

IN ARBITRATION

John Grabowski, et al.)	
)	
Claimants,)	
)	
v.)	
)	Before JAMS, Reference No.
)	090806B
Wackenhut Services, LLC)	
)	
Respondent.)	

ORDER

On August 16, 2007, a "PARTIAL FINAL AWARD" was entered in this case denying Claimants' Motion for Class Certification under Florida Rule of Civil Procedure ("Florida Rule") 1.220(b)(2) and Rule 3(b)(2) of JAMS Class Action Procedures ("JAMS Rules") and granting Claimants' Motion for Class Certification under Florida Rule 1.220(b)(3) and JAMS Rule 3(b)(3) on behalf of:

All employees hired by Wackenhut LLC before February 27, 2006, as "firefighters" who were subject to an Employment Agreement to perform firefighting and other services in Iraq.

On November 15, 2007, for the first time the parties raised the question of whether the certified class includes Fire Chiefs and Assistant Chiefs; Claimants say yes and Respondent says no. Both sides agree that Captains, Lieutenants, and "firefighters" are included in the certified class.

Since the class was certified, hearings by telephonic conference call have been conducted on August 23, 2007; September 13, 2007; October 4, 2007; October 25, 2007; November 15, 2007 (postponed from November 8, 2007 at the joint request of the parties); and January 29, 2008. Most of the issues involved in the telephonic hearings from August 23, 2007 through November 15, 2007, related to the Notice to be sent to the members of the class, the content of the website to be activated by counsel for Claimants, and some issues related to setting a schedule for the liability phase of this litigation. Throughout the period from August to mid November, counsel for the parties negotiated directly and reached resolution on many issues; the arbitrator ruled on those that were not agreed upon, and the arbitrator also had direct input into the content and form of the Notice and website.

Throughout the many discussions during telephonic hearings it was the understanding that counsel for Respondent would furnish the mailing list of names and addresses of members of the class to counsel for Claimants for use in mailing the Notices. During the November 15th conference call which had been set to address scheduling, discovery, and other issues referenced in Rule 16 or the *JAMS Employment Arbitration Rules and Procedures*: (1) it was determined that the arbitration will be bifurcated into liability and damages stages; (2) discovery, including depositions, during the liability stage was addressed; (3) a schedule was set for the liability phase; and (4) plans were made for finalizing the Notice and website, for sending out Notices, and for counsel for Respondent to send the mailing list of class members to counsel for Claimants.

During the November 15th hearing, while counsel for the parties were discussing how many depositions would be taken and of whom, counsel for Claimants mentioned that some Fire Chiefs might opt out of the class and therefore Claimants may want to take their depositions. Up to this time, neither party had raised the issue either orally or in writing about whether Fire Chiefs and Assistant Chiefs are members of the certified. The first time this was mentioned was when Counsel for Respondent responded to counsel for Claimants mentioning chiefs perhaps opting out by stating that Chiefs and Assistant Chiefs were management were or should be carved out of the class. Respondent argued that it has a right to contact managers, that managers were broadly carved out of class actions of this type, and added that the list it was furnishing to Claimants for those to receive Notice would include Captains, Lieutenants, and "firefighters" but not Fire Chiefs and Assistant Chiefs. Counsel for Claimants stated that Fire Chiefs and Assistant Chiefs are within the class--that the standardized Employment Agreement covered them, that they were paid hourly and could bring a claim for not being paid for all of the hours they worked just as the other class members could, and that they were therefore included in class.

The Arbitrator did not rule on this new issue during the hearing but instead determined that counsel for both sides needed to brief this issue. It was also ordered, with the concurrence of both sides, that in to proceed without delay in sending Notice to as many class members as possible, until a ruling is issued on whether Chiefs and Assistant Chiefs are included in the definition of the certified class, individuals whose only title with Wackenhut was Chief or Assistant Chief would not be sent Notices. (Respondent agreed that any employees who held positions both as Chief and/or Assistant Chief and as "firefighter," Lieutenant, or Captain were included in the class.) On November 29, 2007, the Arbitrator notified counsel that the Notice and website were approved and therefore the Notices could be mailed out and the website activated.

