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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-180010.01

DATE: NOV 5 1976

MATTER OF: John H. Brown - Arbitrator's Award of Special Achievement Award

DIGEST:

Agreement between FAA and union (PATCO) provided that discrimination would not be used in the agency's awards program. Arbitrator found that employee had been discriminated against by supervisor in violation of agreement and directed that cash performance award be given to employee. Payment of cash award ordered by arbitrator would be improper since granting of awards is discretionary with agency, agency regulations require at least two levels of approval, and labor agreement did not change granting of awards to nondiscretionary agency policy.

This matter involves a request dated August 11, 1975, from the Federal Labor Relations Council for a decision on the propriety of a payment ordered by a labor relations arbitrator in Department of Transportation, Federal Aviation Administration (FAA), Montgomery FAC08/Tower, Montgomery, Alabama, and Professional Air Traffic Controllers Organization (PATCO) (Amis, Arbitrator) FLRC No. 75A-32.

The facts in the case as found by the arbitrator are as follows: Mr. John H. Brown, an Air Traffic Control Specialist, grade GS-12, employed by the Federal Aviation Administration in Montgomery, Alabama, filed a grievance on May 31, 1974, alleging that his supervisor improperly had failed to recommend him for a Special Achievement Award in violation of section 1, article 50, Recognition and Awards Program, of the PATCO/FAA collective bargaining agreement effective April 4, 1973, which provides as follows:

> "Section 1. The Employer agrees that quality step increases, special achievement awards, or other awards

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> based entirely upon job performance, shall be used exclusively for rewarding employees for the performance of assigned duties. This program shall not be used to discriminate among employees or to effect favoritism."

The arbitrator's opinion indicates that John Brown was a model employee. His former supervisor, who retired as a result of sudden illness in February 1973, intended to recommend Mr. Brown for a Special Achievement Award. Prior to his retirement he advised his replacement that Mr. Brown was eligible for the award and suggested that he prepare a recommendation. Mr. Brown's present supervisor did not submit a recommendation but subsequently stated that he would have done so except that Mr. Brown used extraneous language in giving control instructions. The extraneous language consisted of amenities such as "thank you" and "please" which were not a hinderance to safety. The supervisor had rated Mr. Brown on all other phases of his work as "exceeds requirements" except for this phase on which he rated him as "meets requirements."

In addition, the arbitrator found that Mr. Brown's performance evaluations for a 2-year period, from September 1, 1972, to September 1, 1974, satisfied the criteria for a Special Achievement Award as set forth in the agency's official eligibility requirements.

The arbitrator further found that the supervisor had exhibited a deep-seated negative bias toward employees receiving dual compensation from the Federal Government and that this bias had caused the supervisor to discriminate against Mr. Brown, who was receiving additional compensation for a service-connected disability, by not recommending him for a Special Achievement Award despite his obvious eligibility for consideration. The arbitrator concluded that such discrimination was a violation of the collective bargaining agreement. Accordingly, he made the following award:

> "AWARD: Grievance sustained. John H. Brown shall be given a Special Achievement Award effective May 31, 1974, and shall be provided the maximum cash benefit permitted under the regulations."

The Department of Transportation appealed the arbitrator's award to the Federal Labor Relations Council, and the Council has requested our decision as to whether the expenditure of appropriated funds as ordered by the arbitrator may legally be made.

We must look to the Incentive Awards Act, 5 U.S.C. §§ 4501-06 (1970), to determine the legality of the payment. Section 4503 of title 5 provides as follows:

> "The head of an agency may pay a cash award to, and incur necessary expense for the honorary recognition of, an employee who—
>
> "(1) by his suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of Government operations; or
>
> "(2) performs a special act or service in the public interest in connection with or related to his official employment."

Section 4506 of title 5 of the United States Code grants authority to the Civil Service Commission to prescribe regulations and instructions governing agency awards programs.

