



relationship between the parties can be found in the Collective Bargaining Agreement (see Attachment A). Article 33.9 of the CBA states, “The arbitrator shall have no authority to add or modify any terms of this agreement or Agency policy.” There is not a single provision in the CBA that would allow the Arbitrator to bifurcate the proceedings over opposition from the Agency.

If the parties had authorized bifurcation, it would have been located in Article 33, which is titled “Arbitration.” Had the parties desired, they could have specifically authorized an Arbitrator to bifurcate the liability and damages phases over the objection of one of the parties (note that Article 33.10 does not allow bifurcation of threshold issues). The failure to include this in the CBA is evidence that the mutual intent of the parties was to not include bifurcation as part of an arbitration proceeding over the objection of one party. Accordingly, the Union’s Motion should be denied.

***b. Federal Rule of Civil Procedures 42(b) does not authorize bifurcation as the Union requested***

The Union cites to Federal Rule of Civil Procedures 42(b) as the authority for the Arbitrator to order separate trials into liability and damages phases. Unfortunately, the Union misquoted this rule. Rule 42(b) states in full:

(b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

Although Rule 42(b) has been interpreted by the courts to permit bifurcation in court proceedings, it has not been extended to arbitration proceedings. As is well known, the Federal Rules of Civil Procedure are inapplicable to arbitrations.

The Union’s Motion, on page 4, states, “It is clear that Rule 42(b) gives courts and arbitrators the authority to separate trials into liability and damage phases.” The Union cites to *De Anda v. City of Long Beach*, 7 F. 3d 1418 for their rationale, where according to the Union, the court expressed that *arbitrators* have the authority to separate trials into liability and damages phases. No where in this case are the words “arbitrator” or “arbitration” used. It only states that the *courts* have the authority to separate trials into liability and damage phases. In fact, none of the cases cited by the Union address bifurcation within the arbitration process.

Both the Agency and the Federal Labor Relations Authority agree that the Federal Rules of Civil Procedure are inapplicable to the arbitration process. In a number of cases, the Authority has asserted that the Federal Rules of Civil Procedure do not govern administrative proceedings. Although not a case where bifurcation was an issue, the Federal Labor Relations Authority stated in *United States Department of the Navy and American Federation of Government Employees, Local 1923*, 57 FLRA 280 (2001):

We note that the Authority's long-standing precedent does not require that arbitration proceedings be governed by the Federal Rules of Civil Procedure." AFGE, Local 2004, 55 FLRA 6, 10 (1998). In so holding, the Authority has noted that the Federal Rules were designed to govern procedures in the United States district courts and do not purport to be applicable in administrative proceedings.

The Authority further stated that "when contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial." *Id* at 285, citing *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 276 (7th Cir. 1995); see also, *American Federation of Government Employees, AFL-CIO, Local 3615 and U.S. Department of Health and Human Services, Social Security Administration, Office of Hearings and Appeals*, 44 FLRA 806 (1992); and *American Federation of Government Employees, Local 2004 and U.S. Department of Defense, Defense Logistics Agency*, 55 FLRA 6 (1998). It is logical to conclude from the above cited cases that bifurcation would be an example of such "niceties" relinquished.

Accordingly, Federal Rule of Civil Procedures 42(b) does not allow the Arbitrator to bifurcate the proceedings over the opposition of the Agency, and as such, the Union's Motion should be denied.

***c. The Union's cited arbitration decisions do not authorize bifurcation as the Union requested***

In *American Federation of Government Employees, Local 12 and U. S. Department of Labor*, 61 FLRA 456 (2006), the FLRA restated the long standing rule that arbitration awards are not precedential. Accordingly, it is the position of both the Agency and the Federal Labor Relations Authority that the decisions the Union cited have no precedential effect on the current arbitration. As such, the cited decisions do not authorize bifurcation as the Union requested.

The Union cites five arbitration decisions where bifurcation was authorized. It is the Agency's position that these decisions are not binding precedent, and in fact some support the Agency's position that bifurcation is not appropriate without the expressed consent of the parties.

The first two arbitration decisions cited by the Union in its Motion as authority for the Arbitrator to order separate trials into liability and damages phases are: *American Federation of Government Employees and Department of Health and Human Services, Social Security Administration, Baltimore, MD*, 91 FLRR 2-1249 (1991) and *American Federation of Government Employees and Department of Health and Human Services, Social Security Administration*, 93 FLRR 2-1341 (1993). Although the two cited decisions are not precedential, it is interesting to note that in both cases it appears that the parties agreed to bifurcation. In *American Federation of Government Employees and Department of Health and Human Services, Social Security Administration, Baltimore, MD*, 91 FLRR 2-1249 (1991), there was no discussion as to bifurcation authority, and the opinion only states that "at the hearing no evidence or views were presented with respect to remedy in the event that the Arbitrator found the exemptions of the employees involved to be inappropriate." In *American Federation of*

*Government Employees and Department of Health and Human Services, Social Security Administration*, 93 FLRR 2-1341 (1993), it is clear that the parties agreed to bifurcation. As the opinion states, “the parties had agreed to trifurcate the proceedings of the two Grievances.”

