

**MICHAEL WOLF**  
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June 20, 2008

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U.S. Small Business Administration  
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Washington, DC 20416

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Snider & Associates, LLC  
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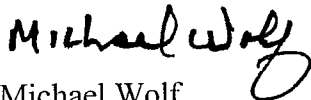
RE: FMCS Case 07-52363

Dear Messrs. Cantlon and Snider:

Enclosed please find my preliminary award addressing the Union's pending motion to compel. I am also enclosing an invoice for the time I have worked on this case since January 1, 2008; this work includes three preliminary awards (including today's) and the telephone conference held on May 6, 2008.

At the end of the award I address the scheduling of additional hearing days. I would appreciate it if you could respond to that portion of the award as promptly as possible.

Sincerely yours,



Michael Wolf

Enc.

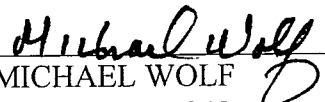
ARBITRATOR MICHAEL WOLF  
4532 43<sup>rd</sup> Street, N.W.  
Washington, DC 20016

**INVOICE**

FMCS Case 07-52363  
U.S. Small Business Administration-AFGE, Council 228

Travel Days.....	0
Hearing Days.....	0
Study Days.....	2
Total Days.....	2
<b>TOTAL FEES (\$900 X 2)</b>	<b>\$ 1,800.00</b>
<u>Expenses</u>	0
<b>TOTAL FEES AND EXPENSES</b>	<b>\$ 1,800.00</b>
<b>AMOUNT PAYABLE BY THE EMPLOYER</b>	<b>\$ 900.00</b>
<b>AMOUNT PAYABLE BY THE UNION</b>	<b>\$ 900.00</b>

DATE: 6/20/08

  
MICHAEL WOLF  
EIN # 52-2248848

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

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IN THE MATTER OF THE ARBITRATION

between

U.S. SMALL BUSINESS ADMINISTRATION,  
Employer.

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, COUNCIL 228,  
Union,

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

DATE: June 20, 2008

  
MICHAEL WOLF

## PRELIMINARY AWARD

On May 6, 2008, counsel for the Union sent an email to Agency counsel requesting the following:

Please identify the individual(s) who created and/or had input into the generation of the Employee lists.

Also kindly provide 3 or 4 dates in the next month when we can meet to discuss working on a reasonable procedure and timeline agreement for §7114 RFI's and any other thing that the Parties may be able to reach agreement on, without wasting more time and money.

Agency counsel responded, in part, on May 16, 2008:

This responds to your emails of May 6 and 14, 2008, regarding the pending FLSA grievance.

I am the representative of the Agency in all matters related to the pending grievance. All contacts with the Agency must be through me. No Agency supervisor or management official or non-unit employee who can bind the Agency as an agent is authorized to speak with you or any member of your staff. You are thus requested not to attempt to contact any such individuals. Accordingly, your request for the identity of "the individual(s) who created and/or had input into the generation of the Employee lists" is denied. You may submit any questions to me about the generation of the Employee lists to which you refer. The Agency non-bargaining unit employees who were assigned that work task are agents of the Agency for purposes of this litigation and thus must not be contacted by you or members of your staff. Please make all contacts through me. Thank you.

\* \* \* \*

With respect to an anticipated request for representative testimony, the Agency is not at this time prepared to agree to any representative testimony until the Union specifies which particular series are alleged to be improperly classified under FLSA, and which type of overtime and when that overtime occurred for any unit employees who allegedly were not properly compensated. See U.S. Dep't of Defense, Pentagon Protection Agency, Wash. DC, 62 FLRA 164 (2007) (in a REP case, the Authority rejected purported representative testimony since it did not reflect the actual duties of each position.) The Agency has no intention of being bound at hearing by the testimony of only a few Union witnesses as being

representative of an entire series distributed through the nation throughout different regions and offices. Rather, the Agency intends to call its own unit employee witnesses in each challenged series and various locations and the supervisors of each Union witness. However, the Agency remains interested in obtaining the specifics about which specific series the Union is 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 it 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 relates to individual employees are identified and can be expeditiously litigated.

As of now, the Union continues to challenge the classification of every series, is alleging that every unit employee regardless of classification was not properly compensated, and is alleging that every type of overtime work was performed by every unit employee without proper compensation without any specifics.

If the Union is willing to provide specific information per the above, and specific proposals by individual for settlement, the Agency is more than willing to meet at your convenience.

The Agency's response provoked two separate emails from the Union's counsel on the same date:

I have no idea what you are talking about. I just asked for their identity, not to speak to them. I want to call them as a witness at a hearing. If you refuse to name them, I will bring it to the Arbitrator and reveal your foolishness. Your choice.

\* \* \* \*

It[']s clear that the Agency is interested in Discovery rather than settlement talks, in its Palestinian-like demands and preconditions. Some day you will approach us to settle and we will remind you of this intransigence.

The Union also advised the Agency that it would not comply with a separate request from the Agency that the Union produce information.

On June 3, 2008, the Union filed a "Motion to Compel Agency's Response to 7114." The Agency filed its opposition on June 12, 2008.

