

DECISION



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

FILE: B-180010

DATE: OCT 29 1975

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MATTER OF: Portland (Maine) Air Traffic Control Tower -
Arbitration Award of Backpay to Air Traffic
Controller Deprived of Overtime Work

DIGEST: Federal Labor Relations Council questions the propriety of sustaining an arbitration award of 1 hour backpay to an employee deprived of overtime work in violation of a negotiated labor-management agreement. Agency violations of such 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. Therefore, where an agency obligated itself in a labor-management agreement to provide 2 hours of productive work when an employee is held on duty beyond his regular shift and, in violation of such agreement, provided him only 1 hour, an arbitration award providing backpay to the employee for the additional hour may be sustained.

This matter involves a request for an advance decision from the Federal Labor Relations Council (FLRC) on the propriety of a payment ordered by a labor relations arbitrator in Professional Air Traffic Controllers Organization and Federal Aviation Administration, Portland, Maine, Air Traffic Control Tower (Gregory, Arbitrator), FLRC No. 74A-15.

The facts in the case are as follows. The Portland, Maine, Air Traffic Control Tower is operated by air traffic controllers employed by the Federal Aviation Administration (FAA). The control tower normally operates between 7 a.m. and 11 p.m. daily; however, occasionally an evening flight of Delta Airlines arrives in Portland considerably later than its scheduled time. Whenever this flight arrives late, the air traffic controller on duty is required to remain at work after his regular quitting time of 11 p.m. The chief controller had established work guidelines for controllers required to stay beyond their normal quitting time that allowed 1 hour of overtime pay for any time worked after 11 p.m. and terminated before midnight and 2 hours of overtime pay if the work time extended beyond midnight.

On June 21, 1973, the evening Delta flight arrived late at the Portland Airport and did not depart until 11:26 p.m. Mr. Richard A. Fournier was the air controller on duty at the

time. He remained beyond his normal quitting time and closed the control tower at midnight. He was paid for 1 hour of overtime at the appropriate rate pursuant to the work guides established by the chief controller.

Mr. Fournier and his labor organization, the Professional Air Traffic Controllers Organization (PATCO), filed a grievance on June 22, 1973, alleging that the work guidelines established by the chief controller violated article 40, section 5, of the negotiated agreement then in force, which reads as follows:

"ARTICLE 40 — OVERTIME

"Section 5. Whenever an employee is held on duty beyond his regular shift, he shall be guaranteed a minimum of two hours of productive work."

The employee's grievance was denied by the agency on the basis that the facility could not provide productive work after assistance to Delta Airlines had been completed. The disputed matter was submitted to arbitration. The arbitrator made the following finding and conclusion:

"* * * it is my opinion that the grievant's and PATCO's interpretation of Article 40, Section 5, with reference to the present case, is correct. My conclusion, therefore, is that under Article 40, Section 5 of the agreement the grievant was entitled to two hours of overtime pay at the appropriate overtime rate when he was held over on the evening of June 21, 1973."

Accordingly, the arbitrator allowed the grievance of Richard A. Fournier and awarded him another hour's pay at the appropriate overtime rate, in addition to what he has already received, for having been held over beyond his regular shift on June 21, 1973.

The FAA petitioned the FLRC for review of the above-quoted award alleging that the award directing payment for an additional

hour of overtime conflicts with applicable law, regulations, and decisions of our Office.

Under the provisions of 5 U.S.C. § 5542(a) (1970) and the regulations implementing the statute contained in 5 C.F.R. § 550.111, an agency has authority to order or approve overtime work which is defined as each hour of work in excess of 8 hours in a day. The statute and regulation also require that such work must be performed by the employee in order for him to receive overtime pay. The FAA, in its agreement with PATCO, exercised its statutory authority and, in effect, authorized overtime work of at least 2 hours for employees held over beyond their regular shifts since it agreed to provide productive work for such overtime period. During the proceedings, the agency argued that no work was available for the overtime added to the tour; however, this was effectively countered by the union in pointing out that many administrative, operational, and training tasks could have been assigned to a controller who was held over on duty beyond his regular tour. Such tasks include resetting runway lights, securing the recording equipment, securing the facility logs, determining the traffic count for the daily operations survey for the tower, securing the tower upon his departure, training with operational manuals, and familiarization with operating procedures.

The arbitrator found that the FAA violated the terms of the negotiated agreement by failing to fulfill its commitment of providing the required 2 hours of productive overtime work for the employee.

We have held that where an arbitrator has made a finding that an agency has violated a mandatory provision of a negotiated agreement which causes the employee to lose pay, allowances or differentials, such violation is as much an unjustified or unwarranted personnel action as is an improper separation, suspension, furlough without pay, demotion or reduction in pay, as long as the provision was properly included in the agreement. Accordingly, the Back Pay Act, 5 U.S.C. § 5596 (1970), is the appropriate statutory authority for compensating the employee for pay, allowances or differentials he would have received but for the violation of the negotiated agreement. 54 Comp. Gen. 312 (1974), 54 id. 403 (1974), 54 id. 435 (1974), and 54 id. 538 (1974).

Section 5596 of title 5, United States Code, the authority under which an agency may retroactively adjust an employee's compensation, provides, in part, as follows:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee--

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

"(2) for all purposes, is deemed to have performed service for the agency during that period * * *." (Emphasis supplied.)

The implementing regulations for the above-quoted statute concerning the recomputation of pay for employees who have undergone an unjustified or unwarranted personnel action specifically provide for the payment of premium pay. In this regard section 550.804 of title 5, Code of Federal Regulations, provides as follows:

"(b) In recomputing the pay, allowances, differentials, and leave account of an employee under paragraph (a) of this section, the agency shall include the following:

"(1) Premium pay which the employee would have received had it not been for the unjustified or unwarranted personnel action * * *."

In B-175275.14, June 20, 1975, 54 Comp. Gen. ___, we held that where an employee was deprived of overtime work in violation of a

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negotiated agreement, the employee may be awarded backpay for the overtime lost under the provisions of the Back Pay Act. Accordingly, we have no objection to the implementation of the arbitration award requiring the payment of an additional hour of overtime to the grievant for overtime work that the FAA authorized and failed to provide as it had obligated itself to do under the agreement. The amount of the payment must be determined by the FAA and made in accordance with the provisions of 5 U.S.C. § 5596 and implementing regulations.

R.F. KELLER

Deputy Comptroller General
of the United States