

In the Matter of a Controversy	)
	) FLSA Grievance
between	)
	)
American Federation of Government Employees,	)
National Immigration and Naturalization Service	)
Council,	)
Union,	) Arbitrator’s Final
	) Opinion and Award
and	) (Pay and receipt issues)
	)
U.S. Department of Homeland Security,	)
Immigration and Customs Enforcement,	) Date: December 18, 2008
Agency.	)
_____	)

I. INTRODUCTION

This is the final decision and order in a dispute under the Fair Labor Standards Act (FLSA) between the U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, (formerly U.S. Immigration and Naturalization Service (INS)), hereinafter referred to as the “Agency” or the “Employer”, and the American Federation of Government Employees, AFL-CIO, National Immigration and Naturalization Service Council (NINSC), hereinafter referred to as the “Union.” The Agency is represented by Leyni Rosario, and the Union by Angelia Wade and Joe Goldberg.

This final decision and order principally concerns the number of FLSA hours due Case #311, with the parties disagreeing as to whether the entitlement is to 2061 (the Agency’s position) or 2361 (the Union’s). There are also three lesser issues,

concerning receipt of payment (2 claimants) and dispute as to the amount of a payment (1 claimant).

## II. GENERAL BACKGROUND

For potential review purposes, it is useful in this final decision and award to again briefly summarize this matter, a dispute which is more than 14 years in duration.

This formal dispute began on June 2, 1994, when the Union filed a grievance asserting that the Employer violated the law by exempting certain bargaining unit employees from FLSA coverage. The Union requested back pay and other remedies. Since then, this controversy has involved numerous matters but has primarily concerned two categories of claimants, those who were erroneously classified by the Agency as FLSA exempt and a sub group of those, who claimed that they were not only entitled to compensation for erroneous classification but also for “suffer or permit” overtime.<sup>1</sup>

In 1998, the Employer acknowledged that many of the bargaining unit members covered by the Union grievance were FLSA non-exempt, and accordingly changed their classifications from FLSA exempt to FLSA non-exempt. As of that

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<sup>1</sup> There are two kinds of claims involved in FLSA arbitrations, “straight” and “suffer or permit” overtime. Straight overtime involves work performed by an employee in excess of 40 hours per week, reported to the Agency in Time and Attendance reports, and for which the employee did not receive appropriate compensation. In contrast, “suffer or permit” overtime is by its nature 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. *E.g.*, 5 CFR Section 551.104, defining “suffered or permitted work.”

reclassification, employees in those positions became eligible for FLSA overtime. The employer acknowledged liability for back pay. The eligible period for back pay (“retroactive period”) is June 2, 1991 (3 years prior to the grievance) to May 23, 1998 (the date that the Agency reclassified the claimants).<sup>2</sup>

Beginning in June 2005, straight overtime FLSA claims (*i.e.*, for erroneous classification) were processed for 7,857 class members by the National Finance Center (NFC-New Orleans). Most of those were entitled to regular FLSA overtime payment and an equal amount in liquidated damages and have received payment for their erroneous classification.

As to the second category of claimants, there were 484 who made “suffer or permit” claims that were addressed in evidentiary hearings on December 10, 2003, January 13-15, 2004, February 24-26, 2004, March 29-31, 2004, and May 19-21, 2004. Many of these claimants sought payment for lunch hour work.

On January 3, 2006, I issued a decision on 464 of those claims and addressed the remaining 20 claims (after submission of additional information) in two supplemental decisions dated June 7, 2006 and July 24, 2006.<sup>3</sup> In all, I determined that approximately 234 claimants were entitled to “suffer or permit” compensation and ordered the Agency to calculate the FLSA back pay entitlement, to include liquidated damages in an equal amount.

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<sup>2</sup> By written decisions, I previously addressed a number of other issues related to back pay entitlement for FLSA overtime earned prior to the reclassification. *See, e.g.*, my 9/30/2001 opinion as to entitlement of FLSA overtime for cruise ship activities.

