

April 24, 2006

Iilir M. Tsungu Chief, L&ER Policy Section Bureau of Immigration and Customs Enforcement Department of Homeland

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 / Apr. 11 and 21, 2006 Conf. Calls/ Summaries and other matters

(Sent to Mr. Goldberg, Ms. Wade and Mr. Tsungu by e-mail on April 24, 2006)

Dear Joe, Iilir and Angelia:

This is a summary of our two last conference calls, April 11 and 21, 2006 Thank you to the Union and Agency for arranging those calls. I have also attached the letter that will be sent to non LEO Suffer or Permit recipients, which is the letter drafted by Iilir, with the "calculation of overtime payments" paragraph deleted because it related to calculation of suffer or permit overtime for law enforcement recipients (and which the Union disputes). The other attachment is an order as to the calculation of LEO suffer or permit overtime, which the Agency requested (because it did not agree that such calculation was necessary in light of the apparent dispute as to calculation methodology).

The April 11, 2006 Conference Call (participated in by Iilir, Joe, Wayne Coleman, Leyni and myself).

The following matters were discussed:

1) Status of Computations for Suffer or Permit Overtime – The 60 cases that have been completed (non LEO and outside the time frame covered by DOJ records) are being verified by Laguna because they may have been done incorrectly. Other than those 60, 5 other cases have been completed. In all, the 242 cases have been divided between CBP, Laguna and CBP, Dallas. Mindy in Laguna is coordinating (although it appears from our most recent call that Leyni is now the coordinator). As of this April 11 call, it was going to take 60 days by Laguna and Dallas to complete the calculations.

2) Snag in Computations for LEO recipients – Wayne notified us that the Agency – although it is still consulting with OPM – would have to use a formula in computing suffer or permit overtime for law enforcement types that would result in a lower hourly rate and less compensation than we had anticipated. Wayne cited to FPM Ltr 551-24 (Jan 14, 1992), which he believed was still in effect because there was no evidence that it had been sunsetted and because the formula was ratified in Appendix E of a recent OPM Report in July 2004 (Wayne, through Iilir, has since provided the web site for this report, which I have accessed). Wayne agreed to provide a live case example of the way in which the formula would work.

I expressed some concern about this development because it seemed that such a formula was contrary to the time and one half benchmark that I had been assuming. I also suggested that the application of such a formula might be different when done in the normal course of business, as contrasted with an arbitrator's determination after an adversary proceeding. Still, I recognize that I am bound by reasonable OPM interpretations of the FLSA (clarity of that interpretation

and its reasonableness is still not clear to me, though). Everyone acknowledged that this was a matter that deserved our immediate attention and we agreed to talk about this further by conference call on April 21, 2006. (By the time of that conference call, Joe had shot off a letter dated April 17, 2006, objecting to the proposed calculation method and the Agency, while cautioning restraint by the arbitrator, had proposed a letter to suffer or permit recipients, referred to above, which included an explanation of the formula.)

3) Information as to Case Number 343 – There was some confusion about requests made by the Union to the Agency concerning this case and whether information was provided to the Agency by the Union. Leyni was going to consult with Joe about this. (The information submission problems have apparently been worked out and Joe delivered numerous documents to the Agency the week of April 17, 2006).

4) Status of Payment for Randy Callahan (as ordered by the arbitrator) – An Agency administrative assistant is working on this and the Agency will check on the progress in payment and report back.

The April 21, 2006 Conference Call (participated in by Ilir, Joe, Wayne, Alethea, Lynwood, Leyni, Jim Bonnette, Judy Sipio and myself).

The following matters were discussed:

1) Attorney Fees – I previously requested that the Union make its demand on the Agency, prior to submitting it to me, which it did. Ilir has forwarded that demand to Tom Muther in legal, who has been away but will be returning this week. Ilir will talk to Tom and get back to Joe by COB this week.

2) Status of Payment for Randy Callahan – The Union requested that the payment be made to AFGE Council 117 (because these are Union funds and Randy is no longer a Union officer). Ilir will check on whether it can be done that way and get back to Joe on that and on the status of payment by COB this week.

3) Status of Computations for Suffer or Permit Overtime – This was the primary reason for this call. Leyni explained the status of the computations, generally. She is coordinating the work by Laguna and Dallas. Each office has 121 cases (to include 30 each of those that are being reverified). Laguna is farther along than Dallas and has completed verifying the original 30 plus 12 cases in addition.

While priority is being given to non LEO recipients, each office anticipates completing all of the calculations – LEO and non LEO - by May 28, 2006 (so that electronic funds transfers could be done from Laguna as of that date for current employees). Ilir cautioned that he would still have to get funding authorization, after he is clearer on the amounts. As I indicated, I am assuming that this funding authorization can be accomplished quickly (i.e., days) and that payment is not delayed much.

Wayne provided further information on the calculation method for LEO recipients, referred to in our last conference call, and indicated that the Agency was meeting with OPM that afternoon for further clarification. Wayne referred to provisions of the statute (29 USC Section 207(k) and 204(f)) as well as the regulations (5 CFR

Sections 551. 512 (a) and 5 CFR Section 551.541). I advised that I had done some brief research; that the issue was confusing; that it was not clear to me whether recipients would be hurt by the formula that the Agency was suggesting to use; that I needed to visualize the impact through actual calculations; and, that there was an obvious disagreement between the parties. The parties will brief this issue, as follows: the Agency will provide its written position by May 3, 2006, with case and other citations, in response to Joe's position letter dated April 17, 2006; and, Joe will have until May 12, 2006 to reply. Those are mail dates.

