DECISION

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

61198

FILE: B-181972 DATE: JUL 23 1976 97866

MATTER OF: Charleston Naval Shipyard - Reconsideration of Arbitrator's Award of Backpay for Night Differential

DIGEST: Labor union appealed GAO decision holding arbitrator's award of backpay for night shift work improperly denied to employees in violation of collective bargaining agreement could not be implemented since agency's action was not unjustified or unwarranted personnel action under Back Pay Act and no night work was actually performed. Subsequent decisions have held that omission such as failure to afford opportunity for overtime work in violation of agreement may constitute unjustified or unwarranted personnel action although overtime work was not performed. Therefore, upon reconsideration, arbitrator's award may be implemented where employees were improperly denied assignment to night shift. B-181972, August 28, 1974, reversed.

This action is in response to the request of November 10, 1975, from the Federal Employees Metal Trades Council of Charleston for reconsideration of decision B-181972, August 28, 1974, holding that an arbitrator's award of premium pay for night shifts improperly denied to certain employees may not be implemented. The union has requested reconsideration on the basis of subsequent decisions of this Office, B-180010, October 31, 1974 (54 Comp. Gen. 312) and B-180010, August 25, 1975 (55 Comp. Gen. 171).

Pursuant to a negotiated collective bargaining agreement, the union and the Charleston Naval Shipyard established a procedure for manning the "swing" or second shift which operated from 4:15 p.m. to 12:00 p.m. The procedure, as set forth in Article VIII, Section 9, provided that the shift would be manned by volunteers picked on the basis of seniority and rotated every 90 days, with certain exceptions to that procedure. One employee filed a grievance over the fact that the Shipyard had retained three employees on this shift continuously over a 9-month period and thus denied the grievant "fair and equitable application" of the negotiated agreement. The arbitrator found that the staffing of the swing shift for educational purposes (the three employees were enrolled in college) on a "continuing, quasi-permanent basis" violated Article VIII, Section 9, as well as Article IV, Section 3 of the agreement, the latter providing that the agreement will be applied fairly and equitably to all employees. The arbitrator's award of backpay held:

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> "The parties are to ascertain which volunteers according to rotation and seniority would have received premium pay on or after July 23, 1973, and pay them such amounts of premium they would have received for such work."

The Assistant Secretary of the Navy (Manpower and Reserve Affairs), by letter dated July 24, 1974, requested a decision whether the arbitrator's award of backpay could be implemented. By decision B-181972, dated August 28, 1974, we held that "/t/he denial of the opportunity for overtime to the employees, though found to be in violation of the collective bargaining agreement by the arbitrator, is not an unjustified or unwarranted personnel action" within the meaning of the Back Pay Act, 5 U.S.C. 5596 (1970) and the implementing Civil Service Commission regulations, 5 C.F.R. Part 550, Subpart H (1974). The decision cited a prior decision B-175867, June 19, 1972. In our decision B-181972, supra, we held further that since the night shift was not actually performed, premium payment was not authorized, citing our prior decisions in 46 Comp. Gen. 217 (1966); 42 id. 195 (1962); and B-175867, supra.

In its request for reconsideration, the union has cited two subsequent decisions of this Office, 54 Comp. Gen. 312 (1974) and 55 id. 171 (1975). In the 1974 decision we held on page 318 that a violation of a mandatory provision in a collective bargaining agreement, if properly includable in the agreement, which causes an employee to lose pay, allowances or differentials, is as much an unjustified or unwarranted personnel action as an improper suspension, furlough without pay, demotion or reduction in pay. Therefore, we held that the Back Pay Act is the appropriate statutory authority for compensating the employee for the pay, allowances or differentials he would have received but for the violation of the agreement, and we stated further that to the extent that our previous decisions may have been interpreted as holding to the contrary, such decisions would no longer be followed.

In 54 Comp. Gen. 1071 (1975), we had occasion to reexamine our position with respect to our "no work, no pay" policy where the improper personnel action was one of omission. We held in that case that an unjustified personnel action may involve acts of omission as well as commission, such as a failure to afford an opportunity for overtime work in accordance with the requirements of agency regulations or a collective bargaining agreement. Therefore, we held that an employee may be awarded backpay for overtime lost because of violation of a mandatory provision of a labor-management agreement and that our decision B-175867, June 19, 1972, would no longer be followed. This position has been followed in 55 Comp. Gen. 171 (1975) and 55 id. 405 (1975).

Subsequent to the decisions cited above the Supreme Court of the United States in United States v. Testan, decided March 2, 1976, ___U.S.___, 47 L. Ed. 2d 114, 44 U.S.L.W. 4245, held that neither the Classification Act, 5 U.S.C. 5101 et seq. (1970), nor the Back Pay Act, 5 U.S.C. 5596 (1970), creates a substantive right to backpay for the period of a improper classification. We have examined the Testan case, and we find that it is not applicable to the night work pay issue in the present case.

In the instant case certain employees were deprived of night shift work in violation of the collective bargaining agreement--an act of omission--and the arbitrator found that but for the Shipyard's improper action other employees would have received such work on the basis of rotation and seniority. On reconsideration of this case in light of our subsequent decisions, we now hold that B-181972, August 23, 1974, is reversed and that the arbitrator's award may be properly implemented. The amount of payment and the employees entitled to payment must be determined by an appropriate authority and the award 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