DOCUMENT RESUME

08008 - [C3348420]

[Arbitrator's Backpay Award May Not Be Implemented]. B-192952. November 24, 1978. 4 pp.

Decision re: International Association of Machinists and Aerospace Workers; by Robert F. Keller, Deputy Comptroller General.

Contact: Office of the General Counsel: Personnel Law Matters I.
Organization Concerned: Department of the Navy; Federal Labor Relations Council.
Authority: Back Pay Act of 1966 (5 U.S.C. 5596). 5 U.S.C. 5107. 5 U.S.C. 5346. 56 Comp. Gen. 624. 55 Comp. Gen. 629. 54 Comp. Gen. 760. 54 Comp. Gen. 763. 5 C.F.R. 511. 5 C.F.R. 532. F.P.M., ch. 511.

A union appealed a decision of the Federal Labor Relations Council denying an arbitrator's award which directed restoration of certain employees to their former positions with backpay. The arbitrator found that the agency violated a negotiated agreement by failing to consult with the union prior to converting certain wage board positions to General Schedule. The arbitrator did not have the authority to restore the employees to their former positions and did not meet the test of finding that "but for" the agency's failure to consult with the union, the employees would have been entitled to additional compensation. (HTW)

P2 type ...

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

8420

FILE: B-192952 DATE: November 24, 1978

MATTER OF: International Association of Machinists - Claim for Retroactive Pay

DIGEST: 1. Arbitrator found agency violated negotiated agreement by failing to consult with union prior to converting certain wage board positions to General Schedule, and arbitrator directed agency to restore employees to former positions with backpay. Union appeals Federal Labor Relations Council decision denying implementation of arbitration award. In view of statutes and regulations governing classification actions and appeals, we conclude that arbitrator was without authority to restore employees to former positions.

2. Union appeals Federal Labor Relations Council decision denying arbitrator's award of backpay where agency failed to consult with union prior to converting several wage board positions to General Schedule. Since arbitrator did not find that agency was required to follow union advice or would have been precluded from converting positions, award does not meet "but for" test under Back Pay Act, and, therefore, it may not be implemented.

This decision is in response to a request from District Lodge 110 of the International Association of Machinists and Aerospace Workers, filed on behalf of Local Lodge 2297 (hereinafter referred to as the "union"). The union is appealing a decision of the Federal Labor Relations Council, FLRC No. 77A-127, dated July 25, 1978, in which the Council modified an arbitration award by striking that portion of the award which directed restoration of certain employees to their former positions with backpay. The question presented is whether but for the agency's failure to consult with the union with regard to the reclassification of certain employees, the employee would have been entitled to additional compensation.

The facts, as reported in the arbitrator's opinion and award, are that the Department of the Navy issued instructions in December 1975, which stated that certain Wage Grade positions would be discontinued and were to be reclassified as General Schedule positions. It appears that agency officials at the Naval Air Rework Facility, Cherry Point, North Carolina, met with the nine affected employees at the facility to discuss this action. The job descriptions were later rewritten, and the positions were reclassified from WG-14 to GS-9.

The arbitrator found that the agency had violated the negotiated agreement by failing to consult with the union regarding this action. Furthermore, the arbitrator found that if six of the nine employees who were reclassified to General Schedule positions had instead remained in their Wage Grade positions, they would have received a 75 cent increase in their hourly rate of pay which would have exceeded their rate of pay in grade GS-9. Therefore, the arbitrator ordered the agency to restore these employees to their former Wage Grade positions with backpay until such time as further action could be taken after negotiation and consultation with the union. The agency appealed the arbitrator's award to the Federal Labor Relations Council.

The Council, in considering the agency's appeal, requested an opinion from the Civil Service Commission (CSC) on this matter, and the CSC advised the Council that, in view of the statutes and regulations governing classification appeals, the arbitrator was without authority to order restoration of these employees to their former positions. Furthermore, the CSC stated that the arbitrator's award of backpay failed to meet the "but for" test as established under decisions of our Office for awards under the Back Pay Act. On the basis of this opinion, the Council, as stated above, by decision dated July 25, 1978, modified the arbitrator's award by striking that portion of the award which directed the agency to restore these employees to their former positions with backpay.

On appeal to our Office, the union argues that the arbitrator's award did in fact meet the "but for" test since but for the violation of the negotiated agreement and "evading the time required for consultation", these employees would have received a pay increase in their wage board positions. The union contends that any subsequent conversion from WG-14 to GS-9 would have resulted in a reduction in pay and would have constituted an adverse action.

As noted in the Council's decision, the classification of positions is within the jurisdiction of the employing agency and the Civil Service Commission. See 5 U.S.C. §§ 5107 and 5346 (1976). We have held that the decision to change a position from a wage system to the General Schedule is essentially a classification matter, the timing of which is governed by Civil Service Commission regulations. See Donald R. Foulke, 56 Comp. Gen. 624 (1977); and Federal Personnel Manual, Chapter 511, Subchapters 2 and 7. Furthermore, classification actions are subject to requests for review and appeals by employees only under the provision of the CSC's regulations contained in 5 C.F.R. Parts 311 and 532 (1977). See also Article XVIII, section 1 and 2, of the negotiated agreement. Therefore, we conclude that the arbitrator was without authority to restore these employees to their former positions.

With regard to the arbitrator's award of backpay, our Office has 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. See Mare Island, 55 Comp. Gen. 629 (1976) and decisions cited therein. Thus, the Back Pay Act of 1966, 5 U.S.C. § 5596 (1976), 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, as we pointed out in Mare Island, supra, where the agency is not required to carry out the advice received as a result of consultation, the failure to consult does not result in the necessary "but for" relationship between the wrongful act and the harm to the employee for which the Back Pay Act is the appropriate remedy. See also 54 Comp. Gen. 760, 763 (1975). In the present case, the arbitrator did not find that the negotiated agreement imposed a requirement on the agency to follow the advice it received during the consultation process or that the agency would have been precluded from converting these wage board positions to the General Schedule if it had complied with the consultation provisions of the agreement. Instead, it appears the arbitrator presumed that if the agency had consulted with the union, the wage board positions would not have been converted to the General Schedule until after the effective date of the wage board pay increase. However, we conclude that there is no showing that but for the agency's failure to consult with the union, these positions would not have been converted to the General Schedule or that the employees would have been entitled to additional compensation.

Accordingly, there is no legal authority for implementation of the arbitrator's award, and we must sustain the determination of the Federal Labor Relations Council.

R.F. Keller

Deputy Comptroller General
of the United States