

Samuel A. Vitaro
ARBITRATOR / MEDIATOR / FACT - FINDER

e-mail:

April 4, 2006

Iilir M. Tsungu
Chief, L&ER Policy Section
Bureau of Immigration and Customs Enforcement
Department of Homeland Security
800 K Street, Northwest, Suite 5000
Washington, D. C. 20536

Angelia Wade, Legal Rights Staff Attorney
Joe Goldberg, Assistant General Counsel - Litigation
AFGE(AFL-CIO)
80 F Street, Northwest
Washington, D. C. 20001

Re: AFGE and NINSC / FLSA Grievance / March 31, 2006 Conf. Call /
Summary and other matters

(Sent to Mr. Goldberg, Ms. Wade and Mr. Tsungu by e-mail on April 4,
2006)

Dear Joe, Iilir and Angelia:

Thank you for participating in the March 31, 2006 telephone conference and
thank you to the Union for arranging that call. In addition to the three of you,
the others on the call were Ms. Sipio and Ms. Rosario. There were several

matters discussed and addressed as follows:

- 1) **More Specific Letters to Claimants Who Are Contesting the Calculations** – There is some confusion about what has been done here. Ms. Sipio explained that corrected attachment Bs have been sent to those who had received attachment Bs with incomplete information as to certain time periods (although the calculations themselves may have been correct. These may overlap with some of those contesting calculations but most likely do not line up with the disputed concerns. Ms. Sipio will transmit the status log that she received from Lynwood to Ilir and Leyni. She will also prepare a list of SSAs for those who received a corrected Attachment B and transmit those, with a sample corrected Attachment B to Ilir. That information will also be sent by Ilir to the Union. Ilir and Leyni will determine which, if any of the claimants disputing straight overtime, have received specific responses. The parties and this arbitrator are in agreement that such responses are deserved and necessary.
- 2) **W-2s and 1099s** – This problem appears to be under control. Ms. Sipio has been giving priority to these requests, so that only one recent request (Ms. Campbell) appears to be outstanding.
- 3) **Suffer or Permit Calculations** – There are 242 suffer or permit claimants who will receive compensation. The payroll information from DOJ has been received and the Smalls / Coleman / Rosario spreadsheet has been prepared to facilitate the CBP calculations and has been provided to CBP. (Ilir will provide this spreadsheet to the Union and the arbitrator).

Calculations for approximately 60 of the 242 claimants have been completed (those not requiring DOJ records and not involving LEO lunch hour compensation), although Laguna is doublechecking the calculations. Ilir explained that CBP has gotten more payroll people involved on overtime and comp time to expedite payment. Ilir also explained that some of the suffer or permit claimants can be paid directly from CBP (agency employees who have signed up for such payment) and the remainder will be paid by EFT (those current federal employees who have authorized EFT) and check

(the remainder). Ilir will get Judy Sipio (and the Union and arbitrator) a list by SSA of those who will be paid by NFC- NO (i.e., those current Agency employees not receiving compensation by EFT).

The tough nut to crack, though, will involve the individual calculations for the LEO lunch hour compensation claimants. The Union suggested that NFC – NO do those and the Agency, while expressing reservation, agreed to consider that approach. In any event, Ilir is making efforts with CBP to expedite their work. We will discuss the result of those efforts by conference call on Tuesday, April 11 at 1:00 pm (EST). The Agency will arrange the call. Because of the narrow topic for this call, there is no need for NFC participation.

4) **The Supplemental Award** – I intend to issue a supplemental award within approximately 2 weeks covering those matters left open in the previous decision. The Union will be submitting certain commute information by Monday, April 3. As to those for whom the Union has been unable to gain commute information, I will presume commute time, as I previously explained to the parties. The Agency has already submitted the information required by this arbitrator’s decision.

4) 5) **Spreadsheet with Information as to Those Contesting Some Aspect of Straight Overtime Calculation or Processing** - This is a spreadsheet organized by SSA and prepared by Ms. Smalls for the Agency. Ms. Smalls was not on this call so I am unclear if she has added a column showing the disposition, if any, of the problems addressed. Ilir will assure that the column has been added and provide a copy of the spreadsheet to the Union and the arbitrator.

6) **Letter to Precede Suffer or Permit Payment** – The parties have submitted suggested versions of letters that will be sent to those receiving suffer or permit awards and which will precede receipt of the award itself.

Because the parties could not agree, I have redrafted the letter, which is attached, taking language from both suggested versions. Please note that I have accepted the Union's approach of providing an explanation of the calculations for an individual recipient. Let's talk about this needed enclosure during our upcoming conference call on April 11.

While I understand that there have been delays, I am pleased with our progress and thankful to you for all of your hard work. Please let me know if the above does not comport with your recollection or notes.

Thanks again.

Sincerely,

Sam Vitaro

Date

Claimant's name
Address
City, State

Re: FLSA Suffer or Permit Arbitration Award and Payment

Dear Claimant:

You will soon receive payment either by mail or by Electronic Funds Transfer for certain “suffer or permit” FLSA overtime awarded to you by an Arbitrator’s Decision dated January 6, 2006. Thus, the purpose of this letter is to briefly explain the background which led to that decision, the nature of “suffer or permit” overtime”, an explanation of the enclosures to this letter, the amount that you will be receiving, an explanation of liquidated damages, an explanation of certain tax aspects of the award, and to provide you with an address for seeking answers to questions you may have.

Background

On June 2, 1994, the American Federation of Government Employees (AFGE) National Immigration and Naturalization Service Council (NINSC or Union) filed a grievance on behalf of current and former federal employees within the bargaining unit with the U.S. Immigration and Naturalization Service (INS or Agency). Upon examination of all allegations and issues within the grievance, the Agency determined FLSA provisions covered certain positions held by the grievants. On May 23, 1998, the FLSA status of the positions held by the above-mentioned grievants was changed to FLSA non-exempt.