The briefing schedule on the present issue provided that initial and response briefs be completed by December 7, 2007, but that date was extended to December 21, 2007 by joint agreement of the parties. In their brief on that date counsel for Respondent requested oral argument which was set for January 29, 2008. Both sides were permitted to submit additional material by January 28, which Respondent did. The telephonic hearing on this issue lasted almost two hours, and on February 1, 2008, the arbitrator requested and received copies of additional cases cited during that oral argument.

After carefully considering the briefs of the parties including the arguments, materials, and cited authorities, and reviewing relevant earlier filings and orders in this case, for the reasons set forth below, I find that the Chiefs and Assistant Chiefs are members of the class certified in this case.

First, the plain language of the class identified in the August 16, 2007 Partial Final Award leads to this conclusion. It includes all employees hired by Respondent before a specific date as “firefighters” who were subject to an Employment Agreement to perform “firefighting and other services in Iraq.” As noted above, both sides agree that “firefighters,” Lieutenants, and Captains are included in the class, thus the class is not limited just to those who were specifically labeled “firefighters.” At oral argument on January 29, 2008, counsel for Respondent emphasized that Chiefs and Assistant Chiefs do not engage in physical firefighting, but the class definition is not limited in that way. The plain language emphasizes that class members are employees hired “subject to an Employment Agreement” to perform “firefighting and other services in Iraq” (emphasis added.) **Second**, the three persons who have served as Fire Chiefs and Assistant Chiefs and who have submitted Declarations which were filed by class claimants with their brief on this issue, have all stated, “The term ‘firefighters’ refers to all Wackenhut personnel in the chain of command on a particular military base, including the firefighters, Lieutenants, Captains, Assistant Chiefs, and Fire Chiefs.” **Third**, there is no argument about the employees at all ranks up through Fire Chief being hired under the same standardized Employment Agreement. Claimants have consistently emphasized that all employees were hired under the same standardized Employment Agreement which specified that “all hours worked over 40 hours per week will be paid at the straight time rate.” In fact the claim has been brought as a breach of contract claim (and in the alternative, *quantum meruit*) with a focus on the same contract, allegedly breached by Respondent in the same way by not paying firefighters for all hours worked (services rendered in the alternative *quantum meruit* claim), and on the allegation that all members of the class were either on active duty or on call, engaged to wait, 24 hours a day, either six or seven days a week. That is, other than the hours that they were actively working and for which they were paid, they were also entitled by contract to be paid for all other hours because they were on call, engaged to wait, during all other hours either six or seven days per week.

During the telephonic hearing when the issue first was mentioned on November 15th counsel for Respondent argued that the main reason for not including Chiefs and Assistant Chiefs in the class that has been certified was that they were managers, they set policies/ called the shots, and that they were administrative employees in Iraq, not full-time firefighters. Counsel for Claimants responded that in addition to their other arguments, without discovery it could not be known if they called the shots or not.

In their initial brief on this issue, counsel for Respondent argued that the Chiefs and Assistant Chiefs are not included in the class because (1) there is an insufficient nexus between the work and working conditions of the Chiefs and Assistant Chiefs on the one hand and the Firefighters, Lieutenants, and Captains on the other hand for them to be

included in the same class; (2) none of the 24 Class Representatives ever worked as a Chief or Assistant Chief; and (3) including the Chiefs and Assistant Chiefs in the class would so hamper Wackenhut's ability to defend itself as to violate its due process rights to "be able to speak freely with its Managers to gather facts relevant to its defense." WACKENHUT SERVICES' BRIEF at 3.

