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DECISION

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

FILE: B-190494 DATE: May 8, 1978

MATTER OF: Department of Labor - Arbitration Award of Overtime Pay for Traveltime

DIGEST: Department of Labor questions legality of arbitration award that employees required to travel on Sunday to attend training were entitled to overtime pay for their travel-time. Arbitrator concluded that travel resulted from an event beyond control of agency because agency had relinquished control over scheduling to training contractor. Award conflicts with 5 U.S.C. § 5542 and Federal Personnel Manual and may not be implemented.

This decision is in response to a letter dated October 11, 1977, from Mr. Jack A. Warshaw, Deputy Assistant Secretary for Labor-Management Relations, Department of Labor, requesting our ruling on an arbitration award captioned National Union of Compliance Officers (Independent) and Labor-Management Services Administration, U.S. Department of Labor (Gamser, Arbitrator) (FMCS Case No. 76K19418), March 21, 1977.

This case involves the issue of whether certain employees of the Labor-Management Services Administration, Department of Labor, are entitled to overtime pay for travel performed on Sunday to a training site. The issue arose out of the following circumstances.

The Labor-Management Services Administration contracted with the International Foundation of Benefit Plans to provide the training, with sessions scheduled to begin at 9 a.m. on Mondays and to conclude in the afternoon on Fridays. The Administration issued a memorandum directing the employees to arrive at the training site on the Sunday evening prior to the start of the training sessions in order to insure that such employees would be present at the beginning of training on Monday morning. Employees who were exempt from the requirements of the Fair Labor Standards Act were required to travel on their own time without compensation to the training site. Nonexempt employees were compensated for such travel to the extent that such compensation was required by the terms of the Fair Labor Standards Act.

The union filed a grievance contending that the collective-bargaining agreement was violated in that the employees who were exempt from the Fair Labor Standards Act should have been compensated for the time spent in Sunday travel status or, that under the provisions of the agreement, travel should have been scheduled during normal working hours. In this regard, Article 30, section 1, of the agreement required the Labor-Management Services Administration, consistent with 5 U.S.C. § 5542 governing overtime pay, to schedule and arrange for all official travel for unit employees to occur within regular hours of work, to the maximum extent practicable. The dispute as to the alleged violation of the above-cited agreement provision could not be informally resolved by the parties. Hence, the issue of whether employees required to travel on Sunday were entitled to overtime pay or compensatory time off, was referred to arbitration.

ARBITRATOR'S OPINION AND AWARD

The arbitrator rendered his decision on the basis of written briefs and supporting documents submitted by the parties and did not hold a hearing on the matter. In his decision the arbitrator focused on the provisions of 5 U.S.C. § 5542(b) as the central issue of the dispute. That statute reads in relevant part as follows:

"(b) For the purpose of this subchapter--

* * * * *

"(2) time spent in a travel status away from the official-duty station of an employee is not hours of employment unless--

* * * * *

"(B) the travel * * * (iv) results from an event which could not be scheduled or controlled administratively."

With a view toward the above-quoted statutory criterion, the arbitrator discussed the issue of whether the Sunday travel resulted from an event which could not be scheduled or controlled

administratively by the agency. In this connection the arbitrator reviewed the Civil Service Commission's implementing regulations and instructions in subchapter S1, Book 550, Federal Personnel Manual (FPM) Supplement 990-2. The arbitrator found that under these FPM provisions, there exis a presumption that the Government controls the scheduling of a course when it is conducted by an outside institution for the benefit of the Government. In light of this presumption the arbitrator reviewed the terms and conditions of the contract between the Department of Labor and the Training Contractor and concluded as follows:

> "If the Government retained administrative control over the length of the course or when it was to begin, that fact is not apparent from the terms of the contract quoted above. It appears that contrary to an assumption of administrative control about which the FPM spoke, the actual terms of this contract indicate that the Government relinquished administrative control to the Contractor over the course schedule and hence the time that these grievants had to travel in order to be in class on Monday morning when the Contractor determined that the course would begin."

On the basis of the above finding that the Labor-Management Services Administration had relinquished administrative control over scheduling to the contractor, and upon his further finding that the Administration failed to prove that the travel could not have been done "to the maximum extent practicable" within regular duty hours, the arbitrator held that the employees required to travel on Sunday were entitled to overtime pay or compensatory time off under the collective-bargaining agreement and 5 U.S.C. § 5542.

