DECISION

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

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FILE: B-180010

DATE: AUG 25 1975

MATTER OF: Naval Rework Facility (Jacksonville) - Arbitration Award of Backpay to Employees Deprived of Overtime Work

DIGEST: Federal Labor Relations Council questions the propriety of sustaining an arbitration award that orders backpay for employees deprived of overtime work in violation of a negotiated agreement. Agency violations of negotiated agreements which directly result in loss of pay, allowances or differentials, are unjustified and unwarranted personnel actions as contemplated by the Back Pay Act, 5 U.S.C. § 5596. Improper agency action may be either affirmative action or failure to act where agreement requires action. Thus, award of backpay to employees deprived of overtime work in violation of agreement is proper and may be paid.

This action involves a request dated May 9, 1975, by the Federal Labor Relations Council (FLRC) for an advance decision as to the propriety of certain payments awarded by an arbitrator in the matter of Naval Rework Facility, Naval Air Station, Jacksonville, Florida, and National Association of Government Employees, Local R5-82 (Goodman, Arbitrator), FLRC No. 73A-46.

The FLRC first issued a decision on the appeal from the arbitration award in this case on September 24, 1974, holding that the payments awarded by the arbitrator violated applicable law and regulations. The labor organization in the case, the National Association of Government Employees (NAGE), filed a motion with the FLRC on January 17, 1975, to reconsider and modify its decision in light of the decision in B-180010, issued by the Comptroller General on October 31, 1974 (54 Comp. Gen. 312). Hence, pursuant to 31 U.S.C. § 74, the FLRC has requested the Comptroller General to render a decision on the propriety of the payments awarded by the arbitrator.

The arbitration award resulted from a grievance filed by the employees of certain repair shops at the Naval Rework Facility concerning the number of employees scheduled to work on Thursday,

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January 25, 1973, and on Saturday, January 27, 1973. It had apparently been the practice of certain repair shops at the Facility to schedule overtime on Saturday in addition to the normal Monday through Friday administrative workweek. Thursday, January 25, 1973, was a national holiday declared by President Nixon to mourn the death of former President Lyndon B. Johnson.

The arbitrator found that the agency, in scheduling work during the days in question, had violated Article XII, section 4, of the parties' negotiated agreement. The aforementioned section provides:

> "Employees will be required to work on a holiday if necessary in order to effectively accomplish the mission of the facility; however, such holiday work will not be scheduled to avoid overtime."

The arbitrator determined that 56 employees were ordered to work on the national holiday, January 25, 1973, and that only 28 employees were ordered to work on the following Saturday, January 27, 1973. He found that, although there was no indication in the evidence as to the agency's intent on the matter of scheduling, the acts of the agency did, in fact, avoid overtime pay. Hence, the arbitrator sustained the union's grievance and ordered that "all personnel who worked on Thursday, January 25, 1973, and were not allowed to work on Saturday, January 27, 1973, are to be paid for four additional hours." The rationale for this award was that the employees who worked on the holiday but not on Saturday had received 48 hours of pay, consisting of compensation for the basic 40-hour week plus 8 hours of holiday pay, as compared to the 52 hours of pay received by the employees who worked on Saturday, consisting of compensation for the basic 40-hour week plus 8 hours of Saturday work at the overtime rate of time and one-half.

The agency apparently agreed with the findings and conclusions of the arbitrator, but believed that the payments awarded would be improper under the decisions of our Office. Therefore, the agency filed an exception to the payment portion of the award, relying on the rule stated in several of our decisions that employees may not be compensated for overtime work when they do not actually perform work during the overtime period. See, for example, 42 Comp. Gen. 195 (1962); 45 id. 710 (1966); 46 id. 217 (1966); and B-175867, June 19, 1972. The Federal Labor Relations Council upheld the exception in its decision of September 24, 1974, on the basis of the Comptroller General's decisions.