Turning first to argument (3), in their Supplemental Brief and at oral argument Respondent emphasized the language in *Shores v. Publix Super Markets, Inc.*, M.D. Fla, Nov. 25, 1996, 1996 WL 859985, "Defense counsel have the unequivocal right to conduct *ex parte* communications with managerial employees to discover the acts, omissions and statements of those employees in their managerial capacity for which Publix may be liable." Respondent asserts that this shows that managerial employees must not be part of the class so that Respondent may exercise this right. But in *Shores* the court ruled that these managerial employees were **and remained** members of the class, and the court went on to permit counsel for the defendant to conduct *ex parte* communication on the limited subject of their possible conduct for which Publix could be held liable under specific limitations and safeguards imposed by the court. Here the Respondents has requested that this Arbitrator issue an order that the Chiefs and Assistant Chiefs are **not** part of the class because Respondent is entitled to talk, *ex parte*, to all present and former Fire Chiefs or Assistant Fire Chiefs about the underlying facts of this case. Claimants respond that they are not alleging acts, omissions, or statements of the Chiefs and Assistant Chiefs for which Wackenhut may be liable. To the contrary, they assert that Chiefs and Assistant Chiefs had no authority to affect the issues in play in this arbitration, which are how the employees were paid and how the bases were staffed, CLASS CLAIMANTS' BRIEF at 4-7. As for Respondent's earlier argument that supervisors are routinely excluded from classes of employees in cases of this type, the case law clearly indicates that they may indeed be part of the same class, and Respondent concurred with this during the oral argument on January 29th.

With respect to argument (2), class counsel state that Respondent should not have waited until this late stage to argue the exclusion of Chiefs and Assistant Chiefs but should have made this argument when they were arguing class certification, and also note that the three Fire Chiefs and Assistant Chiefs who submitted Declarations have stated their willingness to serve as additional Class Representatives, CLASS CLAIMANTS' RESPONSE BRIEF at 3, citing Declarations of Rose, Sobota, and Parker at paragraph 15.

Respondents also argue that the interests of the two groups clash with respect to the following item in the Declarations of each of the 24 Class Representatives:

6. During the time that I was based in Iraq at . . . [specific location(s) where had been stationed], I was assigned to duty or on call 24 hours per day, 7 [in one Declaration the number is 6] days per week. **While I was on call, my supervisors called upon me and the other firefighters for such tasks as to listen to radios that alerted us to various duties to accomplish, respond to missile attacks, answer telephone emergencies, work in the "alarm room,"**

work in the communications center at the base, participate in practice drills, and transport the fire apparatuses for maintenance. During my time at . . . [specific location(s) where had been stationed], I and the other firefighters were on duty or engaged to wait on a continual basis due to the task force ordered by the Department of Defense and the shortage of firefighters to replace us (emphasis added.)

The bulk of the argument between the two sides orally and in their briefs has to do with the highlighted language above, the second sentence of this item.

Respondent argues that (1) Chiefs and Assistant Chiefs do not engage in the examples of tasks listed by Declarants above, and that this shows the lack of proper nexus between the two, arguing that the claims of the two groups are not common and the claims of the class representatives are not typical of the Chiefs and Assistant Chiefs because of the differences in work; and (2) that each Declarant Class Representative is complaining that “my supervisors called upon me and the other firefighters for such tasks as” those listed and that the Chiefs and Assistant Chiefs are the very supervisors who were calling upon them to do these tasks and therefore there is a conflict so that they cannot be members of the same class.

Claimants respond that “[t]he particular job duties that were performed by anyone up the line from firefighter to Fire Chief are not relevant to the inquiry of whether the Fire Chiefs and Assistant Chiefs should be included as members of the class” and that discovery would reveal that Chiefs and Assistant Chiefs did perform duties listed, CLASS CLAIMANTS’ RESPONSE BRIEF at 1. Respondent disagrees. I note that the Declarations of the three Chiefs/ Assistant Chiefs do not include this list of tasks. But according to Claimants the correct focus is on the fact that all were employed under the same Employment Agreement and all are claiming that they were on duty or on call and engaged to wait 24 hours per day and were not paid for that time, a common practice of Respondent regarding all employees throughout the ranks. The PARTIAL FINAL AWARD certifying the class does not indicate that the particular description of examples of duties called upon to perform while on call was the basis for the findings supporting class action.