<sup>3</sup> There were several other related issues addressed in these decisions, as well.

Of those 234, approximately 125 were Law Enforcement Officers, determined as entitled to FLSA payment for their lunch periods (indeed, nearly all of these lunch hour overtime claims were conceded by the Agency). Following my determinations and during the period of calculation, the Agency took the position – and presumably realized for the first time – that OPM “guidance”, as expressed in a 1992 Federal Personnel Manual Letter, FPM Letter 551-24 (apparently sunsetted in 1993), required a computation for claimant Law Enforcement Officers, who were receiving Administratively Uncontrollable Overtime (AUO) premium pay, that would result in far less than a payment of 1½ times their rates of pay (the FLSA standard) for their lunch periods (ordinarily 30 minutes per work day but in several cases 1 hour per work day). In effect, this FPM Letter at Example 8, seemed to indicate that the lunch hours were already compensated for by AUO premium pay (25% of basic pay) and that only 50% of the regular rate of the hours over the biweekly overtime standard – in this case 85.5 hours – were to be compensated as FLSA overtime. *See* Union Exhibit A, Sept 28, 2006 Hearing. The Union objected on the basis that the Agency had never invoked the 29 USC 207(k) “trigger”, and, moreover, that the computation method ran afoul of the FLSA’s requirement of 1 ½ times an employee’s rates of pay. *See* Union Letters dated April 17 and March 16, 2006.

An evidentiary hearing followed on September 28, 2006. Before the hearing, and at my direction, the Agency contacted OPM, which chose not to appear or testify, on the apparent basis that OPM does not inject itself into the arbitration process and would only agree, if jointly requested by the Agency and the Union, to provide its interpretation in writing. *See, e.g.*, e-mail dated August 2, 2006 from the Agency to the Arbitrator and the Union and TR. at. 39. The Agency provided testimony from

Wayne A. Coleman, an Agency expert in the area of compensation and overtime payment. Mr. Coleman explained in articulate detail the way in which the OPM calculation formula applied to compensation for lunch periods by Law Enforcement employees receiving AUO. *See* TR. at 33 to 134. There was also testimony and evidence concerning two issues, the payment of a Union witness and the calculation of payment for Case #311.

In a decision dated March 19, 2007, I rejected the computation formula asserted by the Agency, and described above, as to the approximately 125 law enforcement employees or former employees entitled to “suffer or permit” overtime. (*i.e.*, involving the appropriate calculation for lunch periods for Law Enforcement Officers who receive Administratively Uncontrollable Overtime). In addition (and pertinently), as to Case # 311, I concluded, as follows:

As to Case # 311, it will not be reevaluated. To the extent that the Agency and the Union have not done so already, they must meet and determine the number of hours claimed in Case #311 (with the adjustment for the mathematical error), as directed by me at the September 28, 2006 hearing. If they have not done so, they should so advise me within 45 days of the date of this decision and I will make a determination of the number of FLSA hours due within 15 days thereafter.

Thereafter, and during July and August 2007, the parties discussed the hours due Case #311 but were unable to reach agreement, disputing whether this claimant was entitled to 2061 or 2361 hours. In any event, the Agency filed exceptions to my award with the Federal Labor Relations Authority (FLRA). That request was rejected by the FLRA in an order dated February 20, 2008, because the matter was not yet final and ripe for adjudication.

Accordingly, the Union, by letter dated March 28, 2008, requested that I resolve the dispute concerning the number of hours due Case #311. During a later telephone conference among the parties and this arbitrator, the Union identified three other claimants with continuing disputes, Mary Morrison (check purportedly not received), Barbara Kveton (dispute as to amount received), and Joyce Briere (check purportedly not received). The parties submitted briefs concerning Case #311's entitlement and provided e-mails as to their positions on the three other claimants.

