

IN THE MATTER OF ARBITRATION BETWEEN:

National Federation of Federal)
Employees, Local 273,)
)
Union,) Issue: FLSA Exemptions
) Damages
and)
) FMCS No. 080328-02383-8
DEPARTMENT OF THE ARMY,)
FT. SILL GARRISON, 214 FIRES BRIGADE,)
75 FIRES BRIGADE, DENTAL ACTIVITY,)
REYNOLDS ARMY COMMUNITY HOSPITAL,)
Fort Sill, Oklahoma,)
) Arbitrator Kelliher
Agency.)

UNION'S MOTION FOR BIFURCATION OF LIABILITY AND DAMAGES AND
TO ALLOW REPRESENTATIVE TESTIMONY

Now comes NFFE Local 273 (the "Union"), by and through its attorneys, Snider & Associates, LLC, and moves for the Arbitrator to bifurcate the proceedings in the above captioned case. The Union also moves for a ruling from the Arbitrator allowing representative testimony. This motion is intended to promote the efficiency and expediency of the proceedings pursuant to 5 USC 7121(b)(1) and Article 31, Section 1 of the Collective Bargaining Agreement. In support thereof the Union states as follows:

1. Due to the complexity of the issues and the claims involved, bifurcation of the proceedings into two parts – liability and damages – promotes the efficiency and focus of the instant arbitration;
2. Representative testimony is appropriate when the number of potential witnesses exceeds the value of repetitive testimony; and

3. Similar bifurcation processes have been used in other FLSA classification and suffer or permit overtime cases.

Respectfully Submitted,

/s/

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IN THE MATTER OF ARBITRATION BETWEEN:

National Federation of Federal)
Employees, Local 273,)
))
Union,) Issue: FLSA Exemptions
) Damages
and)
) FMCS No. 08-51132
DEPARTMENT OF THE ARMY,)
US ARMY FIELD ARTILLERY SCHOOL,)
Fort Sill, Oklahoma,)
) Arbitrator Kelliher
Agency.)

MEMORANDUM IN SUPPORT OF UNION’S MOTION TO BIFURCATE

In support of its motion, Union further contends that it is in the interest of judicial economy to bifurcate the proceedings into liability and damage phases, to be held separately. The general burden of the claims would require the Union to prove liability prior to presenting any evidence on damages. Such a requirement would save time and money for the parties should the Arbitrator find fully in favor of the Agency.

Accordingly, with the persuasive support of the Federal Rules of Civil Procedure 42(b), and common administrative proceeding practices, the Union seeks to bifurcate this grievance into two phases: (1) Liability and (2) Damages.

ARGUMENT

Federal Rule of Civil Procedure 42(b) provides the Court with broad discretion to bifurcate issues in an action. FRCP 42(b); *see also, In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 452, fn. 5 (3rd Cir. 1997). Specifically, FRCP 42(b) provides:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, *or of any separate issue* or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States. (emphasis added).

In particular, FRCP 42(b) authorizes district courts to bifurcate lawsuits into separate trials “in furtherance of convenience or to avoid prejudice,” or when separate trials “will be conducive to expedition and economy.” *In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 452, fn. 5 (3rd Cir. 1997). Severance of the question of liability from other issues can “reduce the length of trial, particularly if the severed issue[s] [are] dispositive of the case, and can also improve comprehension of the issues and evidence.” *In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 452, fn. 5 (3rd Cir. 1997). It is also clear that Rule 42(b) gives courts and arbitrators the authority to separate trials into liability and damage phases. See *De Anda v. City of Long Beach*, 7 F. 3d 1418, 1421 (9th Cir. 1993).

5 USC 7121(b)(1) provides that:

Any negotiated grievance procedure referred to in subsection (a) of this section shall:

- (A) be fair and simple, [and]
- (B) provide for expeditious processing

Accordingly, in the grievance at bar, the interests of judicial economy, the letter and spirit of the Statute and convenience strongly favor severing the issues relating to the Union’s damages from that of the Agency’s liability. This same bifurcation process was used in prior classification/suffer or permit overtime

cases in the federal sector. See *AFGE and Dept. of Health and Human Services, SSA*, 91 FLRR 2-1249 (Arbitrator Segal, May 1991) (Segal I); *AFGE and Dept. of Health and Human Services, SSA*, 93 FLRR 2-1341 (Arbitrator Segal, August 1993) (Segal II); see also *AFGE, Local 3614 and U.S. EEOC*, FMCS Case No. 03-52257A (Arbitrator Klein, Sept. 2006); *AFGE, Local 222 and Department of Housing and Urban Development* (Arbitrator Rogers 2007); see also *AFGE Local 1770 and US Army Dental Activity, Ft. Bragg* (Arbitrator Hardin 2008 – see Attachment A).