At oral argument on January 29, 2008, class counsel focused on the allegations that Respondent had a common practice applicable to all employees at all ranks of not paying for the on call time/ services, and the common allegation that all of these employees were required to be on call because there were not enough employees, the “shortage of firefighters” referred to in the last sentence of paragraph 6 above. Claimants’ counsel also emphasize that the Chiefs and Assistant Chiefs did not have any authority to affect the “issues that are in play in this arbitration”—how the firefighters were paid and how the bases were staffed, CLASS CLAIMANTS’ BRIEF, at 4, citing the Declarations of Rose, Sobota, and Parker at paragraph 9. Like firefighters at lower ranks, the Chiefs and Assistant Chiefs were on duty or on call 24/7 or 24/6. Of these three Declarants, Rose was employed exclusively as an Assistant Chief and Chief and he stated in paragraph 5, “During the time that I was based in Iraq at . . . [list of bases where he was assigned] I was

assigned to duty or on call 24 hours per day, 6 to 7 days per week. During my time at . . . [same bases] the other firefighters and I were on duty or engaged to wait on a nearly continual basis due to the task force ordered by the Department of Defense and the shortage of firefighters to replace us.” The other two Declarants, Sobota and Parker, held Assistant Chief and/or Chief positions but each also held lower positions (Sobota was a Captain, Assistant Chief, and Fire Chief, and Parker held positions as firefighter, Lieutenant, Captain, and Assistant Chief.) They too described their experiences at all ranks as being assigned to duty or on call 24/7 or 24/6 and on duty or “engaged to wait” on a continual basis “due to the task force ordered by the Department of Defense and the shorting of firefighters to replace us.”

It is clear that Respondent’s argument is focused on the sentence in which the original Declarants stated that while on call their supervisors called upon them and the other firefighters for such tasks as those listed. Respondent submitted a Declaration of the Deputy Program Manager for Wackenhut in Iraq who stated that Fire Chiefs’ job responsibilities do not include those listed in the second sentence of paragraph 6 quoted above. *Declaration of George A. Collins*, at paragraph 7. As noted above, Claimants’ counsel responded by stating that discovery would show they did engage in these activities but nonetheless the specific activities did not matter; what mattered was that they were on call 24/7 or 24/6. According to Claimants during oral argument on January 29, 2008, which supervisor (a Chief or Assistant Chief or a Captain or Lieutenant) called upon them to perform tasks while on call and what those tasks were is irrelevant, because the claim is that they were on call and required to be paid whether or not they were called upon to perform any tasks during the on call time. When they were actually performing tasks they were paid for that time/ those services. The allegations are about the unpaid time when they were on call/ engaged to wait and not actively performing tasks.

In reviewing the written and oral arguments of counsel, I have carefully reviewed applicable portions of the cases cited by both sides and will briefly summarize the key points of the main cases.

Respondent argued that there is an inadequate nexus or lack of typicality between the claims of the Chiefs/ Assistant Chiefs on the one hand and the other employees, and that there is a conflict between the two groups such that representatives of one group cannot adequately represent the other. In response, Claimants point to *Dukes v. Walmart Stores, Inc.*, 222 F.R.D. 137, 167-168 (N.D. Cal. 2004.) In *Dukes* plaintiffs alleged that women were discriminated against in pay and promotions. Named plaintiffs included both hourly and salaried employees, and both non managers and managers, although no high level managers. The defendant cited fact-specific allegations in various class members’ declarations to show that the claims of the named representatives were not typical of the class. The court noted:

“Some degree of individualized specificity must be expected in all cases, however, and it does not necessarily defeat typicality. . . . Rather, the court must consider whether the named plaintiffs suffered injury from a specific discriminatory practice of the employer in the same manner that the members of the proposed class did, and whether the named plaintiffs and the class members

were injured in the same fashion by a general policy of employment discrimination. . . .so long as the discrimination they allegedly suffered occurred through an alleged common practice. . . .their claims are sufficiently typical to satisfy Rule 23(a)(3)” *id.*

On whether proposed representatives have conflicts of interest with the class members so as to constitute inadequacy of representation, the court noted that “similarity, not identity, of interests” is required and only adverse interests are precluded. *Id.* at 168. In *Dukes* the court noted that certification may not be denied merely because the class includes both supervisory and non-supervisory employees, and also noted that the requested relief applied throughout the class, that the alleged discriminatory policies affect supervisory and non-supervisory employees alike, and that there were not conflicts that would preclude certification. *Id.*

Respondent argues that the allegations of the class members about the duties that their “supervisors” called upon them to perform while on call show that the interests of Chiefs/ Assistant Chiefs and the class clash, citing *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 337-39 (4th Cir. 1998) for the proposition that class certification was in error when there was a potential conflict of interest between different members of the class. WACKENHUT SERVICES’ BRIEF at 2. That case involved an actual conflict of remedies sought which would benefit one group of claimants but hinder the rest of claimants and arose in a case certified under (b)(2) where claimants could not opt out. In the present case certified under (b)(3) claimants are permitted to opt out and there is not an assertion that remedies sought would harm some class members. Respondent also cites *Gilchrist v. Bolger*, 733 F.2d 1551, 1555 (11th Cir. 1984) as supporting its argument because the Court of Appeals found that the trial court did not abuse its discretion in eliminating supervisors from the proposed class. As already noted, in many cases supervisors are part of the same class with non-supervisors and the ruling in *Gilchrist* was based on an abuse of discretion standard. In *Wells v. Ramsey, Scarlett and Co., Inc.* 431 F.2d 436, 437-38 (5th Cir. 1975) the Fifth Circuit found there was no nexus between the plaintiff and the employees he sought to represent, not that there was an “insufficient nexus.” Similarly, in *Lo Re v. Chase Manhattan Corp.*, 431 F. Supp. 189, 197-98 (S.D.N.Y. 1977), the court found that plaintiffs who were claiming sex discrimination aimed at preventing women from achieving managerial, professional, or official positions had not indicated any identity of interest with the mass of women in lower-grade positions such as maintenance and low level clerical positions other than those who had sought promotions, *id.* at 197-98.

On potential conflict between Chiefs and Assistant Chiefs on the one hand and other employees on the other, Respondents also cite *Donaldson v. Microsoft Corp.*, 205 F.R.D. 558, 568 (W.D. Wash. 2001) in which the district court denied plaintiffs’ motion for class certification. Plaintiffs alleged gender and racial discrimination in the ratings system that determined compensation and promotions. There were three named plaintiffs and two of them were supervisors who

“were obligated to implement the very supervisory system which this litigation challenges. . . .Since plaintiffs [sic.] allegations about disparate treatment and disparate impact arise directly from the evaluation system at Microsoft, the Court

is unable to envision a class which would include both those who implemented the ratings system and those who allegedly suffered under it. This conflict appears insurmountable.”

The court therefore held that there was not adequacy of representation of the class by the named representatives due to this conflict. In the present case, according to Respondent, supervisors “assigning certain work to Firefighters during their ‘on call’ time has been, according to Claimants, the common bond among the class members and the factual predicate and legal theory of the case.” During oral argument on January 29th Claimants’ counsel responded that here the Chiefs and Assistant Chiefs are **not** the decision makers with respect to the issues in play—being on call 24 hours a day due to inadequate staffing and not being paid for that. Claimants take the position that the certification decision was not based on the description of the duties they were called on to perform when they were called into active duty from being on call/ engaged to wait or which supervisor called them to perform these tasks.

