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DECISION

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

FILE: B-200004 DATE: October 9, 1981

MATTER OF: Samuel R. Jones - Claims on matters subject to a negotiated grievance procedure - GAO jurisdiction

DIGEST:

1. Civilian employee of Department of Army was detailed to higher-grade position for period of 42 days. Collective bargaining agreement provided for temporary promotion with backpay for details beyond 30 days. Agency objects to submission of the matter to GAO since same collective bargaining agreement provides that employees must use negotiated grievance procedures to resolve grievable issues. GAO will not assume jurisdiction over claims filed under 4 C.F.R. Part 31 where the right relied upon arises solely under the collective bargaining agreement and one of the parties to the agreement objects to submission of the matter to GAO. However, if otherwise appropriate, GAO will consider, under 4 C.F.R. Part 31, matters subject to a negotiated grievance procedure, despite the objection of a party, where the right relied upon is based on a law or regulation or other authority which exists independently from the collective bargaining agreement and no grievance has been filed.

2. The jurisdictional policies established in this case for claims filed with GAO under 4 C.F.R. Part 31 involving matters of mutual concern to agencies and labor organizations differ from those established in 4 C.F.R. Part 22 (1981). The differences are based upon differences in the respective procedures and are designed to achieve a balance between GAO's statutory obligations under title 31 of the United States Code and the

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smooth functioning of the procedures authorized by the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135.

In this decision we are considering the claim of Mr. Samuel R. Jones for a retroactive temporary promotion and backpay in connection with an overlong detail which Mr. Jones asserts is remediable pursuant to our Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977). Since Mr. Jones' claim is based on a right that arises solely under the collective bargaining agreement, and the agency has objected to consideration of the claim by the General Accounting Office, we will not take jurisdiction over Mr. Jones' claim.

At the same time, we are extending the analysis contained in a companion case decided today, Schoen and Dadant B-199999, regarding this Office's jurisdictional policy for settling claims on matters of mutual concern to agencies and labor organizations when those claims are filed pursuant to 4 C.F.R. Part 31.

FACTS

The administrative record establishes that Mr. Jones was employed as a Railroad Maintenance Vehicle Operator at the Hawthorne Nevada Army Ammunition Plant. For a period of 42 days, from June 19 through July 30, 1978, Mr. Jones was officially detailed to and performed the higher-grade duties of the position of Railroad Maintenance Vehicle Operator Foreman. During the period of Mr. Jones' detail there was a negotiated agreement in effect between the agency and the American Federation of Government Employees (AFGE Local 1630), the exclusive representative of unit employees, including Mr. Jones. Article 15, Section 3 of the agreement provided that an employee of the unit would not be detailed to a position of higher grade for more than 30 days within a period of 1 year. On this factual basis Mr. Jones, through his authorized representative, AFGE Local 1630, filed a claim with our Claims Group under Part 31 of title 4, Code of Federal Regulations, on June 19, 1979, seeking backpay for the period of the detail beyond 30 days. Unlike Schoen and Dadant, supra, no grievance was ever filed under the negotiated agreement.

THE AGENCY'S POSITION

The Personnel Division of the Hawthorne Army Ammunition Plant has strenuously objected to our consideration of Mr. Jones' backpay claim. The agency points out that at the time of Mr. Jones' detail from June 19, 1978, to July 30, 1978, there was a negotiated agreement in effect between the agency and American Federation of Government Employees Local 1630. As a wage grade Railroad Maintenance Vehicle Operator, Mr. Jones was a unit employee. The same agreement that provides in Article 15, Section 3, that an employee of the unit may not be detailed to a position of higher grade for more than 30 days within a period of 1 year, also provides in Article 11, Section 1, that the "* * * negotiated procedure shall be the exclusive procedure available to the Union and the employee in the bargaining unit for resolving employee grievances * * * excluding those for which a statutory appeals procedure exists."

The agency asserts that even if Mr. Jones' detail exceeded the 30-day limitation, it was a grievable issue, and as such, the negotiated grievance procedure was the exclusive procedure available for redress. The agency therefore contends as follows:

> "This agency contends that when a grievable matter subject to an exclusive negotiated procedure may arguably constitute an unwarranted or unjustified personnel action, the appropriate authority to make any finding must be those individuals including arbitrators entitled to make such decisions under the terms of the operative collective bargaining agreement. To reason otherwise would result in redressing one arguable violation of a mandatory provision of a negotiated agreement by deliberately circumventing another. This can only serve to subvert the statutory scheme governing labor relations in the Federal sector."

Hence, the agency argues that the Comptroller General should not assume jurisdiction over any matter which could be grieved under a collective bargaining agreement, and would deny all consideration of Mr. Jones' claim because he did not file a grievance under the negotiated grievance procedures.

ANALYSIS

In order to understand the jurisdictional policies established in this case, it is necessary to first consider the source of the right to backpay relied upon by the claimant. The type of overlong detail provision used to support the claim for backpay in this case is commonly referred to as a Turner-Caldwell type of claim. However, as discussed below, there is an important distinction in that the right in this case arises solely under the collective-bargaining agreement and is for 30 days, rather than 120 days.