The Commission has exercised this authority and issued regulations governing the awards program in 5 C.F.R. Part 451. The regulations read in pertinent part as follows:

> "451.102 Policy.
>
> "The policy of the Commission in administering chapter 45 of title 5, United States Code, is to:

> "(a) Establish broad principles and standards for the administration of the Incentive Awards Program
>
> "(b) Delegate to heads of agencies authority to establish and operate incentive awards plans consistent with these principles and standards * * *."

The awards statute and implementing regulations vest discretion in heads of agencies to make or not to make awards and to tailor the awards as they see fit in accordance with the regulations, and the courts will not upset agency determinations except for a clear showing of abuse of discretion. Sheller v. United States, 202 Ct. Cl. 571 (1973), cert denied, 414 U.S. 1092. See also Serbin and Stedman v. United States, 168 Ct. Cl. 934 (1964); Kemolinski v. United States, 164 Ct. Cl. 451 (1964), cert denied, 377 U.S. 981; Martilla v. United States, 118 Ct. Cl. 177 (1950). Thus, an agency would normally be free to accept or reject a recommendation in regard to a performance award, and to do so without a review by this Office or the courts of that exercise of discretion, provided it acts in good faith and not in abuse of its discretion. See 46 Comp. Gen. 730, 735 (1967).

In recent decisions this Office has attempted to give meaningful effect to the labor-management program established under Executive Order 11491 and to arbitration awards rendered thereunder if such awards are consistent with laws, regulations and our decisions. 54 Comp. Gen. 312, 320 (1974). We have held that provisions in collective bargaining agreements under the Executive Order may become nondiscretionary agency policies and, if the agency has agreed to binding arbitration, that the arbitrator's decision is entitled to the same weight as the agency head's decision would be given. Id. at 316. But we further stated therein that our decision "should not be construed to mean that any provision in a collective bargaining agreement automatically becomes a nondiscretionary agency policy," and we added that "/w/hen there is doubt as to whether an award may be properly implemented, a decision from the Council or from this Office should be sought." Id. at 319, 320.

The issue to be resolved, therefore, is whether the PATCO-FAA agreement makes the grant of a performance award mandatory where, as here, there has been a finding that an employee has been discriminated against by his immediate supervisor in violation of section 1, Article 50, of the agreement. The FAA order which implements the awards program (FAA Order 3450.7B)--which the FAA-PATCO agreement is made subject to by section 12(a) of Executive Order 11491--specifically provides that, although an employee's immediate supervisor is responsible for initiating a special achievement award recommendation (paragraph 32.d.(1) and 33.b.), there must be at least two levels of supervision involved in the initiation and approval process for such awards, except for those approved by the Administrator, Deputy Administrator, and officials reporting to the Administrator. Thus, a supervisor's recommendation does not necessarily mean that an award will be granted since approval at a higher level is required.

We find nothing in the negotiated agreement that changes the procedure for making incentive awards established in FAA Order 3450.7B or that creates any vested right in employees to receive awards. Section 1 of Article 50 requires that awards are to be based upon performance of assigned duties and may not be used to discriminate or to effect favoritism. However, that provision does not purport to eliminate the procedures set up by the FAA order or to take away the agency's discretion to select eligible employees for awards. In other words, the agreement did not change the granting of awards into a mandatory agency policy, even where discrimination is found. Therefore, notwithstanding the arbitrator's finding of discrimination in the failure of the grievant's supervisor to recommend him for a special achievement award, the grievant would not necessarily have been granted an award if he had been so recommended, since a single supervisor's recommendation is not by itself the decisive act in the awards process.

Accordingly, since the granting of a special achievement award remained discretionary with the FAA, the expenditure of appropriated funds for the cash award to John H. Brown ordered by the arbitrator may not legally be required. However, we would not object to a remedy which requires that an award recommendation be prepared and considered for Mr. Brown pursuant to agency regulations.

R.F.KELLER

Deputy Comptroller General
of the United States