the hearing which employees and/or series of employees the Union will be contesting. I have already advised the Agency that I will then adjourn the hearing so that the Agency can have a reasonable period of time to prepare its defenses. In the conference call, Agency counsel stated that it should not take an especially long period of time to prepare evidence for the defense with respect to liability (although I fully understand that the actual presentation of evidence may require multiple hearing dates).

This case has been pending for more than one year, much of that time taken up in discovery and procedural disputes. Nevertheless, the outline of the Union's position on the merits is well known. Because the hearing has been bifurcated, the Agency is not required to assemble witnesses and data with respect to remedy; it need only address the liability issue with respect to exempt employees in this first phase of the hearing. The Agency has had more than sufficient time since my December 7, 2007 preliminary awards to prepare its defensive arguments and evidence. It is now time for the case to commence. Accordingly, I am denying the Agency's requests (i.e., motion) incorporated in its May 16, 2008 email.

I had asked the parties in our conference call to advise me of their availability for the first day of hearing. Neither party has responded. I am therefore setting this hearing for September 4, 2008. The parties are to notify me

within 10 days of receipt of this preliminary award whether they are unavailable on that date and, if so, the reasons for their unavailability.