### III. CASE #311

Case #311 involves a Deportation Officer who submitted claims for several thousand hours of overtime compensation between 1991 and 1998. (In size, these claim forms occupied more than 4 inches of paper and were broken down into specific dates). Most of the claimed hours involved unpaid meal periods. For those, the claimant asserted in documents that he had worked during those meal periods. At the hearing, the Agency stated that it was accepting and not contesting these claims. Indeed, following the submission of supplementary material by the Union, the Agency, in a September 30, 2004 supplemental filing, provided that "Initial determination to accept claims for time worked through lunch, and for time spent after hours working on specific cases is unchanged." Thus, in my decision dated January 3, 2006, I found that the Case #311 claimant had met his burden of proof as to the hours claimed. The initial computation by the agency was that the Case #311 claimant was entitled to more than 8000 hours.

Then, in connection with the September 28, 2006 hearing referred to above, the Agency presented evidence that the 8000 hours was mathematically incorrect and I permitted an adjustment. Moreover (and as reflected above), the Agency asked me to partly reconsider my original ruling as to Case #311, arguing that this claimant was not entitled to any claimed lunch period hours unless he was in an AUO status. While I rejected that claim at the hearing (*see, e.g.*, TR. at 10), I allowed the Agency to provide testimonial and documentary evidence as to the dates of the claimant's AUO status (*see* TR. at 142-153 and Agency Exhibits 2 and 3). I restated that rejection in my decision dated March 19, 2007 and in the conclusion quoted above.

This issue has resurfaced again, as represented by the instant difference between the parties, with the Union claiming that the case #311 claimant is entitled to 2361 hours and the Agency claiming 2061 hours. Stated another way, the Agency contends that this claimant was not AUO certified until November 29, 1992 and is therefore not entitled to the 345 meal period hours claimed up until then (*i.e.*, 2361-2061). More specifically, the Agency argues in its brief, as follows:

There are two ways an FLSA covered employee can be given credit as hours of work for a scheduled meal period. First, in accordance with 5 CFR Section 551.411(c), if she or he is a law enforcement officer (LEO) covered by AUO (5 U.S.C. 5545 (c) (1) or (2)), then the meal period is counted as hours of work regardless of whether or not work was performed. Second, if she or he is not covered by AUO, then a scheduled meal period can be counted as hours of work only if it is demonstrated that work was performed (this can be as "suffered or permitted" work or work officially ordered by a supervisor) . . . . Here, because the claimant in Case #311 did not provide evidence that he performed work through his meal period prior to becoming AUO certified, Case #311 is not entitled to get credit for the meal period until November 29, 1992. (citations and footnote omitted).

Agency's June 9, 2008 Brief at 2.

The flaw in the Agency's argument, as pointed out by the Union, is that the Case #311 claimant *did* demonstrate that he worked during these pre November 29, 1992 meal periods. As stated above, he provided documentation at the hearing that he worked, the Agency accepted that claim and even after he submitted additional support for his claim, the Agency represented that "Initial determination to accept claims for time worked through lunch, and for time spent after hours working on specific cases is unchanged."

For reasons stated above, I find that the Case #311 claimant has satisfied his burden of proof and is entitled to 2361 hours of overtime.

#### IV. THE OTHER THREE CLAIMANTS

As indicated above, the Union, in a telephone conference and e-mails, has indicated that Mary Morrison did not receive her check for payment, Barbara Kveton disputes the amount that she received, and Joyce Briere did not receive her check.

As to both Ms. Morrison and Ms. Briere, the Agency asserted that it sent checks to these claimants. Indeed, as to Ms. Briere, the Agency provided information as to the relevant dates and information as to issuance as well as copies of the front and back of the cashed check.

Concerning Ms. Kveton, the Agency credibly represented that it paid the amount directed by this arbitrator. I note too that there is no information as to the nature of any disputed amount.

The Agency has satisfied its obligations concerning these three claimants.

AWARD

1. As to Case # 311, the claimant is entitled to 2361 hours of overtime.
2. As to the three other claimants, the Agency has satisfied its obligations to them.
3. This is the final order in this matter.

Respectfully submitted,

/S/ Samuel A. Vitaro

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Samuel A. Vitaro  
Arbitrator

Date: December 18, 2008