The Union also cites three additional arbitration cases: *AFGE, Local 3614 and U.S. EEOC*, FMCS case No. 03-52257A; *AFGE, Local 222 and Department of Housing and Urban Development*; and *AFGE Local 1770 and US Army Dental Activity, Ft. Bragg*. In all, with the exception of *AFGE Local 1770 and US Army Dental Activity, Ft Bragg*, there is no discussion on bifurcation authority. Only in *AFGE Local 1770 and US Army Dental Activity, Ft Bragg* is there discussion on the issue, but it may be one of few cases where bifurcation has been permitted against the express consent of the parties. Moreover, it seems that the issue raised in that particular arbitration is not the same as those in the instant arbitration.

The Agency attempted to locate any relevant authority that authorizes an Arbitrator to bifurcate an arbitration hearing over the objection of one of the parties without success. What the Agency found was a number of cases where the parties agreed to bifurcation. See *Federal Bureau of Prisons, Federal Transfer Center, El Reno, Okla. and American Federation of Government Employees, Local 171*, 106 LRP 43586 (2001); *Federal Union of Scientists and Engineers (FUSE), National Association of Government Employees (NAGE), Local RI -144 and Department of the Navy, Naval Undersea Warfare Center Division Newport*, 106 LRP 34252 (2006); *American Federation of Government Employees, Local 2382 and Carl T. Hayden VA Medical Center*, 106 LRP 18077 (2006); and *Puget Sound Naval Shipyard & IMF and Bremerton Metal Trades Council*, 107 LRP 30325 (2007).

Accordingly, as stated above, it is neither the Agency’s position that the CBA, the Federal Rule of Civil Procedures 42(b), nor the Union’s cited arbitration decisions authorize the Arbitrator to bifurcate the liability and damages phases of this Grievance over the objection of the Agency. Without such authority, the Agency respectfully requests that the Arbitrator deny the Union’s request.

**2. Bifurcation at this stage of the proceedings could in fact significantly lengthen the Arbitration and associated costs.**

If the Arbitrator were to find that he does in fact have the authority to order bifurcation, it is the Agency’s position that bifurcation would not promote the efficiency or expediency of litigating the grievance, and as such, the Union’s Motion should be denied in total.

The Agency would generally agree that bifurcation could result in a faster complaint process if no liability is found; however, the overall proceedings could be significantly longer if liability was found and damages were decided in a second, separate proceeding.

It is the Agency’s position that many of the employees that are alleging FLSA misclassification, and thus potentially FLSA overtime claims, will have to testify during the Agency’s case-in-chief on the misclassification, and so will their supervisors. If these employees and supervisors are present during the Agency’s case-in-chief, they will also be available to testify in regards to remedies related to misclassification and the Union’s case-in-chief on

liability and damages pertaining to FLSA overtime claims. It would be more practical, and in the long run more expeditious, to proceed in presenting testimony on liability and damages pertaining to the Union's case-in-chief, and any other FLSA related remedies being sought by the Union. There are not any significant reasons why employees and supervisors already present at the arbitration during the Agency's presentation of its case-in-chief should need to return during a second phase to testify in regards to remedy for misclassification, and/or in regards to FLSA overtime liability and damages related issues pertaining to the Union's case-in-chief. In fact, due to the constant turnover of Army personnel at Army installations and civilian employee family members associated with these Soldiers, there may be many military and civilian witnesses that will need to be brought back to Fort Sill to attend the arbitration if they are no longer at the installation by the time a second phase is held before arbitration, thus affecting DoD's official mission and causing the arbitration to become more costly.

If the Union is only arguing bifurcation of the Union's case-in-chief on FLSA overtime liability and damages (suffered and permitted overtime, failure to provide a choice between overtime and compensatory time, etc), then the Agency's above stated argument even more so applies. If the Arbitrator bifurcated the hearing, it would not eliminate the need to call all of the allegedly effected employees during the merit or liability phase, and then again during the damages phase. Thus, the employees and their supervisors would need to return to testify at least twice on directly related issues.