With respect to the "no work, no pay" policy, we had held in those decisions that the "withdrawal or reduction" in pay referred to in the Back Pay Act, now codified in 5 U.S.C. § 5596 (1970), meant only the actual withdrawal or reduction of pay or allowances which the employee had previously received or was entitled to. These holdings were followed in B-175867, June 19, 1972, where an employee was deprived of the opportunity to work overtime by the agency's failure to comply with its agreement with the union. We stated therein that the improper denial of the opportunity to perform overtime to the aggrieved employee was not an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596, and the implementing Civil Service Commission regulation, 5 C.F.R. § 550.803. We also held that the statute authorizing overtime, 5 U.S.C. § 5542(a), clearly contemplated the actual performance of overtime duty, citing the above-mentioned decisions. Accordingly, we concluded that, although the union-management agreement had been violated, there was no authority for overtime pay since no overtime work had been performed.

In our earlier decisions, we had also construed the Back Pay Act of 1966 as requiring positive or affirmative action by an agency official, rather than an omission or failure to take action for an improper reason, in order to provide a remedy in the form of backpay. For example, we held an employee was not entitled to backpay, where his agency had improperly failed to promote him. See 48 Comp. Gen. 502 (1969).

In our more recent decisions, however, we have held that the violation of a mandatory provision of a negotiated agreement resulting in the loss or reduction of an employee's pay, allowances or differentials, is an unjustified or unwarranted personnel action, provided that the mandatory provision was properly included in the agreement. Hence, we now believe that such violations are subject to the Back Pay Act, 5 U.S.C. § 5596, and that the Act is the appropriate statutory authority to compensate an employee for pay, allowances, and differentials he would have received but for the violation of the mandatory provision in the negotiated agreement. 54 Comp. Gen. 312 (1974), and 54 id. 403 (1974). Our present position is stated at 54 Comp. Gen. 312, 318 as follows:

> "We believe that a violation of a provision in a collective bargaining agreement, so long as that provision is properly includable in the agreement, which causes an employee to lose pay, allowances or differentials, is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough

without pay, demotion or reduction in pay and that therefore the Back Pay Act is the appropriate statutory authority for compensating the employee for the pay, allowances or differentials he would have received but for the violation of the agreement. In that regard, to the extent that previous decisions of this Office may have been interpreted as holding to the contrary, such decisions will no longer be followed."

We have also recently held that a finding by an appropriate authority, such as the Assistant Secretary of Labor for Labor-Management Relations, that an employee has undergone an unjustified or unwarranted personnel action as a result of an unfair labor practice which directly caused the employee to be deprived of pay, allowances or differentials he would otherwise have received but for such action, would entitle the employee to backpay. 54 Comp. Gen. 760 (1975).

Finally, we ruled in B-175275, June 20, 1975, 54 Comp. Gen. ___, that an employee deprived of overtime pay in violation of a labor-management agreement may be awarded backpay under the Back Pay Act for the overtime lost. In that decision, we expressly set aside the distinction between commission and omission in connection with improper personnel actions.

In view of the foregoing, our present position is that an unjustified or unwarranted personnel action may involve acts of omission as well as acts of commission. Such improper action may involve the failure to promote an employee in a timely manner when there is a mandatory requirement to do so or the failure to afford an employee an opportunity for overtime work in accordance with mandatory requirements of agency regulations or a negotiated agreement. Thus, an agency may retroactively grant backpay, allowances and differentials under the provisions of the Back Pay Act to an employee who has undergone an unjustified or unwarranted personnel action, without regard for whether such action was one of omission or commission.

The arbitrator concluded in the present case that 28 employees had been deprived of overtime work in violation of a provision of the negotiated agreement. The arbitrator also concluded, and the agency admitted, that had the 28 employees been properly scheduled, they would have received 52 hours of pay for 40 hours of work instead of 48 hours of pay for the 40 hours actually worked. Therefore, in accordance with B-175275, June 20, 1975, 54 Comp. Gen. ___, supra, we hold that the arbitrator's award of backpay for employees deprived of overtime work

in this case may be implemented by the agency in accordance with the provisions of 5 U.S.C. § 5596 and implementing regulations.

R.F.KELLER

Acting Comptroller General
of the United States