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

10,034

FILE: B-193176 DATE: May 4, 1979

MATTER OF: Rocky Mountain Arsenal - Claim of Supervisory Personnel to Additional Environmental Differential Pay

DIGEST: Wage grade supervisors who are not members of exclusive bargaining unit claim additional environmental differential awarded to nonsupervisory personnel under arbitration award. Agency states that environmental differential rate was properly reduced in 1974 and would have applied to nonsupervisory personnel but for violation of negotiated agreement. Since supervisors are not covered under negotiated agreement and since action reducing differential rate did not constitute unjustified or unwarranted personnel action, they are not entitled to additional differential awarded to nonsupervisory personnel.

This action is in response to the request for an advance decision from S. Brink, Finance and Accounting Officer, Rocky Mountain Arsenal, Department of the Army, concerning the entitlement of certain supervisory personnel to additional environmental differential pay during the period from August 1974, to March 1978. The question presented is whether these supervisory personnel, who were not members of an exclusive bargaining unit, may derive any benefit from an arbitration award of additional environmental differential pay to nonsupervisory personnel who were within the bargaining unit.

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BACKGROUND

The report from the Department of the Army states that prior to October 1974, the Arsenal permitted the individual supervisors to authorize environmental differential pay at high or low degree hazard rates for wage grade employees working in close proximity to unusually severe hazards. In most cases the employees, along with the supervisors, received a "high degree hazard" rate of 8 percent when they entered a "restricted area" where operations involving toxic chemicals were conducted. In October 1974, the Commander of the Arsenal published RMA Regulation 690-9 which outlined new procedures to determine whether an employee was eligible for

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environmental differential pay and whether the hazard was of a high or low degree nature. As a result, Local 2197 of the American Federation of Government Employees (AFGE), filed a grievance on November 18, 1974, under its negotiated collective bargaining agreement alleging that the environmental differentials had been reduced in five locations in violation of the negotiated agreement. The union argued that the regulation had been implemented without negotiations and the mutual agreement of the parties as required under the contract.

The Arsenal challenged the arbitrability of the grievance, but the Assistant Secretary for Labor-Management Relations, Department of Labor, ruled on August 5, 1976, that the issue was subject to the grievance and arbitration provisions in the negotiated agreement. The grievance was then heard by an arbitrator who found that the new regulation affected a prior benefit or practice and that this action violated Section 4 of Article XXXV of the negotiated agreement which provided as follows:

> "It is further agreed and understood that any prior benefits and practices and affecting personnel practices and working conditions of members of the Unit which have been mutually acceptable to the parties and which is not specifically covered by this AGREEMENT shall not be changed unless mutually agreed to by the parties."

The arbitrator held that the parties had not mutually agreed to these changes, and he awarded retroactive payment of the higher environmental differential which would continue until the parties reached a mutual agreement on the matter.

The Arsenal appealed the arbitration award to the Federal Labor Relations Council (FLRC) arguing that the arbitrator's award interfered with an agency function in determining environmental differential pay under the provisions of Federal Personnel Manual (FPM) Supplement 532-1, Subchapter S8-7g(2). In addition, the Arsenal contended that the award did not meet the requirements for backpay under the Back Pay Act, 5 U.S.C. § 5596 (1976).

The FLRC decision, No. 77A-53, dated August 31, 1977, held that the award did not violate the provisions of FPM Supp. 532-1, Subchapter S8-7, since those regulations provide for local determination of specific work conditions for which environmental differential

is payable. In addition, the FLRC noted that the collective bargaining process is listed as one specific means of locally determining whether a particular work situation warrants payment of environmental differential. With regard to whether the award violates the Back Pay Act, the FLRC noted that the arbitrator found an obligation under the agreement for negotiation and mutual agreement before the existing environmental differential payments could be changed. The FLRC noted further that but for the agency's violation of the agreement by failing to reach a mutual agreement with the union, the employees would have continued to receive the higher rates until a mutual agreement as to new rates could be reached. Thus, the FLRC concluded that the arbitrator's award did not violate the provisions of the Back Pay Act.