The Department of Labor appealed the arbitrator's award to the Federal Labor Relations Council, but the Council denied the petition for review on the ground that the agency's exception was directed to the arbitrator's findings of fact which are not to be questioned on appeal. FLRC No. 77A-39, August 25, 1977.

Discussion and Conclusion

In asking for a decision from the Comptroller General as to the legality of payment, the Labor Department challenges the arbitrator's conclusion that its contract with the training contractor had removed the scheduling of training activities from its administrative control and therefore required overtime payment for the Sunday travel. The Labor Department argues that the language of the contract and the affidavit of the contracting officer show the agency maintained control over scheduling.

We have reviewed the training contract and have discovered that the arbitrator apparently overlooked Article VII, regarding the scheduling of course dates and times. This provision reads in part as follows:

> "VII. Dates of Courses
>
> "The training will be conducted at various times over a six month period. Dates and times to be coordinated and approved by the Contracting Officer's Technical Representative. * * *"

In addition, Article IV, Task 2 provides that the contractor, in cooperation with the agency, shall "assist" in selecting and scheduling trainees, and Task 3 provides that the contractor "in consultation with" the agency shall establish a schedule of classes.

These provisions of the training contract clearly require the contractor to coordinate the course schedules with the agency's representative and to secure his approval of dates and times of the course sessions. We, therefore, agree with the Labor Department that the Labor-Management Services Administration maintained control over the scheduling of the training courses.

We do not, however, turn our decision upon our disagreement with the arbitrator's interpretation of the training contract. In our view, the overtime statute and the implementing regulations preclude treating the Sunday travel in question as constituting an uncontrollable event for the purposes of 5 U. S. C. § 5542(b)(2)(B)(iv).

The general rule is that traveltime outside of regular duty hours is not considered hours of employment and is not compensable except

as provided for by the Congress in 5 U.S.C. § 5542. See Barth and Levine v. United States, 215 Ct. Cl. ___ (Ct. Cl. No. 349-74, decided January 25, 1978). The relevant statutory exception in 5 U.S.C. § 5542(b)(2)(B)(iv) permits overtime pay for travel that "results from an event which could not be scheduled or controlled administratively."

The Civil Service Commission is authorized by 5 U.S.C. § 5548(a) to prescribe regulations to administer the overtime statute. In implementing the statutory exception in 5 U.S.C. § 5542(b)(2)(B)(iv), the Commission has interpreted the phrase "could not be scheduled or controlled administratively" to refer to "the ability of an executive agency * * * to control the event which necessitates an employee's travel." FPM Supplement 990-2, Book 550, subchapter S1-3, page 550-8.03 (Added July 1969). The FPM Supplement continues as follows:

> "--For example, training courses throughout the country generally are scheduled to start at the beginning of the workweek, and usually start at 9 a.m. daily. Attendance at training centers located away from an employee's duty station, therefore, usually will require the employee to travel outside his normal work hours. Since the agency which is conducting the training course can schedule the hours of training, the training course is an event which can be scheduled or controlled administratively; and employees who attend the course will not be paid for time in travel status regardless of whether employed by the agency conducting the training course or another agency.
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> "--On the other hand, travel will be considered hours of work when it results from unforeseen circumstances (e.g., a breakdown of equipment) or from an event which is scheduled or controlled by someone or some organization outside the Government. (See Comptroller General decision B-163654, April 19, 1968.)" (Emphasis added.)

The FPM then listed additional examples as an aid in applying the rule as to administratively uncontrollable travel (id. at 550-8.05).

"Case No. 5:

"Training courses by private organizations generally are scheduled to start at the beginning of the workweek. Attendance at a training course conducted in a location away from an employee's duty station may require the employee to travel outside his normal work hours.

"Determination:

"Unless the training course is conducted by a private institution for the benefit of the Government, when a training course is conducted by an institution outside the Government, it is an event which cannot be scheduled or controlled administratively and required travel outside the employee's regular work hours to attend the training course will be considered hours of employment. However, when a training course is conducted by an institution for the benefit of the Government, it is to be assumed that the Government can control the scheduling of the course and therefore the event is under administrative control of the Government." (Emphasis added.)