## **THE UNION'S POSITION**

The Union argues:

1. The Agency has refused to produce the requested information without providing any "countervailing interest or reason...."
2. "The Union needs the names of the individuals who created the list(s) in order to call them as witnesses, not to contact them directly."
3. The information is readily available.
4. Once the Union has shown a particularized need for the information, the Agency has the burden of proving its anti-disclosure interests. While the Union has shown a need for the information identified in the pending request, the Agency has not carried its burden of proving legitimate reasons for non-disclosure.
5. Alternatively, the Arbitrator should draw an adverse inference from the Agency's failure to produce the requested information.

## **THE AGENCY'S POSITION**

The Agency argues:

1. The Union's email of May 6, 2008 did not state that the information request was being made pursuant to Section 7114 of Title 5.
2. Although the Union did not identify a particularized need for the information, the "Agency does not oppose disclosing the identity of the individual who created the employee list that the Agency released to the Union on July 31, 2007 and April 18, 2008." However, it will not "disclose this information to the

Union until the Arbitrator determines who may testify in the hearing and orders the parties to exchange witness lists.”

3. The Agency advised the Union that it was willing to meet with the Union regarding outstanding issues and possible settlement, but only “if the Union was willing to provide specific information and specific proposals by individual for settlement.....”

4. The Union’s reference to “‘Palestinian-like demands and pre-conditions’ has taken this case out of an arbitration context and into a religious and political attack on the Agency and a personal attack on Agency Counsel.... [I]t is apparent that Union Counsel continues to intentionally and strategically use these types of references and insults, now escalating to religious and political epithets.”

5. The Arbitrator should instruct Union counsel “to immediately cease such conduct and to instruct the parties that an adverse inference will be drawn if these types of comments and remarks continue from either Counsel.”

### **FINDINGS AND CONCLUSIONS**

#### **A. Union Request for Dates to Meet**

The Union’s request for dates on which counsel for the parties could meet to discuss outstanding issues, is not actually a request for data under 5 U.S.C. §7114(b)(4). The Union seems to want me to compel the Agency to meet with it to resolve points of contention in this litigation and to compel the Agency to identify dates when it will do so.

Section 7114(b)(3) states that the “duty ... to negotiate in good faith ... shall include the obligation ... to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays....”

Although this provision requires both parties to meet in good faith for purposes of bargaining, the Union does not cite any cases applying it to the litigation context. Nor do the facts before me suggest that Section 7114(b)(3) should be applied to pending pre-hearing litigation issues in this case. While I encourage the parties to engage in a more open dialogue and while I consider the current state of relations between the parties to be counterproductive, Section 7114 is not a vehicle for compelling the parties to set aside specific dates for pre-hearing meetings.

Agreement on outstanding litigation issues would undoubtedly make the evidentiary hearings proceed more smoothly, but the Union’s request for dates does not constitute information that falls within the confines of Section 7114(b)(4). This part of its motion is accordingly denied.

B. Identity of Agency Officials Who Prepared the Roster of Employees

The Agency previously produced to the Union rosters of bargaining unit employees. The Union indicated its intention to use those rosters as part of its prima facie case and to call the employees who prepared the rosters as witnesses to authenticate the documents. The Union further indicated in its motion that it could forego this information if the Agency stipulated to the authenticity and admissibility of the rosters. Absent a stipulation, the Union stated that it is requesting the names of the employees who created the rosters

because it needs their testimony at the hearing scheduled for September 4, 2008.

The Agency's initial response was a non sequitur:

I am the representative of the Agency in all matters related to the pending grievance. All contacts with the Agency must be through me. No Agency supervisor or management official or non-unit employee who can bind the Agency as an agent is authorized to speak with you or any member of your staff. You are thus requested not to attempt to contact any such individuals. Accordingly, your request for the identity of "the individual(s) who created and/or had input into the generation of the Employee lists" is denied.

As Union counsel pointed out in response, his request was merely to obtain the names of the relevant persons; he was not proposing to contact the employees. The Agency nevertheless persisted in refusing to provide the names and continues to persist in its opposition to the pending Motion.

The Agency is obligated to produce information under Section 7114 if it is: (1) "normally maintained ... in the regular course of business," (2) "reasonably available," (3) "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining," and (4) "not prohibited [from release] by law."<sup>1</sup> With respect to the instant motion, I find that the Union has established a particularized need for the information (i.e., the need to prove the identities of bargaining unit employees who are deemed exempt by the Agency for purposes of the FLSA). Conversely, the Agency has failed to identify any exception to justify non-disclosure. It has not contended that the

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<sup>1</sup> Although not relevant here, Section 7114 provides an exception for any information that "constitute[s] guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining." 5 U.S.C. §7114(b)(4)(C).

information is maintained outside the regular course of business, that it is unavailable or that any law prohibits disclosure.

While the Agency asserts in its opposition memorandum that it has no objection to identifying the names of the employees who created the rosters, it still has not produced them. It again reverts to a quid pro quo attitude about Section 7114.<sup>2</sup> It states that it will not produce the names of the requested employees “until the Arbitrator determines who may testify in the hearing and orders the parties to exchange witness lists.” Neither condition that the Agency places on production is sustainable.

