The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: AFGE Local 2413 - Retroactive Environmental Differential Pay - Effect of Arbitration Award

File: B-230411

Date: June 23, 1988

DIGEST

1. Where an arbitrator failed to take jurisdiction of an issue that was a matter of interest and not grievance arbitration, we will consider the claims under 4 C.F.R. Part 31 (1988). A grievance was not filed in this case, and the employees' rights to environmental differential pay for the period of time prior to implementation of the new collective bargaining agreement are based on statutes and regulations which exist independently from the collective bargaining agreement.

2. Employees claim hazardous duty differential for a period prior to arbitration award. The entitlement to hazardous duty differential is a decision vested primarily in the employing agency, and this Office will not substitute its judgment for that of agency officials unless that judgment was clearly wrong or was arbitrary and capricious. The claims are denied.

DECISION

Mr. Joseph F. Henderson, Staff Counsel, American Federation of Government Employees (AFGE), requests a decision on behalf of AFGE Local 2413 for 53 employees of the Maritime Administration who claim retroactive environmental differential pay for exposure to asbestos. The claims are denied since the employees have not provided clear and convincing evidence that the agency acted in an arbitrary and capricious manner in denying retroactive environmental differential pay for the periods involved.

BACKGROUND

The claimants here are all employed by the Maritime Administration, Central Region, Beaumont Reserve Fleet, Beaumont, Texas. As a result of a favorable interest

arbitration award1/, a new labor-management agreement between the Maritime Administration and AFGE Local 2413 became effective June 7, 1984. The agreement provided that all wage grade employees at the Beaumont Reserve Fleet shall receive environmental differential pay as authorized by Federal Personnel Manual (FPM) Supplement 532-1, Appendix J, Part II, asbestos, on a full-time basis.

The union contends that the same conditions which warranted the current payment of environmental differential pay existed prior to the arbitrator's decision, and that the employees are entitled to such pay from May 9, 1975, to the date of the current agreement, June 7, 1984.2/

The agency contends that our Office is precluded by our regulations in 4 C.F.R. § 22.7(a) (1988) from taking jurisdiction on the merits of an arbitration award which is final and binding under 5 U.S.C. § 7122(b) (1982). In response, the union contends that the backpay claims for environmental differential pay were never an issue in the arbitration itself as the arbitrator never accepted jurisdiction of the claims. Thus, the union argues that the claims were not rejected by the arbitrator, but were deferred for lack of jurisdiction and authority.

OPINION

We agree with the union's contention that this Office is not precluded from taking jurisdiction under the circumstances presented in this case. The record shows that the arbitrator failed to take jurisdiction on the issue of retroactive environmental differential pay since this was interest and not grievance arbitration, and he felt that he had no authority to do so. A grievance was not filed in this case, and the employees' rights to environmental differential pay are based on statutes and regulations which exist independently from the collective bargaining agreement. Therefore, we will consider the claims as existing separately from our

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1/ Interest arbitration concerns new terms and conditions of employment whereas grievance or rights arbitration concerns disputes involving the terms and conditions of the existing collective bargaining agreement. Lodge 802, Etc. v. Pennsylvania Shipbuilding Co., 835 F.2d 1045 (3rd Cir. 1987).

2/ The AFGE recognizes that a portion of the claims may be barred by our 6-year statute of limitations, 31 U.S.C. § 3702(b)(1) (1982).

labor-management authority, and we will adjudicate them under our general claims authority in 4 C.F.R. Part 31 (1988). See Samuel R. Jones, 61 Comp. Gen. 20, at 25 (1981); 4 C.F.R. § 22.7(c) (1988).

In the area of environmental differential pay, we have consistently held that the authority to determine whether a particular situation warrants payment of a hazardous duty differential is a decision which is vested primarily in the employing agency. We will not substitute our judgment for that of the agency officials who are in a better position to investigate and resolve the matter, unless there is clear and convincing evidence that the agency's decision was wrong or that it was arbitrary and capricious. 58 Comp. Gen. 331 (1979); Joseph Contarino, et al., B-202182, Jan. 19, 1982.

The record shows that the agency followed the standards for exposure to asbestos promulgated by the Occupational Safety and Health Administration (OSHA) in 29 C.F.R. § 1910.1001(b) (1976).3/ Further, the employees were protected against exposure by respirators or other required protective devices or by safety measures, and the union has not presented any evidence to show that the agency acted in an unreasonable manner when it followed the OSHA standards for exposure to asbestos.

Accordingly, on the record before us, we cannot say that the Maritime Administration was either wrong or arbitrary and capricious in refusing to pay environmental differential pay for periods prior to the arbitrator's award and prior to the addition of the pay provision in the collective bargaining agreement. Therefore, the employees' claims are denied.

Milton J. Socolar

for Comptroller General
of the United States

3/ The arbitrator used a different standard than OSHA in his determination that the employees were entitled to environmental differential pay prospectively under the new agreement.