The agency moves the Arbitrator to allow one phase of arbitration to include all matters pertaining to both party's cases-in-chief. If the arbitrator allows bifurcation, it could very well include increased hearing time, court-reporter time, attorney time, Arbitrator time, travel expenses, and would take employees and supervisors away from the workplace on multiple occasions. Furthermore, this places the Agency and the Union in a position where witnesses may not be locally available to testify at subsequent phases of the arbitration proceedings. This would not be in the best interested of any party, would not promote efficiency of litigating this Union grievance, and would clearly not expedite this hearing and as such, the Union's Motion should be denied.

### **3. Representative Testimony should be denied**

It is the Agency's position that to prove the merits of the Union's case-in-chief on overtime issues related to "suffered and permitted" claims, and their claim that employees were denied the right to choose between overtime and compensatory time, the Union must take the testimony of all allegedly affected employees. Accordingly, representational testimony would not dismiss the need to receive the testimony of every affected employee.

Furthermore, representational testimony would not be sufficient because the claims are not duplicative. The number of hours one employee worked "suffered and permitted" overtime would be irrelevant to the claims of another employee. Whether one employee was not given the right to choose between overtime and compensatory time would also be irrelevant to the claims of another employee. Furthermore, the employees are not all in the same job category, and not all the employees work in the same organization under the same supervisor. In short, the employees are too different for representational testimony.

Accordingly, for the above stated reasons, representational testimony would not end the need to call in each allegedly affected employee to present evidence of when said employee was allowed to sustain "suffered and permitted" overtime without compensation, and when said employee was denied the right to choose between overtime and compensatory time and as such, the Union's Motion should be denied.

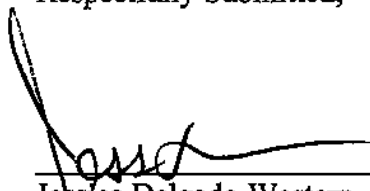
#### 4. Summation

In summation, as stated above, there is no authority for the Arbitrator to bifurcate the arbitration proceedings in more than one phase over the objection of the Agency. The CBA does not authorize the requested bifurcation, the Federal Rule of Civil Procedures 42(b) are not applicable, and the Union's cited arbitration decisions are not precedential and actually support the position that bifurcation requires mutual consent of the parties.

Furthermore, to prove the elements of their claim, the Union must introduce evidence from each affected employee. Representational testimony would be insufficient and bifurcation would not be in the best interested of any party, nor promote efficiency of litigating this grievance, nor expedite this hearing.

Accordingly, the Agency respectfully requests that the Arbitrator deny the Union's Motion for Bifurcation and to allow Representative Testimony.

Respectfully Submitted,



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Jessica Delgado Western  
MAJ Joseph Marshall  
Agency Representatives  
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CERTIFICATE OF SERVICE

I certify that I have e-mailed a true and correct copy of the above and foregoing submission to both the NFFE Local 273 and to the designated Union Representatives, on this 30th day of September, 2008.



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Jessica Delgado-Western  
MAJ Joseph Marshall  
Agency Representative

32.7. UNION Grievance. A grievance by the UNION may be brought within thirty eight (38) calendar days of an incident which gave rise to the grievance or within thirty eight (38) calendar days of the date UNION became aware of the incident. A grievance concerning a continuing practice or condition may be brought at any time. Any such grievance will be filed in accordance with the above described steps and time limits.

32.8. EMPLOYER Grievance. A grievance by the EMPLOYER may be brought against the UNION within thirty eight (38) calendar days of an incident which gave rise to the grievance. Any such grievance will be filed, in writing, to the UNION President. The UNION will have twelve (12) calendar days to render a written decision. If the EMPLOYER is dissatisfied with the decision or the UNION fails to respond, the EMPLOYER may invoke arbitration in accordance with the provisions of Article 33 of this Agreement. A grievance concerning a continuing practice or condition may be brought at any time.

32.9. Grievances raised by an employee, the UNION, or the EMPLOYER may also involve a possible violation of Section 7116 of Title VII of the Act. In such cases, the aggrieved party may elect to grieve under the applicable grievance procedure or may elect to file an unfair labor practice complaint, but not both.

## **ARTICLE 33**

### **ARBITRATION**

33.1. Right to Arbitration. If the decision on a grievance processed under the negotiated grievance procedure, to include mediation, is not satisfactory, the UNION, or the EMPLOYER may refer the issue to arbitration. The notice referring an issue to arbitration must be in writing, signed by the Local UNION President or the EMPLOYER, and submitted within twenty five (25) calendar days following the third step decision or the twelve (12) calendar day period for rendering a third step decision.

33.2. Selecting the Arbitrator. Within ten (10) calendar days from the date of receipt of a valid request for arbitration, the parties shall meet for the purpose of selecting an arbitrator, unless either side waives this meeting. If an agreement cannot be reached or either side has waived the meeting, either party is then authorized to request a list of seven (7) arbitrators from the Federal Mediation and Conciliation Service. The party requesting arbitration is responsible for any fees charged by FMCS. A brief statement of the nature of the issues in dispute will accompany the request, to enable the FMCS to submit a list of arbitrators that are qualified for the issues involved.

