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| In the Matter of a Controversy |) | FLSA Grievance |
| |) | |
| between |) | Arbitrator's Order |
| |) | |
| U. S. Immigration and |) | |
| Naturalization Service, |) | |
| Agency |) | |
| |) | |
| and |) | |
| |) | Date: November 14, 2003 |
| National Immigration and |) | |
| Naturalization Service Council |) | |
| Union |) | |
| _____ |) | |

Order

This Order addresses the Agency's request to move the December 10-12, 2003 hearing from San Francisco to Washington, DC, rules on certain outstanding matters and provides guidance to the parties as to the upcoming hearing.

1. **The Agency's Motion to Move the Hearing:** The Agency's motion is denied. Until its November 3, 2003 request, the Agency did not take this arbitrator up on his initial offer to hold the hearing in Washington, DC. It is now too late to reschedule the hearing. My schedule is contingent on the San Francisco location and the Union has made reservations for a hearing room and reporter in that location. I am sure that additional hearing days will be necessary and I will give preference to a Washington, DC location for the next set of hearings. The hearing will take place as scheduled in San Francisco, CA on December 8 and 9 and, if necessary, December 10, 2003.

2. **The Notification of "Newly Excluded Old Claimants":** By motion dated July 18, 2003, the Union requested that this arbitrator order certain notification options as to "newly excluded old claimants," who purportedly were led to believe that they were members of the class and, whom, the

Union has no way of contacting. (See Union's letter at 3-4). Following my August 5, 2003 order, the Union supported its contention that this notification need was caused by certain Agency errors in a data set provided by the Agency. (See August 6, 2003 response by Union). In a September 26, 2003 reply, the Agency did not contest that the problem was created by its faulty data but asserted that the Union had not established its inability to contact those who may have been misled. I disagree that the Union has any obligation to correct any misunderstandings created by the Agency. While there are obviously ways in which the Union might seek to contact these individuals, the easier course of action and the one that addresses the cause of the problem, are the options suggested by the Union. Accordingly, within 60 days of the date of this order (not 10 days as requested by the Union), the Agency shall utilize and accomplish one of the 3 options specified by the Union. This obviously will require that the Agency use all reasonable means to obtain address data (most probably for former employees) from other agencies such as OPM, IRS and SSA. The Union letter required by each of the options shall be provided by the Union to this arbitrator and the Agency for comment within 10 days of the date of this order. At the conclusion of the 60 day period (or earlier, if the Agency accomplishes its obligation more promptly), the Union website shall be opened for 30 days to allow newly excluded old claimants to apply. Finally, within 20 days of the date of this order, the Agency shall notify this arbitrator and the Union of its efforts to satisfy the obligation set out above.

3. **Immediate Payment of "Old Claimants":** The Union has requested that I order the Agency to immediately order / contact and contract with the Processing Centers to calculate and pay claims of all old claimants (with the exception of newly excluded old claimants) and regardless of whether any suffer or permit claim has been made by any individual old claimant. (See union's letter at 2-3). The Union also requests that certain information be provided to claimants by the processing centers and that the Agency seek to

gain current addresses by all available means. In its September 26, 2003 response, the Agency asserted that it had provided a list of individuals, with information necessary for calculation of back pay to the Union, but that the Union had not replied. (The Union in a September 29, 2003 letter disputed that the Agency had provided information sufficient for calculation to the Union but the Agency disagreed by letter dated October 16, 2003).

As the term "Old Claimants" is used, this includes those employees and former employees (apparently 7,856) whose claims to FLSA back pay are not disputed. As we are all aware, this case has been ongoing for years, the claims of entitlement have been undisputed for years and still, claims for payment do not appear to have been submitted to the processing centers. Thus, I find that the relief requested by the Union is appropriate and order the Agency, within 30 days from the date of this order, to comply with the provisions of the Union's requested order dated July 18, 2003, at paragraphs A. 1-4. I note, among others, that this requires the Agency to facilitate separate payments, to provide payees with a calculation explanation and to assure the processing and payment of old claimants, without waiting until any suffer or permit claim has been resolved.

4. **Deciding issues involving new claimants:** The Union has requested an order for procedures for identifying and determining the eligibility of new claimants. (See Union's letter at 4-5).

In its September 26, response, the Agency provided that it has already submitted documentation to the Union on May 5, 2003 (copied to the arbitrator as Attachment B in digital form), which complied with any requirements of the arbitrator's order. The Union disagreed thereafter (see letter dated September 29), and the Agency further replied by letter dated October 16, 2003. I am unclear as to certain matters involving this request, such as whether the Agency's May 5 submission was adequate, the nature of

any Agency defenses, (and whether waived unless specified in the May 5 submission) and whether the Union has provided its final response to any Agency reasons for exclusion. Accordingly, the parties should be prepared, through evidence (and to provide hard copy in support of any digitized information) and argument to address these matters at the December hearing. I anticipate that we will spend the first part of December 8 on these matters (approximately 2 hours). I further anticipate that any testimony will be provided by computer specialists (assuming the appropriate back up documentation). The Union, which has the burden of proof, will go first in any presentation.

4. Deciding issues involving suffer or permit claims: The Union has requested that this arbitrator make a final determination as to all suffer or permit claims. As I indicated in my previous order, a full resolution of this matter is not yet possible because it is unclear that each of the suffer or permit claimants is within the class. I note that the Agency has asserted and provided a list of those claimants that it believes are not class members (188 claimants). (See attachment C to the Agency's September 26, 2003 response). At the December hearing, the parties should be prepared to provide evidence and argument as to whether these claimants are class members or not. This evidence will be provided in documentary form, and perhaps through computer specialists (but I want the hard copy, as well). I anticipate that we may spend 2-3 hours on this issue on December 8. The Union, which has the burden of proof, will go first in any presentation.

That gets us to the issue that will consume the bulk of our time during the December hearing – the entitlement of undisputed class members to claimed suffer or permit overtime. It appears that there are approximately 400 class members who are making such claims. At this point, I do not want to hear live testimony from claimants, although that may be necessary at some point. Also, I want evidence presented as to each claimant individually (I would

arbitrator and the other side. Finally, I am unclear as the Agency representative. Please clarify whether Susan Dole or Ilir Tsungu is representing the Agency.



Samuel A. Vitaro
Arbitrator

Date November 14, 2013