DECISION

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

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FILE: B-180010 DATE: JAN 6 1976

MATTER OF: Mare Island Naval Shipyard and Mare Island Navy Yard Metal Trades Council, AFL - CIO - Arbitration award of backpay for overtime

DIGEST: Federal Labor Relations Council requests decision on legality of arbitration award of backpay to 54 shipyard employees for overtime and time not worked. The arbitrator found that Shipyard changed basic workweek of employees without complying with consultation requirements of negotiated agreement. However, because arbitrator did not find that but for failure of Shipyard to consult with union, the change in basic workweek would not have occurred, award does not satisfy criteria of Back Pay Act, 5 U.S.C. § 5596 (1970) and, therefore, it may not be implemented.

This action involves a request for an advance decision from the Federal Labor Relations Council on the legality of payments ordered by a labor relations arbitrator in the matter of Mare Island Naval Shipyard and Mare Island Navy Yard Metal Trades Council, AFL-CIO (Durham, Arbitrator), FLRC No. 74A-54. The case is before the Federal Labor Relations Council as a result of a petition for review filed by the Department of Defense and the Department of the Navy alleging that the award violates applicable laws and regulations.

On July 5, 1972, the U.S.S. Abraham Lincoln, a nuclear powered fleet ballistic submarine attached to the U.S. Pacific Fleet, was withdrawn from active duty and entered Mare Island Naval Shipyard for overhaul and repairs. The Chief of Naval Operations determined that the Lincoln could be relieved from fleet operations for a period of 13 months and that it should be returned to service by August 6, 1973. The Shipyard planned and scheduled the overhaul work to be performed and the work was begun. However, it became obvious by early February 1973 that the repair work on the Lincoln was so far behind schedule that the programed completion date could not be met. As a result, the Commander of the Submarine Forces for the Pacific criticized the Shipyard's failure to adhere to the work schedule and demanded that the Lincoln be returned to his command as soon after the original completion date as possible. Also in early February, the Naval Ship Systems Command conducted an inspection and audit of the Shipyard and severely castigated its failure to complete repair work on schedule and condemned its excessive use of overtime.

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Faced with the problem of speeding up work on the Lincoln while restricting the use of overtime, the Shipyard commander ordered subordinate officials to investigate the possibility of initiating a shifted workweek for employees in the propulsion plant testing facility. The purpose of the proposed workweek shift was to achieve a 7 days per week continuous test program. The proposed plan for accomplishing this objective was to schedule the basic workweek of certain employees from Sunday through Thursday and to schedule the basic workweek of other employees from Tuesday through Saturday.

On March 2, 1973, a meeting was held with the president of the Mare Island Navy Yard Metal Trades Council during which shipyard officials discussed the proposal. The president expressed his personal opposition to the proposed change in workweek but promised to confer with representatives of the various unions affiliated with the Metal Trades Council during a meeting scheduled for March 5, 1973. On March 6, 1973, the president informed shipyard officials that the Metal Trades Council was opposed to the plan and suggested alternative solutions to the problem. The Shipyard officials advised the president that they would inform the shipyard commander of the Council's position and that the president would be informed as to the commander's decision.

During the afternoon of March 6, 1973, the Shipyard commander decided to implement the plan to change the basic workweek of certain employees beginning on the following Sunday, and Shipyard officials were instructed to notify the affected employees. The Council's president was not informed of the decision until the following day. Also on March 7, Shipyard supervisors began notifying employees whose basic workweek had been changed. The plan was placed in operation effective Sunday, March 11, 1973.

Four groups of affected employees from various shops at the shipyard, totaling about 54 individuals, presented grievances through the Metal Trades Council protesting the change of their basic workweek. The parties were unable to adjust the grievances under the negotiated grievance procedure and the issues involved were submitted to binding arbitration under the terms of the agreement.

In the arbitration proceeding the union contended that the shipyard violated section 2 of article VI and section 3 of article VIII

of the negotiated agreement in changing the basic workweek of the grievants. Section 2, article VI, provides:

> "Section 2. In formulating or modifying Shipyard instructions and notices concerning policies and programs related to working conditions, the Employer will notify the Council. The Employer will furnish the Council with information as to the content of the instruction being formulated or revised, and will request written comments and suggestions from the Council. At the request of the Council, representatives of the Employer will meet with the representatives of the Council Policy Committee for purposes of oral consultation and to provide the opportunity for an exchange of views."

Section 3, article VIII, provides:

> "Section 3. When necessary to meet operating needs, the Employer may schedule basic workweeks other than Monday through Friday for employees. When changing the days of a unit employee's basic workweek, the Employer, except as otherwise provided in Section 4 below:
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> "a. Will give notice to the employee at least three (3) calendar days before the first administrative workweek affected by the change,
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> "b. Will make the change for a period of not less than three (3) consecutive weeks, and
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> "c. Will notify the appropriate Council steward and, upon request, provide information as to the reason for the change."

The union argued that the consultation requirements of section 2, article VI, were not satisfied by the shipyard before it implemented the plan and that the change in basic workweek was not "necessary to meet operating needs" under the terms and conditions of section 3 of ariticle VIII.

The Shipyard maintained that section 2 of article VI was inapplicable to the instant dispute inasmuch as it neither formulated nor modified a Shipyard instruction or notice relating to hours of work within the meaning of that section. Also, it contended that the change of the grievants' basic workweek was necessary to meet "operating needs" within the meaning of article VIII and that it complied with the consultative requirements of that article in making the change.