33.3. After the list of arbitrators is received from FMCS, the UNION and EMPLOYER will meet within fifteen (15) calendar days, to select an arbitrator from the list. If the parties cannot agree on an arbitrator, the EMPLOYER and the UNION will each strike one (1) arbitrator's name from the list of seven (7) and shall repeat this procedure until only one (1) name remains. The remaining arbitrator shall be the duly selected arbitrator. The EMPLOYER shall strike the first name.

33.4. The UNION or EMPLOYER may withdraw the grievance any time prior to the actual convening of a hearing or submission of the case to the arbitrator.

33.5. The arbitrator's fee and necessary travel expenses will be SHARED equally by the EMPLOYER and the UNION, except that if the party that filed for arbitration later withdraws the grievance, the filing party shall be responsible for any cancellation fees and other expenses charged by the arbitrator. If withdrawal is to the benefit of all parties, the payment of cancellation fees charged by the arbitrator may be negotiated.

33.6. Arbitration Process.

a. The process to be utilized by the arbitrator may be one of the following:

(1). A stipulation of facts to the arbitrator can be used when both parties agree to the facts at issue and a hearing would serve no useful purpose. In this case, all facts, data, documentation will be jointly submitted to the arbitrator with a request for a decision based upon the facts presented. If any other electronic/telephonic communication is necessary with the arbitrator, for any clarification/discussion of the facts, the EMPLOYER and the UNION must be mutually involved/present.

(2). An arbitrator inquiry/investigation can be used when a formal hearing would serve no useful purpose. In this case the arbitrator would make such inquiries as they deem necessary, to include inspecting work sites, taking statements, examining documents, and conducting interviews.

(3). Mini-arbitration may be used to expedite the resolution of the grievance. In this case, the arbitrator would make such inquiries as they deem necessary, prepare a brief summary of the facts, and render an on-the-spot decision without a written opinion.

(4). An arbitration hearing should be used when a formal hearing is necessary to develop and establish facts relevant to the issue. In this case, a formal hearing is convened and conducted by the arbitrator.

b. The parties must mutually agree on any stipulation of the facts to the arbitrator and on the election of any non-hearing resolution of the grievance. Where the parties cannot agree on an alternative procedure, procedure number (4) above must be followed. The parties may jointly direct the arbitrator to simplify or eliminate a written opinion when using the process in (1), (2) or (3) above.

c. The arbitration hearing or inquiry (2, 3 or 4 above), if elected, shall be held during the regular day shift work hours of the basic work week. A representative of the UNION, the grievant's representative if not a representative of the UNION, the aggrieved employee, and any approved witnesses who are otherwise in a duty status with the EMPLOYER, shall be excused from duty for a reasonable amount of time to prepare for the arbitration proceedings and participate in the proceedings, without loss of pay, annual leave, or any other employee benefit. Participants on shifts other than the regular day shift will be temporarily placed on the regular day shift for the day(s)/week(s) of the hearing in which they are involved.

d. The arbitration hearing or meeting location will be provided by the EMPLOYER and agreed to by the UNION. The EMPLOYER will submit proposals for the hearing locations one (1) week after the date the hearing has been set. In the event that the parties cannot agree on a hearing location, the issue will be submitted to the arbitrator by conference call. The parties will abide by the arbitrator's decision as to the hearing location.

33.7. Time Limit. The arbitrator will be told that, in order to fulfill the delegation to arbitrate, he must render a decision and remedy to the EMPLOYER and the UNION as quickly as possible, but in any event no later than thirty (30) calendar days after the conclusion of the hearing and/or submission of final briefs, if any.

33.8. Arbitrator's Authority. The arbitrator's decision(s) shall be final and binding, and the remedy shall be effected in its entirety unless exceptions are filed IAW Section 33.10. of this Article.

33.9. Arbitrator's Authority in Disputes Over the Agreement. The arbitrator shall have the authority to resolve any questions of arbitrability and interpret and define the explicit terms of this Agreement, Agency policy, etc., as necessary to render a decision. The arbitrator shall have no authority to add to or modify any terms of this Agreement or Agency policy.

33.10. Exceptions.

a. Either party may file an exception with the Federal Labor Relations Authority to the arbitrator's award within the timelines of the FLRA. Such exception must be filed in accordance with Authority procedures. If no exception is filed, the arbitrator's decision and remedy shall be effected immediately.

b. Any issue of grievability or arbitrability will be decided as a threshold issue at the hearing on the merits (or other arbitration procedures as outlined above).