Overtime and Suffer or Permitted Overtime

FLSA overtime may be earned in two different ways, straight overtime and suffer or permit overtime. Straight overtime is overtime a federal employee reports to the Agency within his or her Time and Attendance reports. On the

other hand, suffer or permit overtime is unrecorded and consists of work performed for the benefit of the Agency, and about which the Agency knows or has reason to believe that the work is being performed. *Arbitrator's Decision dated January 6, 2006, page 43.* (To the extent that you were eligible, you should have already received a straight overtime payment in the summer of 2005.)

Suffer or permit claims were gathered by the NINSC in the fall of 2001 and submitted to the Agency in early 2002. Only those persons who made a specific suffer or permit claim were eligible to receive suffer or permit compensation from the Agency in this case. These suffer or permit claims were presented to the Arbitrator in a series of hearings between December 2003 and May 2004.

Eligibility for Payment

As stated above, this letter concerns the Arbitrator's decision and corresponding calculations relating to the FLSA suffer or permit overtime claims. The Arbitrator presiding over this case issued that comprehensive decision on the suffer or permit overtime claims on January 6, 2006. A copy of this decision may be accessed at: <http://www.afge.org/index.cfm?fuse=document&documentID=1052>

In his decision the Arbitrator, consistent with prevailing law, determined that, an employee should have met the following requirements at any time between June 2, 1991, and May 23, 1998, in order to receive suffer or permit overtime.

1. The employee must have been in a position that was classified as FLSA exempt between June 2, 1991 and May 23, 1998 and subsequently determined to be FLSA non-exempt.
2. The position described in paragraph 1 above must have been covered by the NINSC bargaining unit (e.g., not a Border Patrol bargaining unit).
3. In that position, the employee must have worked in the United States or its territories (and again between June 2, 1991 and May 23, 1998). (The FLSA does not cover work outside of the United States.)

4. The Employee must have filled out an on-line suffer or permit claim form on the AFGE website which was active in the late fall/winter 2003-04.
5. The Employee's case must have been presented by the Union to the Arbitrator during the INS FLSA suffer or permit hearings that took place between December 2003 and May 2004.

Because you met all five of the above requirements for at least part of the period claimed by you, the Arbitrator, in his January 6, 2006 decision, determined that you were entitled to suffer or permit compensation.

Calculation and Payment Amounts

Your payment should be consistent with the findings made by the Arbitrator as to your particular claim. Stated another way, you should receive only the amount found by the arbitrator, no more and no less. Enclosed with this letter are documents to assist you in understanding the way in which that amount of FLSA "suffer or permit" overtime payment was calculated. These documents include an Earnings Statement and an FLSA "suffer or permit" calculation worksheet. The worksheet shows the total amount of suffer or permit back pay earned, the time periods involved, liquidated damages (an amount equal to the back pay earned) and the total amount paid to you.

Liquidated Damages

The FLSA does not provide for the payment of both liquidated damages and interest. Therefore, the Arbitrator determined that only liquidated damages are appropriate in this case. Liquidated damages are equal to the back pay amount; hence, you will be paid double the amount of backpay you are owed as a result of this decision. Additionally, please note liquidated damages, as explained below, are considered interest income for tax purposes.

Tax Information

Appropriate Federal and State taxes have been withheld on the back pay earnings portion of your payment. Additionally, employees who are or were under the Federal Employee Retirement System (FERS) are subject to the appropriate Old Age, Survivors and Disability Insurance withholdings on

their back pay. Also withheld on the back pay earnings is the Medicare premium and payment into the Civil Service Retirement System or FERS.

The liquidated damages that have been paid along with the FLSA back pay payments are considered taxable interest income to the payees. No taxes have been withheld on the liquidated damages portion of your payment. For the calendar year ending in 2006, you will be provided with a Form 1099 INT (Internal Revenue Service Interest form) or W-2 (income earnings statement) as appropriate, to remind you to report your suffer or permit overtime and liquidated damages with your 2006 Federal, State, and local income tax returns.

For further tax information, please consult a tax advisor.

Inquiries

In any process as large and complex as this one, it is almost inevitable for some class members to have questions about the amount of the retroactive FLSA suffer or permit overtime payment received. For that reason, we have provided you with the payroll history of your calculations. This information should be sufficient to address any of your concerns.

However, if you still have questions about the amount of suffer or permit overtime received (i.e., that it is somehow less than the arbitrator awarded you), please include a brief description of your concern along with any supporting documentation within 30 days of receipt of your payment. Make sure you include your name, social security number, address, and telephone number, addressing your materials to:

INS FLSA Grievance
Office of Human Resources
U.S. Customs and Border Protection
1300 Pennsylvania Avenue NW
Mail Stop 2.3-C
Washington, D.C. 20229

The Agency, in coordination with the Union, will review your inquiries and respond with an explanation that addresses your concerns. You may use Agency mail to forward inquiries or documents to the CBP address listed above. A copy (not the original which must be sent to the Agency at the

address listed above) of the materials should be sent to the Union by both e-mail and surface mail to the addresses listed below:

AFGE-GCO
INS-FLSA-S&P
80 F Street NW
Washington, DC 20001
Awade@afge.org

Resolving this grievance has been difficult and, at times, contentious. It required the services of an Arbitrator, as well as many hundreds of hours of work time by Union and Agency staff. In addition, it required contracting with the DOJ and the NFC to process the retroactive calculations and payments, which include calculations for three different time periods. The Union and Agency have sought to assure that claimants are being provided with proper compensation under the FLSA for the time worked. Thank you for your patience.

Sincerely,