Also, Wayne will provide a real case example to the Union and myself by May 3, 2006. Wayne further suggested that it might be appropriate for the Union, Agency and myself to talk to the OPM representatives by conference call. The Union is willing to do that and I believe it is an excellent suggestion. Ilir and Wayne will check with OPM and decide whether OPM is willing to do that. Ilir, please get back to Joe and myself on that by COB this week.

Wayne also indicated that it might be wise to get a written official position from OPM. The parties both suggested that this formal letter process could take a long time. I am not agreeable to a long delay to do that.

Ilir suggested that in view of the computation disagreement that he was considering delaying the computation of LEO recipients. There was a robust debate between the arbitrator view and the Agency. My view is that these computations will not be delayed (e.g., I need to visualize the computations, the impact can only be determined in that way, the computations will be made in any event, even if one of the parties appealed and the Agency's suggestion would further delay this matter). Because of this disagreement, the Agency requested an arbitrator order, which is attached.

4) Work still to be done by NFC/NO – Because there was some confusion during the conference, I wanted to make clear what NFC still has to do. There is little that they have to do for suffer or permit claims. CBP will be doing all of the calculations. NFC will be responsible for sending out letters, that will precede payment to those who will receive paper checks. (I believe this involves former Agency employees no longer employed by the US government.) There are only a handful of these. Ilir, can we identify this handful and provide the list to Ms. Sipio, the Union and myself, most importantly so that Ms. Sipio can make sure that she has the correct addresses ?

In addition, there is still work to be done by NFC/NO as to straight overtime claims, as described in the two paragraphs below.

5) Straight overtime / beneficiaries – Ms. Sipio described that she has received back a few letters relating to deceased recipients and, is in the process of providing 1153 (the "Death" form) to beneficiaries. Ms. Sipio will provide a list of those to Ilir, particularly those for whom there are address problems and that list will be

provided to the Union and the arbitrator by May 3, so that the Union can be kept aware of this situation and assist in tracking people down.

6) More Specific Letters to Claimants Who Are Contesting the Straight Overtime Calculations – This is another area in which there was a robust (albeit professional) debate between the Agency and arbitrator. There are a number of employees who have contested the straight overtime calculation. From her spreadsheet, Alethea estimated that there are approximately 80 such concerns. Ms. Sipio was not sure but believes that she has gotten back to many of these, by phone call, perhaps by e-mail and perhaps through a letter (which seemed to be more in the nature of a form letter) advising certain recipients of a problem with Attachment B. I have been presuming for months that we were preparing to send out specific letters addressing the specific disagreements raised by recipients, that our panel of two (Alethea and Joe) would try to then resolve any continuing disputes before submitting them to the arbitrator and that we were only waiting until NFC/NO was relocated back to their offices. However, during this conference call, Ilir expressed the view that it was unnecessary to specifically respond in writing to inquiries, even if the recipient's only contact was by telephone. I respectfully disagree with the Agency's position. Each of these 80 or so deserve and will receive specific letters addressing their concern (assuming that they have not yet received an explanation in writing). Alethea and Lynwood will pull names and relevant information out of the spreadsheet and provide that to Ilir, who, in turn, will provide the information to Joe and myself. (Alethea and Lynwood – Please also provide copies of any e-mails related to this issue to Ilir, so that he can pass them on as well). Ms. Sipio is also putting together a spreadsheet as to her attempts to resolve disagreements along with the e-mails that she has received or transmitted in connection with these concerns.

7) Next Conference Call – The next call is scheduled for May 17 at 1:00 PM (Eastern). It is the Agency's turn to arrange that call.

Please let me know if the above does not comport with your recollection or notes. Also, I was intending to issue my supplemental decision but I am going to delay it, pending further discussions on this snag in LEO computations.

Again, thanks for your hard work (and welcome back Wayne).

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 (if you no longer work at DHS) or by Electronic Funds Transfer (if you are currently employed at DHS) 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 a point of contact 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 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 were changed to FLSA nonexempt.

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. See Arbitrator’s Decision dated January 6, 2006, page 43. To the extent that you were eligible, you should have already received a straight FLSA overtime payment in the summer of 2005.

“Suffer or permit” claims were gathered by the Union 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 the following website provided by the Union:

<http://www.afge.org/index.cfm?fuse=document&documentID=1052>

In his decision, the Arbitrator, consistent with prevailing law, determined that a claimant should have met the following requirements at any time between June 2, 1991, and May 23, 1998, in order to be eligible for “suffer or permit” overtime.

1 The claimant 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 between June 2, 1991 and May 23, 1998. (The FLSA does not cover work outside of the United States.)

4 The claimant 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 claimant'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, and because your specific claim for "suffer or permit" hours were determined by the Arbitrator in his January 6, 2006 decision that you were entitled to "suffer or permit" compensation, at least, in part, payment for back pay plus liquidated damages is being made to you.

Calculation and Payment Amounts

Your payment is consistent with the findings made by the Arbitrator as to your particular claim. Stated another way, you should receive only the amount determined by the arbitrator, no more and no less. This means that you may not receive compensation for your entire claim if the Arbitrator found that you were not entitled to the whole of your claim.

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 "suffer or permit" 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 your 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-GCOINS-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. 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,

In the Matter of a Controversy)) FLSA

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Government Employees,) National Immigration and Naturalization Service

) Council,) Union,) Arbitrator's

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Order and))

U.S. Department of Homeland Security,) Immigration and Customs Enforcement,

) Date: April 24, 2006 Agency.

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ORDER

The Agency is directed to complete all suffer or permit calculations for the approximate 242 employee and former employees entitled to benefits by

May 28, 2006, to specifically include LEO and non LEO recipients.
Samuel A. Vitaro
Arbitrator