



*National Weather Service
Employees Organization*

May 2007

NWSEO FILES GRIEVANCE FOR 140 EMPLOYEES SEEKING LOST OVERTIME WAGES

On May 9, NWSEO filed a grievance on behalf of approximately 140 bargaining unit employees in Alaska, Puerto Rico, Hawaii and elsewhere in the Pacific who are covered by the Fair Labor Standards Act. Between June, 2002 and September, 2006, the NWS failed to include non-foreign COLA in the employees' regular hourly rate when computing overtime. Last August, OPM directed the NWS and other agencies to pay employees lost overtime wages from April 2004 until the method of calculating overtime was corrected. Although the NWS corrected the method of calculating overtime, it has failed to give employees the two years back pay ordered by OPM.

In addition, NWSEO's grievance demands overtime for three, rather than two, years - from April, 2003 to September, 2006 - as well as an additional equal amount as liquidated damages, to which employees are entitled under the FLSA. Back pay could total over a million dollars. The text of the grievance follows:

RE: Union Grievance over FLSA violation

Dear Mr. Johnson:

This is a union grievance filed pursuant to Article 10, section 9(B) of the parties' collective bargaining agreement over management's failure to properly calculate and pay overtime to those bargaining unit employees who are covered by the Fair Labor Standards Act and who receive non-foreign cost-of-living allowances, as well as management's continuing failure to pay these employees lost overtime wages as ordered by the Office of Personnel Management on August 3, 2006.

Under the FLSA, overtime is calculated on the basis of 1.5 times the hourly regular rate calculated on the basis of the employee's total remuneration. Historically, Federal agencies failed to include the non-foreign which COLA employees receive in Alaska, Puerto Rico, Hawaii and the Pacific territories as part of the employees' "total remuneration" on which overtime is calculated. Since this COLA has been as much as 25% of the employee's base rate, overtime has been underpaid by as much as 25% in many cases.

On May 3, 2002, the Office of Personnel Management issued new FLSA regulations making it clear that non-foreign COLA was to be included in overtime computation. These regulations were published at 5 C.F.R. § 591.239 and became effective on June 3, 2002. Yet, the National Weather Service ignored these regulations and continued to underpay unit employees.

In early 2004, the Office of Personnel Management discovered that Federal agencies were not including non-foreign COLA in FLSA overtime calculations. On August 3, 2006 OPM sent a memorandum to each Chief Human Capital Officer in each agency instructing them to: (1) immediately include non-foreign COLA in overtime calculations and (2) pay each affected employee back pay with interest for two years prior to April 4, 2006, the date on which the matter was previously brought to the attention of agency payroll providers. A copy of the OPM memorandum is enclosed herewith.

According to agency counsel, the National Weather Service began correctly calculating and paying overtime in pay period 19 - September 17, 2006. However, management continues to fail to pay the employees lost overtime wages as directed by OPM, despite several requests from NWSEO.

As relief, we request that all affected unit employees be paid lost overtime from April 4, 2004 to September 17, 2006, as directed by OPM.

OPM applied the two year FLSA statute of limitations contained in 29 U.S.C. § 255(a). However, this section of the FLSA provides that employees are entitled to three years of back pay in the case of wilful violations of the FLSA. Wilfulness is established when "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richmond Shoe Co.* 486 U.S. 128, 133 (1988). The NWS's failure to properly calculate overtime is willful in this case because the agency knew, should have known, or showed reckless disregard for what the law requires because OPM published new regulations covering this very issue in 2002. The NWS, as a Federal agency, cannot deny knowledge of regulations published by its own personnel management agency. The FLSA statute of limitations is applicable to grievances which arise under Federal sector collective bargaining agreements. *Dep't of Veteran's Affairs, Pittsburgh Health Care System and AFGE Local 2028*, 60 FLRA No.

104 (2004). Accordingly, affected unit employees are entitled to three, rather than two, years back pay from April 4, 2003 to September 17, 2006.

In addition, 29 U.S.C. § 216 provides that employees are entitled not only to lost overtime compensation, but also “an additional equal amount as liquidated damages.” Payment of such liquidated damages can only be excused if the employer demonstrates that “the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation” of the FLSA. 29 U.S.C. § 260. Liquidated damages are presumed. *Dep’t of Commerce, NOAA, Office of NOAA Corps Operations and IBEW Local 80*, 55 FLRA 816, 822 (1999). The NWS did not have reasonable grounds for believing that its method of calculating overtime was correct because OPM published regulations on point in 2002. “Ignorance alone will not exonerate the employer” from liability for liquidated damages. *Dep’t of Commerce, NOAA, Office of NOAA Corps Operations and IBEW Local 80*, 57 FLRA No. 98 (2001). The normal presumption that government agencies act in good faith does not apply to the issue of whether an agency is liable for liquidated damages. *Adam v. U.S.*, 46 Fed. Cl. 616. Accordingly, affected unit employees are also entitled to liquidated damages equal to the amount of overtime they lost.

Enclosed herewith are three lists which we believe identify all the unit employees who are covered by this grievance and their work locations. On March 26 NWSEO submitted an information request for the names and duty locations, as well as the dates on which employees worked overtime and the hours of overtime they worked, for all unit employees who are FLSA covered and who receive non-foreign COLA. This information was requested for the purpose of preparing this grievance. The agency has failed to respond to this request, which is a violation of Article 6, section 2 and 5 U.S.C. § 7114(b)(4). To the extent that the enclosed lists do not cover all unit employees who are affected, our inability to identify all employees is a result of management’s failure to comply with Article 6 and § 7114 and all affected unit employees are entitled to relief under this grievance whether identified herein or not. As further relief herein, we demand that the agency fully respond to the March 26 information request.

Finally, NWSEO is also entitled to reasonable attorney fees incurred in the investigation and processing of this grievance.

Sincerely yours,

Daniel Sobien
National President