After considering the evidence and arguments presented by the parties during the proceeding, the arbitrator found that the shipyard's "action was not arbitratry or capricious and was necessary to meet operating needs within the meaning of Article VIII, Section 3, of the Agreement." The arbitrator also found, however, that the shipyard had modified one of its Instructions (NAVSHIPMAREINST 5330.2D) governing hours of work, when it changed the basic workweek of the grievants, and in doing so violated the consultative provisions of section 2, article VI. As a remedy for this violation the arbitrator fashioned the following award:

> "The change in the basic workweek of the aggrieved employees instituted by the Employer was in violation of ARTICLE VI, Section 2, of the Negotiated Agreement. The Employer shall pay to each of the grievants the difference between what he would have been paid at the overtime rate and the amount actually paid at the straight time rate for each Saturday and Sunday he worked during the periods the administrative workweek was in force. The days each was off during the normal workweeks as a result of the changed workweek shall be treated as days of authorized administrative leave."

The sole issue presented for consideration by us is whether or not the arbitrator's award of backpay to the aggrieved employees violates applicable law and regulations.

The Department of the Navy has challenged the validity of the award of overtime pay, 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); and 46 id. 217 (1966). Our "no work, no pay" rule set forth in

the cited decisions was based on the premise that the statutes authorizing overtime, 5 U. S. C. § 5542(a) and 5 U. S. C. § 5544(a) clearly contemplated the actual performance of overtime duty. The Navy further points to our decision B-175867, June 19, 1972, which held that the improper denial of the opportunity for an aggrieved employee to work overtime in violation of a mandatory provision of a negotiated agreement is not an unjustified or unwarranted personnel action within the purview of the Back Pay Act, 5 U. S. C. § 5596 (1970), and the regulations implementing that statute. Hence, the Navy argues there is no available remedy for employees who are denied the opportunity of performing scheduled overtime work.

Our holding in B-175867, supra, was based on our previous decisions holding that the overtime statutes required the actual performance of work during the overtime period. However, upon reexamination we have subsequently changed our view and held that an employee improperly denied overtime work may be awarded backpay. See 54 Comp. Gen. 1071 (1975) where we expressly stated that we would no longer follow our decision B-175867, supra. See also B-180010, August 25, 1975, 55 Comp. Gen. ___.

In our recent cases we have also held that a violation of a mandatory provision in a negotiated agreement, whether by an act of omission or commission, 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, provided the provision was properly included in the agreement. 54 Comp. Gen. 312 (1974), 54 id. 403 (1974), 54 id. 435 (1974), and 54 id. 538 (1974). Thus, the Back Pay Act of 1966, 5 U. S. C. § 5596 (1970), is the appropriate statutory authority for compensating an employee for pay, allowances, or differentials he would have received, but for the violation of the negotiated agreement.

However, before any monetary payment may be made under the provisions of 5 U. S. C. § 5596 (1970), there must be a determination not only that an employee has undergone an unjustified or unwarranted personnel action, but also that such action directly resulted in a withdrawal of pay, allowances, or differentials, as defined in applicable civil service regulations. Although every personnel action which directly affects an employee and is determined to be a violation of the negotiated agreement may also be

considered to be an unjustified or unwarranted personnel action, the remedies under the Back Pay Act are not available unless it is also established that, but for the wrongful action, the withdrawal of pay, allowances, or differentials would not have occurred. 54 Comp. Gen. 760, 763 (1975). We further stated in that decision the general rule that:

> "* * * failure-to-consult actions, in the absence of a requirement that the agency carry out the advice received as a result of the consultation, are not likely to result in the necessary 'but for' relationship between the wrongful act and the harm to the individual employee for which the Back Pay Act is the appropriate remedy."

In light of the foregoing, in order to make a valid award of backpay, it is necessary for the arbitrator not only to find that the negotiated agreement has been violated by the agency, but also to find that such improper action directly caused the grievants to suffer a loss or reduction in pay, allowances, or differentials.

Here, the arbitrator found that the Shipyard violated the agreement by its failure to consult with the union before initiating a change in the basic workweek of the grievants which caused them to undergo an unjustified and unwarranted personnel action. However, the arbitrator did not find that the agreement imposed a requirement on the Shipyard to carry out the advice it received during the consultation process or that the agency would have been precluded from implementing the workweek changes if it had complied with the consultation provisions of the agreement. Therefore, there is no showing that but for the shipyard's failure to consult with the union the grievants would have received overtime pay for each Saturday and Sunday they worked during the period that the changed basic workweek was in effect.

Accordingly, there is no legal authority for the payments awarded by the arbitrator, and the award may not be implemented.

It should be pointed out that if the arbitrator had made the proper findings to support the award as fashioned, he should also have awarded backpay instead of administrative leave for days off during the grievants' regular basic workweek on which they normally would have worked but for the change in workweek.

We note that, pursuant to section 19(d) of Executive Order 11491, the union had the option of raising the failure to consult issue as either an unfair labor practice under section 19(a)(6) or as a grievance under section 13, but not under both procedures. The union elected to file a grievance under section 19 of the Order which resulted in the arbitration award now being reviewed. Where an award is defective the reviewing authority should, if feasible, resubmit the award to the arbitrator for corrective action. Enterprise Wheel and Car Corp. v. United Steelworkers of America, 269 F.2d 327 (4th Cir. 1959), approved in part 363 U.S. 593, 599 (1960), National Brotherhood Packinghouse and Dairy Workers Local No. 52 v. Western Iowa Pork Company, Inc., 247 F. Supp. 563 (1965), affirmed 356 F.2d 275 (8th Cir. 1966). Therefore, to provide a remedy for the union, we recommend that the Federal Labor Relations Council consider resubmitting the award to the arbitrator with instructions that he fashion an award similar to the remedies permitted for unfair labor practices under 29 C.F.R. § 203.26(b) (1975).

Deputy R.F. [illegible]
Comptroller General
of the United States