ISSUE

The Arsenal has not questioned the legality of the arbitration award but has questioned whether wage grade supervisory personnel who are not members of the exclusive bargaining unit may derive any benefit from the arbitration award. The Arsenal argues that there has been no finding that the provisions of FPM Supp. 532-1 were improperly applied by the Arsenal, but only a finding that the Arsenal committed a procedural violation of the negotiated agreement by failing to reach mutual agreement with the union on the implementation of the new procedures. The Arsenal concedes that the violation of a collective bargaining agreement does not appear to constitute an unjustified or unwarranted personnel action towards personnel who were not members of the exclusive bargaining unit, but the Arsenal argues it would be very inequitable to not compensate wage grade supervisors for the same work performed by their subordinates.

DISCUSSION AND CONCLUSION

The statutory authority for environmental differential pay is contained in 5 U.S.C. § 5343(c)(4) which provides that the Civil Service Commission (CSC) (now Office of Personnel Management) shall prescribe regulations for the administration of the prevailing rate system including regulations which provide "for proper differentials, as determined by the Commission, for duty involving unusually severe working conditions or unusally severe hazards * * *." The regulations promulgated by the

CSC are contained in FPM Supp. 532-1, Subchapter S8-7, and Appendix J. The regulations provide, in S8-7g(2), that each installation or activity must evaluate its situations against the guidelines provided in Appendix J to determine entitlement to environmental differential. In addition, as provided in S8-7g(3), negotiations through the collective bargaining process may be used for determining coverage of additional local situations.

In the present case the Arsenal points out that there has been no determination that its action in October 1974, reducing environmental differential pay was improper or erroneous. However, the Arsenal concedes that under the collective bargaining agreement the Arsenal had negotiated away its right to make unilateral determinations concerning environmental differential pay with regard to members of the exclusive bargaining unit. Thus, with respect to employees who were not members of the exclusive bargaining unit, the Arsenal states it was proper under its regulations to reduce their environmental differential from 8 to 4 percent in 1974.

With regard to the entitlement of these supervisory personnel to retroactive environmental differential pay, we have held that the failure to carry out a nondiscretionary administrative regulation or policy or a violation of a mandatory provision in a negotiated agreement, which causes the employee to lose pay, allowances, or differentials, constitutes an unjustified or unwarranted personnel action under the provisions of the Back Pay Act, 5 U.S.C. § 5596, and the implementing regulations contained in 5 C.F.R. Part 550, Subpart H (1978). See Annette Smith, 56 Comp. Gen. 732 (1977); and 55 id. 42 (1975). There must also be a determination that the withdrawal, reduction, or denial of pay, allowances, or differentials was the result of and would not have occurred but for the unjustified or unwarranted personnel action. Annette Smith, supra.

In the present case, the supervisory personnel were not covered by or subject to the negotiated agreement, and the Arsenal concedes that their environmental differential was properly reduced under agency regulations in 1974. Therefore, we find no basis for awarding additional environmental differential to these supervisory personnel in the absence of a finding of an unjustified or unwarranted personnel action.

We have compared the situation in this case with that in our decision E. G. Walters, et al., B-180010.07, June 15, 1977. In

Walters one question presented was the entitlement of wage board foremen to a pay rate increase retroactive to the date nonsupervisory personnel received an increase pursuant to an arbitration award under collective bargaining procedures. In that decision we held that even though the foremen were not included in the bargaining unit, their pay rate could be adjusted retroactively since the salary of the foremen was assimilated to the negotiated rate of pay for nonsupervisory personnel. In the present case, however, there does not appear to such an assimilation or linkage between the entitlement of supervisory and nonsupervisory personnel to environmental differential.

The Arsenal contends, and we do not question, that they properly reduced the environmental differential rate in 1974 and that this reduction would have applied to nonsupervisory personnel as well, but for the Arsenal's violation of the collective bargaining agreement. Therefore, we find no basis to include supervisory personnel within the scope of the arbitration award granting additional environmental differential to nonsupervisory personnel. Although we are mindful of the inequity in permitting a higher rate of environmental differential to nonsupervisory personnel for the same work as performed by supervisory personnel, we know of no basis under law or regulation to permit retroactive payment in this case.

Accordingly, payment of additional environmental differential to wage grade supervisors is not proper and may not be made.

T. J. Keller

Deputy Comptroller General
of the United States