



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

February 18, 2009

By certified mail/return receipt requested and e-mail (m@sniderlaw.com)

OFFICE OF
ADMINISTRATION
AND RESOURCES
MANAGEMENT

Michael J. Snider, Esq.
Law Offices of Snider and Associates, LLC
104 Church Lane, Suite 100
Baltimore, MD 21208

Dear Mr. Snider:

This letter constitutes the U.S. Environmental Protection Agency's (EPA or Agency) response to the August 22, 2008 grievance of the parties (GOP) filed by the American Federation of Government Employees, Council 238 (the Union) against EPA under the collective bargaining agreement (Agreement) between the Union and the Agency. I am EPA's representative designated to respond to this GOP. For the reasons stated below, EPA finds that the claims raised by the Union in the GOP are not arbitrable and have no merit, and, therefore, the grievance is denied.

In the GOP, the Union alleges that EPA

violated the Fair Labor Standards Act [(FLSA)], Title V, OPM and DOL Regulations, the [Agreement] and all other relevant and applicable law, rule and regulation when it:

1. Failed to properly classify bargaining unit employees as FLSA non-exempt;
2. Failed to pay proper compensation for overtime work to bargaining unit employees (exempt, nonexempt and wrongfully exempt);
3. Improperly failed to allow bargaining unit employees a choice of compensatory time or overtime (exempt, nonexempt and wrongfully exempt); and
4. Failed to pay suffer or permit overtime to employees (nonexempt and wrongfully exempt).

In the GOP, the Union noted that it "waives the [grievance procedure] time frames . . . until a mutually agreeable time subsequent to the gathering and providing of the information

requested in the Union's August 21, 2008 Information Request and after a Grievance meeting in this matter."

On September 25, 2008, the parties met to discuss the GOP and related information requests. On December 5, 2008, the Agency provided an initial response to the Union's information request. On December 7, 2008, the Union responded to the Agency's initial response expressing disappointment with the response and requesting another meeting. On December 30, 2008, the Agency provided the remaining data with respect to your Information Request, Item #1, from its headquarters and regional offices in Excel spreadsheet format, as indicated in the Agency's initial response of December 5. On January 7, 2009, the Agency provided a response to the Union's December 7 and December 30, 2008 requests to meet and discuss the case. On January 8, 2009, the Union submitted two documents to the Agency via email, which EPA has construed as the Union's supplemental statement of particularized need supporting its information requests. The Agency will respond to the Union's supplemental statement under separate cover. Based on the discussions between the Agency and the Union's counsel and the Union's January 8, 2009 submission of the documents referenced above, EPA has determined that there is no need to delay the Agency's response to the GOP.

First, the GOP fails to comport with the language of the Agreement. Under the Agreement, a party filing a GOP "shall inform [the other party] of the specific nature of the complaint in writing, as well as any provision of law, rule or regulation allegedly violated." (Agreement, Article 38, Section 9) (Emphasis added) The Agreement also provides that "where words or terms are not defined in this Agreement, by applicable law or regulation, they shall have their dictionary meaning (Webster's Unabridged)." (Agreement, Article 2, Section 2.B.) *Webster's* defines a "provision" as "That which is stipulated in advance; a condition; a previous agreement; a proviso; as, the *provisions* of a contract; the statute has many *provisions*." It defines "proviso," in relevant part, as "An article or clause in any statute, agreement, contract, grant, or other writing."

In the GOP, the Union fails to note any "provision" of law, rule or regulation allegedly violated by EPA, and only vaguely refers to alleged violations of the "[FLSA], Title V, OPM and DOL Regulations, the [Agreement] and all other relevant and applicable law, rule and regulation." This is not sufficient to properly state a grievance under the Agreement, which makes the GOP not arbitrable.

Second, as to the substance of the GOP, the Union has failed to identify specific positions or employees who are the subjects of the grievance. In its communications with the Union, the Agency requested that the Union actually identify the positions or employees at issue in the GOP, but the Union has failed to do so. Instead, the Union has explicitly maintained that the GOP goes to "all bargaining unit employees." (Emphasis added) The GOP also provides that the Union is "seeking to reclassify all FLSA Exempt employees/positions as FLSA Nonexempt." (Emphasis added)

The Agency submits that the Union's claim that "all bargaining unit employees" (approximately 8,000 employees) are misclassified as FLSA exempt in an agency composed

largely of scientists, engineers and lawyers is unsupported by any evidence and without merit. The Agency denies that it failed to properly classify bargaining unit employees as FLSA non-exempt.¹

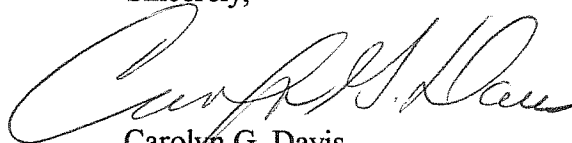
The Union has also failed to identify any particular employees for whom the Agency failed to pay proper compensation for overtime worked. The Agency is not aware of any circumstances in which it failed to pay proper compensation for overtime worked for any of the 8,000 employees included in the GOP by the Union.

The Union has also failed to identify any particular employees for whom the Agency failed to allow a choice of compensatory time or overtime. Until the Union identifies such employees, the Agency denies this claim.

In addition, the Union has failed to identify any particular employees for whom the Agency failed to pay suffer or permit overtime. Until the Union identifies such employees, the Agency denies this claim.

In summary, by not identifying "provisions" of applicable statutes, rules, regulations, or Agreements between the Agency and the Union which allegedly have been violated by EPA, the Union has failed to articulate a sufficient grievance under the Agreement. As a result, the Union's grievance is not arbitrable. Even if the Union had met this threshold issue, the Union has failed to provide any support for its claims with regard to any specific employees or category of employees. The remedies requested by the Union are denied. Further, the implication (in the requested remedies) that the Agency engaged in willful violations of the law is also denied. This is the Agency's final decision on this matter.

Sincerely,



Carolyn G. Davis
Director, Labor and Employee
Relations Staff

cc: Charles Orzechoskie, President
AFGE Council 238

¹ While there was a very small number of erroneously coded GS-4 level employees identified in the Agency's December 5, 2008 response, these were obvious coding errors and were promptly corrected.