Other Federal Courts have allowed similar bifurcation processes. See *Goldman v. RadioShack Corp.*, 2005 WL 1155751 (E.D.Pa. 2005); See *In re Farmers Ins. Exchange Claims Representatives' Overtime Pay*, 300 F.Supp.2d 1020 (D.Or. 2003)(decision issued following bifurcated proceeding on liability.); see also *Schmitt v. State of Kan.*, 844 F.Supp. 1449 (D.Kan. 1994). As the court noted in *RadioShack*, bifurcation is appropriate in this case because it will promote judicial economy by limiting the presentation of lengthy evidence which may be irrelevant if the fact finder determines that the Agency is not liable, i.e. did not fail to properly classify employees as non-exempt. Similarly, if the Agency is not found liable for overtime wages, there is no need for evidence on willfulness and damages. Bifurcating the trial promotes judicial expedition and economy by limiting evidence to that which is essential to the disposition of the case. Bifurcation is also appropriate because the standards and evidence required to prove liability are entirely different than the evidence required to prove damages.

Finally, bifurcation is appropriate because it will not prejudice the Agency and may avoid prejudice to the Union. The issue of liability and the issue of damages are legally distinct; therefore, bifurcation will not prejudice the Agency. Conversely, if the Court did not bifurcate, the intermingling of liability with issues of willfulness and damages might prejudice the Union, who has the burden on damages and would need to focus much more time and effort to prepare witnesses for that aspect of the case.

Resolution of the liability phase could obviate the need for a hearing on the issue of the Union's damages, which undoubtedly would take much longer to hear and could involve issues that could complicate the liability phase, all at additional cost to the parties. Thus, bifurcation preserves resources and reduces the expenses of the parties, while focusing the factfinder to improve comprehension of the issues and evidence on the complex issue of liability .

MEMORANDUM IN SUPPORT OF MOTION TO ALLOW REPRESENTATIVE
TESTIMONY

In order to promote the efficiency and expediency of the arbitration proceeding, the Union seeks to present representational testimony. It has been clearly established that representative testimony is allowable when duplicative testimony would become redundant and wasteful of time and resources. See *Riech v. Southern New England Home Communications Corp.*, 121 F.3d. 58; *McLaughlin v. HO FAT SETO, H-O, space, F-A-T space, S-E-T-O*, 850 S.2d. 586; see *AFGE Local 1770 and US Army Dental Activity, Ft. Bragg* (Arbitrator Hardin 2008 – see Attachment A). In *AFGE Local 3614 and EEOC*, FMCS Case No. 03-52257A (2006)(Klein, J., Arbitrator), the Arbitrator issued an Opinion and

Award that found violations of overtime policy for investigators and support staff. Despite the fact that only one support staff employee testified, the Arbitrator concluded that: in light of the finding that the representative support staff employee worked suffer or permit overtime, the other non-exempt support staff employees worked suffer or permit overtime as well. *See Id.* at 74-77.

The Fourth Circuit has similarly addressed the issue of representational testimony. *See Chao v. Self Pride, Inc.*, 2006 WL 469954 (D.Md. 2006). In that case, the court discussed the factors to determine whether representational testimony is allowed: 1) whether employees were from the same department; and 2) whether employees performed similar job functions. *Id.* As many Federal Courts have similarly held, there is no requirement in FLSA overtime wage case to present live testimony at trial to prove the amount of back wages due. *See e.g., Reich v. Gateway Press*, 13 F.3d 685, 688 (3d Cir.1999) (“We disagree with the district court's conclusion that the failure to testify at trial is necessarily fatal to an employee's claim for back wages, for there are other modes of proof.”); *Marshall v. Mammias Fried Chicken, Inc.*, 590 F.2d 598 (5th Cir.1979) (stating that the Secretary had provided a sufficient basis to calculate the number of hours worked by each employee through the testimony of a government compliance officer who had reviewed payroll records and submitted computations of unpaid wages for each employee). In this case, the Union can similarly present enough evidence, either demonstrative or representational testimonial evidence to establish a pattern and practice of FLSA violations committed by the Agency.

Certificate of Service

I hereby certify that a copy of the foregoing was delivered via e-mail to the following individuals on this 29th day of August 2008:

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