There is no motion in limine pending that would cause me to eliminate or approve of witnesses in advance of the hearing. The Union seems to want to call the employees who created the rosters as witnesses, and the Agency has not suggested any reason why doing so would be improper. It is up to the Union to decide who to call as witnesses in support of its prima facie case; the Agency will object as it sees fit. The Agency offers no reason why, at this juncture, I should “determine who may testify at the hearing.” Nor does the Agency explain why it believes that its statutory obligations under Section 7114 should be held in abeyance pending such a ruling by me.

Similarly, the Agency fails to explain why compliance with its statutory obligation should be dependent on a mutual exchange of witness lists. While such cooperation is a good idea, it is not statutorily or contractually mandated.

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<sup>2</sup> See Preliminary Award dated December 7, 2007, in which I pointed out that the Agency's statutory obligations under Section 7114 are not conditioned on the Union also producing information. Award at 32.

Moreover, there will be a recess after the first day of hearing; the Agency will not have to commence its defense with respect to exempt employees until it has had the benefit of hearing the Union witnesses' testimony. Given the limited nature of the upcoming hearing date, it is neither necessary nor sensible to make an exchange of witness lists a precondition for the Agency's production of information required by statute.

In short, I conclude that the Agency's refusal to disclose the identities of the employees requested by the Union to be without any legal or logical foundation. The identities of the employees who prepared the rosters should be disclosed immediately to the Union.<sup>3</sup>

C. Agency Request for Adverse Inference

The Agency complains that Union counsel has engaged in personal attacks that are threatening and discriminatory. I agree that Union counsel's fulmination against "Palestinian-like demands and pre-conditions" is highly inappropriate and inflammatory. In litigation, an ad hominem is not a productive substitute for reasoned discourse. Such conduct should cease.

At the same time, the Agency's opposition to disclosure has been, on occasion, obstinate and dilatory. In this latest discovery dispute, the following admonitions by Agency counsel are but one example:

I am the representative of the Agency in all matters related to the pending grievance. All contacts with the Agency must be through me. No Agency supervisor or management official or non-unit employee who can bind the Agency as an agent is authorized to speak with you or any member of your staff. You are thus requested not to attempt to contact any such individuals.

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<sup>3</sup> The Union's request for an adverse inference is premature and will not be considered unless and until there is non-compliance with a discovery directive.

Accordingly, your request for the identity of "the individual(s) who created and/or had input into the generation of the Employee lists" is denied. You may submit any questions to me about the generation of the Employee lists to which you refer. The Agency non-bargaining unit employees who were assigned that work task are agents of the Agency for purposes of this litigation and thus must not be contacted by you or members of your staff. Please make all contacts through me. Thank you.

\* \* \* \*

With respect to an anticipated request for representative testimony, the Agency is not at this time prepared to agree to any representative testimony until the Union specifies which particular series are alleged to be improperly classified under FLSA, and which type of overtime and when that overtime occurred for any unit employees who allegedly were not properly compensated. See U.S. Dep't of Defense, Pentagon Protection Agency, Wash. DC, 62 FLRA 164 (2007) (in a REP case, the Authority rejected purported representative testimony since it did not reflect the actual duties of each position.) The Agency has no intention of being bound at hearing by the testimony of only a few Union witnesses as being representative of an entire series distributed through the nation throughout different regions and offices.

While this response lacked the personally inflammatory rhetoric uttered by Union counsel, it too is needlessly inflammatory and obstructionist. Union counsel sought only the names of potential witnesses. The Agency's retort was hostile and confrontational. Since the Agency now seems to concede that it has no statutory basis for objecting to disclosure of the identities of the employees who created the bargaining unit rosters, its continued opposition is unjustified. I am therefore rejecting the Agency's suggestion that I intervene in this unseemly back-and-forth between counsel by issuing my own threat of sanctions. Instead, I suggest that counsel for both sides re-think their approach to this case and replace their name-calling and threats with the hard work of litigation.

D. Hearing Schedule

The first day of the evidentiary hearing in this case is set for September 4, 2008, after which the hearing will be recessed to allow the Agency time to prepare its defense. In an email dated June 12, counsel for the Union advised that he will effectively be unavailable to resume the hearing between September 29 and October 28, 2008. He requests that the hearing resume on September 9, 10, 11, 16, 17 and/or 18. He protests that resumption in November would constitute an undue delay.

The Agency has not responded to this email, although counsel had previously indicated that it would be tied up in contract negotiations with the Union during mid-September. In addition, I am not available for hearings on September 9, 16 or 18. By this award I am requesting that the Agency notify me whether it is prepared to commence its defense on September 10 through 12. If it cannot do so, then I will set the resumption of the hearing for the week of November 10, 2008. While that delay is longer than desirable, much of the delay will be because of Union counsel's schedule and because of the intercession of contract negotiations. In this circumstance, the delay is not "undue."

I am requesting that the parties notify me within 10 days of receipt of this award whether they are available for the additional September and/or November dates. I am also requesting that the Agency advise how many days it expects to need for the defensive part of its case so that I can plan my calendar accordingly.