In our Turner-Caldwell cases, supra, we established the rule that, for purposes of the Back Pay Act, 5 U.S.C. § 5596 (1976), an agency has no authority, absent prior Civil Service Commission approval, to detail an employee to a higher-graded job beyond 120 days. Where an agency does not obtain such approval and keeps an employee on overlong detail, the employee is deemed to have been temporarily promoted from the 121st day of the detail until the employee is returned to regular duty and is entitled to backpay for that period. Federal Personnel Manual (FPM) Bulletin No. 300-40, May 25, 1977, was issued by the Civil Service Commission to provide additional information to assist agencies in the proper application of these decisions.

The type of negotiated 30-day detail provision asserted in Mr. Jones' claim was discussed in a line of decisions of this Office which predated the enactment of the Federal Service Labor-Management Relations Statute 1/ and the publication of our rules governing requests for decisions on matters of mutual concern to agencies and labor organizations. 2/ In that line of cases we stated that although the remedy of retroactive temporary promotion recognized by the Turner-Caldwell line of decisions is based on the Civil Service Commission's instructions at FPM chapter 300, subchapter 8, requiring the Commission's approval of certain details in excess of 120 days, an agency, by its own regulation or by the terms of a collective bargaining agreement, may establish a shorter period under which it becomes mandatory to

1/ Title VII, Civil Service Reform Act of 1978, Pub. L. 95-454, October 13, 1978, 5 U.S.C. §§ 7101-7135.

2/ 4 C.F.R. Part 22 (1981) (originally published as 4 C.F.R. Part 21 at 45 Fed. Reg. 55689-92, August 21, 1980).

promote an employee who is detailed to a higher-grade position. Thus, an agency may bargain away its discretion and thereby make a provision of a collective bargaining agreement a nondiscretionary agency policy, if the provision is consistent with applicable Federal laws and regulations. The violation of such mandatory provision in a negotiated agreement which causes an employee to lose pay, allowances or differentials may be found to be an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596, thus entitling the aggrieved employees to retroactive compensation for the violation.

For a comprehensive analysis of our case law in this regard, see John Cahill, 58 Comp. Gen. 59 (1978). And see also, as a specific case example, Burrell Morris, 56 Comp. Gen. 786 (1977), where we held that an 8-day detail of a prevailing rate employee to perform the duties of a higher-level General Schedule position was a violation of a collective bargaining agreement provision. We concluded that the violation constituted an unwarranted personnel action which entitled the employee to corrective action under the Back Pay Act.

In summary then, Mr. Jones' 42-day detail is not justifiable under the 120-day provisions of our Turner-Caldwell decisions and FPM Bulletin No. 300-40. Rather, under Article 15, Section 3 of the collective bargaining agreement and the line of Comptroller General decisions represented by the Cahill and Morris cases cited above, Mr. Jones asserts that he is entitled to a retroactive temporary promotion with backpay as of the 31st day of his detail.

Turning now to the jurisdictional issue, the question presented is whether GAO will assume jurisdiction over a claim filed under 4 C.F.R. Part 31 when the issue is subject to a grievance procedure authorized by the Federal Service Labor-Management Relations Statute, and one of the parties to the agreement objects to GAO's consideration of the matter, even though no grievance has been filed.

The agency's argument that GAO should not assume jurisdiction over any matter subject to a negotiated grievance procedure overlooks the fact that the

Federal Service Labor-Management Relations Statute did not amend title 31 of the United States Code. The Comptroller General has been rendering decisions on matters involving the expenditure of appropriated funds and settling claims by or against the Government since 1921 and, therefore, the radical change in our jurisdiction proposed by the agency in this case cannot be lightly assumed. See, in particular, 31 U.S.C. §§ 71, 74, and 82d. Since the statute did not amend title 31, we cannot assume that Congress intended employees to be totally barred from having their claims considered by GAO, as argued by the agency. To permit such a total withdrawal of our jurisdiction without a specific directive from Congress would be an abrogation of our statutory duty to settle and adjust claims against the United States. Such a far-reaching result is unsupported and unintended by the express terms and legislative history of the Federal Service Labor-Management Relations Statute.

Having established that the mere existence of a negotiated grievance procedure does not in itself preclude the Comptroller General from considering a claim filed under 4 C.F.R. Part 31, we do however conclude that some restrictions on our jurisdiction are appropriate in recognition of the intent of Congress in enacting the Federal Service Labor-Management Relations Statute. We believe the proper balance between our function under title 31 and the smooth functioning of the procedures authorized by that statute can best be achieved if we decline to assert jurisdiction over cases where the right upon which the claim is based arises solely under the collective bargaining agreement and one of the parties to the agreement objects to consideration of the matter by GAO.

While this restricts the right of individual claimants to have claims adjudicated by GAO, it preserves the right to file a claim on those matters which have traditionally been adjudicated by GAO where the right is based on law or regulation or other authority which exists independently from the collective bargaining agreement. At the same time, in recognition of the important role of collective bargaining in the civil service, it preserves the exclusivity of the grievance procedure where the right relied upon arises solely under the agreement.