The other case cited by Respondent on this issue, *In re Compensation of Managerial, Professional and Technical Employees Antitrust Litigation*, No. MDL 1471, 02-CV-2924, 2006 WL 38937, at *1 (D.N.J. 2006) was an antitrust action brought by employees of certain oil companies alleging an organized allegedly unlawful exchange of salary information; plaintiffs in their proposed class excluded from the class defendants’ personnel “who participated directly in the information exchanges that are the subject of the complaints.” Obviously the plaintiffs would seek to exclude from the class those whom they alleged engaged in unlawful activity that resulted in depressing their salaries. This case does not assist us here.

In reviewing the *Donaldson* case, it is clear to me that the role of the supervisors there was to actually implement the very evaluation system being complained of in that litigation. In the present case, the employees at all ranks are complaining of the same thing, not being paid for being on call/ engaged to wait all day and night when not on active duty due to understaffing. And Claimants have denied that it was the Chiefs or Assistant Chiefs who made decisions regarding either the under-payment or the inadequate staffing that allegedly caused the additional time on call. The certification order in this case is in accord with Claimants’ position on this issue. Also, there is not currently pending a motion for decertification of the class. And whether or not the Chiefs and Assistant Chiefs were or were not the decision makers on the key issues, which they have stated in their Declarations that they were not, is something that I am confident will be addressed in discovery, including depositions.

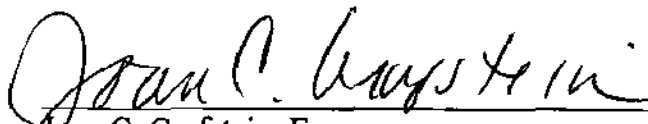
Returning to depositions, the subject that was being discussed back in November when this new issue arose, I note that Point 5 (b) of SCHEDULING ORDER NO. 10 issued on November 19, 2007, provided that Claimants were to identify 5 to 6 Class Representatives who will testify at the hearing and Respondent may take the depositions of those individuals. In light of my ruling below that the three Declarants who have served as Chiefs and Assistant Chiefs and have offered to serve as Class Representatives will be designated to so serve, I have determined that Respondents should be allowed to take their depositions as well. I realize that two of these Declarants were already agreed

by Respondent to be members of the class because they had also served in positions below Assistant Chief, but in an effort to provide every opportunity to Respondent to pursue the evidence in this regard, counsel for Respondent may in their discretion take the depositions of all three if they wish.

The following Order is made respecting the conduct of this Arbitration:

1. The class certified in this case in the PARTIAL FINAL AWARD issued on August 16, 2007 includes, and has included from the time of certification, employees who served in the position of Fire Chief and Assistant Chief, whether exclusively or in addition to serving in other positions.
2. As soon as possible, Respondent will furnish to class counsel the names and addresses of the Fire Chiefs and Assistant Chiefs not previously furnished, and as soon as possible after receiving this list, class counsel will send the **NOTICE OF CLASS ARBITRATION** to those persons. It is my understanding that as with the other members of the class, these members will be given a period of three months to opt out. If counsel wish to agree on a shorter period for these members, they are instructed to so notify the arbitrator through the case manager, along with the reasons, and the arbitrator will notify counsel of whether a shorter period is approved.
3. The following individuals will be added to the Class Representatives: Scott Rose, Art Sobota, and Michael Brent Parker.
4. **SCHEDULING ORDER NO. 10, Item 5**, is revised by adding a new subsection (d) to read, "in addition to the individuals identified in (b) and (c), Respondent may take the depositions of Scott Rose, Art Sobota, and/or Michael Brent Parker.

So ORDERED, this 12th day of February, 2008



Joan C. Grafstein, Esq.
Arbitrator

IN ARBITRATION

John Grabowski)
)
 Claimant,)
)
 v.) Commencement Date: November 08,
) 2006 Before JAMS,
) Reference No. 090806B
 Wackenhut Services, LLC)
)
 Respondent.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Order has furnished this 18th day of February, 2008, by United States mail upon the following:

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