We recognize that very often the collective bargaining agreement incorporates rights which may also exist outside of the contract. For example, an agency regulation could provide for backpay after the 60th day of an overlong detail and the collective bargaining agreement could simply incorporate that regulation. In such cases, as in all matters filed with GAO, the burden is on the claimant to establish that the right relied upon also exists outside of the contract. If the right is based on authority which also exists outside of the negotiated agreement, GAO will generally consider such a claim under 4 C.F.R. Part 31 even though the other party to the agreement objects to consideration of the matter by GAO, provided no grievance has been filed.

In summary then, the jurisdictional policies which will apply to claims filed under 4 C.F.R. Part 31, as expressed in this case and its companion case decided today, Schoen and Dadant, supra, are as follows:

(1) GAO will not review or comment on the merits of an arbitration award which is final and binding pursuant to 5 U.S.C. § 7122(a) or (b). 3/ Gerald M. Hegarty, B-202105, July 7, 1981, 60 Comp. Gen. ____; 4 C.F.R. § 22.7(a).

(2) Where a grievance has been filed and one of the parties to the agreement objects to our jurisdiction, GAO will decline to assert jurisdiction. Schoen and Dadant, supra.

(3) Where no grievance has been filed and where otherwise appropriate, GAO will consider a claim on a matter subject to a negotiated grievance procedure over the objection of one of the parties only where the right relied upon is based on law or regulation or other authority existing independently from the collective bargaining agreement. Claims based upon rights which arise solely under the collective bargaining agreement will not be adjudicated by GAO where a party to the agreement objects to consideration of the matter by GAO.

We recognize that the policy in paragraph (3) above, regarding matters subject to a grievance procedure differs

3/ However, payments made pursuant to such an award do not serve as precedent for payment in similar situations not covered by the award. 45 Fed. Reg. 55690, August 21, 1980.

somewhat from the policy which would apply to matters submitted pursuant to 4 C.F.R. Part 22 (1981). Specifically, 4 C.F.R. § 22.7(b) provides that the Comptroller General will not issue a decision or comment on the merits of a matter which is subject to a negotiated grievance procedure when one of the parties to the agreement objects to submission of the matter to GAO. Thus, under Part 22, an objection by one of the parties to the agreement will always operate to preclude assertion of our jurisdiction, whether or not the right relied upon is based upon authorities which exist outside of the agreement. 4/

These different policies under Part 22 and Part 31 are based upon the differences in the procedures themselves. Under 4 C.F.R. Part 22 (1981), heads of agencies (or their designees), heads of labor organizations (or their designees), or authorized certifying and disbursing officers may request a decision from the Comptroller General on any matter of mutual concern to agencies and labor organizations. Arbitrators and other neutrals may request an advisory opinion from the General Counsel of the General Accounting Office. The procedures provide for service on the parties, a period for comment, and provide that a decision or opinion will normally be issued within 60 days after expiration of the period for written comments. Because of the type of procedure involved, particularly the 60-day provision, it would be inappropriate to permit one of the parties to unilaterally seek and obtain a decision on a matter subject to the grievance procedure within 60 days. The potential for a disruptive impact on the grievance-arbitration process in such circumstances prompted our decision to preclude consideration of such unilateral requests for decisions under this expedited procedure.

4/ A limited exception was provided for in the case of requests from certifying and disbursing officers because these individuals have statutory authority, independent of agency management, to decline payment of a voucher and because they are not a party to the collective bargaining relationship and do not have direct access to the procedures established by the Federal Service Labor-Management Relations Statute.

In contrast, the claims procedure set forth at 4 C.F.R. Part 31 is a less formal procedure available to all individual employees, whether or not they are represented by a labor organization. Under Part 31, individual employees or their authorized representatives may file claims directly with the employing agency or with our Claims Group. Following receipt of a report from the agency, the Claims Group issues a settlement certificate which is appealable by the employee or the agency to the Comptroller General under additional procedures set out at Part 32. Historically, this Part 31 procedure has always provided a forum for any Federal employee to seek review by the General Accounting Office of agency action in regard to his or her compensation and other employment entitlements without the expense and delay of litigation.

Because Part 31 is a different type of procedure, we do not believe it would be disruptive to the grievance-arbitration process to consider claims filed under that Part, provided the basis for the claim exists independently from the collective bargaining agreement and no grievance has been filed. Moreover, as discussed above, since the Federal Service Labor-Management Relations Statute did not amend title 31, we cannot totally bar consideration of all claims which could be subject to a negotiated grievance procedure. Rather, we seek a balance between our function under title 31 and the smooth functioning of the procedures authorized by the Federal Service Labor-Management Relations Statute.

Accordingly, in the circumstances presented in Mr. Jones' case, we are declining jurisdiction of his claim because the right relied upon arises solely under the collective bargaining agreement and the agency has objected to GAO's consideration of the claim.

Milton J. Socolar

Acting Comptroller General
of the United States