Our decisions have consistently followed the Commission's instructions on this matter. See B-165311, November 12, 1968. In 50 Comp. Gen. 519, 522-23 (1971), an employee traveled on Sunday to attend two national milk hearings in Washington, D.C., during the week. We stated that economy or other reasons for scheduling a meeting on Monday do not provide a basis for concluding that the meeting is beyond the control of the agency involved. Then, citing the same FPM provision noted above, we held that the travel could not be compensable a overtime. See also B-146288, January 3, 1975.

In treating the FPM as creating a rebuttable presumption of Government control over the scheduling of training courses conducted by private institutions, the arbitrator in the case before us misinterpreted the FPM provisions. Under the statute and the FPM provisions, the agency's ability to control the event necessitating the travel is the key which determines whether the statutory exception is satisfied. The FPM provision states in effect that, when an outside institution conducts a training course for the benefit of the Government, the event is under the administrative control of the Government because the Government can control the scheduling of the course. This is not a rebuttable presumption. Instead, the FPM provision is an administrative interpretation of the statutory exception to the effect that the scheduling of training courses conducted by outside parties for the benefit of the Government is controlled by the contracting agency by virtue of the contract. Since the agency could control scheduling through the contract, a training course is not an uncontrollable event for the purposes of the overtime statute.

Accordingly, the arbitrator erred as a matter of law in interpreting the FPM as creating a rebuttable presumption and in awarding overtime pay for the Sunday travel to attend the training course. Since section 12(a) of Executive Order 11491 provides that collective-bargaining agreements are governed by applicable laws and regulations, including policies set forth in the FPM, the arbitrator's award is in conflict with the law and regulations governing overtime pay for periods of traveltime and may not be implemented.

Some might find our decision here to be a harsh one, but it is consistent with the manner in which the overtime statute enacted by Congress has been applied by this Office and the Civil Service Commission for all Federal employees. We can find no better way to express our views than to quote the Court of Claims' opinion in Barth and Levine, supra, slip opinion page 6:

> "Though we may perhaps sympathize with the plaintiffs in this case, we are bound to apply the statute as we find it written. The current statutory scheme does not permit us to compensate the plaintiffs. Though we are aware that Congress has exhorted the agencies to schedule travel time so that it occurs within the work shift, 5 U.S.C. § 6101(b)(2) (1970), sometimes

> this is impossible. Yet Congress, far from providing a remedy, has affirmatively prohibited an award of overtime pay for travel time unless the peculiar conditions of the statutory exception are met. No doubt it would be a difficult task to draft a provision which is more realistic and yet avoids the Lewis Carrollian result of paying all federal employees to drive to work. But such a task, quite properly, does not lie within the power of the judiciary; it lies with the legislature. To achieve what they desire, plaintiffs must obtain appropriate statutory amendments from the only body so empowered, Congress. In summary, we have held that the time these plaintiffs spent in travel status away from their official duty station does not fit within the language of the statutory exception. As a result, we must apply the general rule that travel time is not considered hours of employment and is not compensable."

With respect to the standards to be applied to the review of arbitrator awards in the Federal sector, the Court of Claims, in Lodge 2424, IAM & AW, AFL-CIO v. United States, 215 Ct. Cl. ___, 564 F.2d 66 (1977), recently considered a union argument that arbitration awards in the Federal sector ought to be subject to the same limited review criteria as are currently applicable to private sector awards. The Court set forth its rationale for rejecting the union's view as follows:

> "In an effort to avoid the difficult obstacle presented by the cited regulations, plaintiff maintains that judicial review of an arbitrator's decision is a limited one and that the court must enforce an arbitrator's award where the arbitrator does not 'exceed the scope of his authority.' In support of this position, plaintiff cites a long line of cases, including United Steelworkers of America v. U.S. Gypsum Co., 492 F.2d 713 (5th Cir. 1974), reversing 339 F. Supp. 302 (N.D. Ala. 1971); United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960). However, we reject plaintiff's argument because we find that

> the authorities cited are inapposite to the facts of this case. See Byrnes v. United States, Ct. Cl. No. 354-75, order of February 4, 1977 at p. 2, 213 Ct. Cl. ___ (1977).
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> "* * * the cases cited by plaintiff all concern labor arbitration awards made in the context of private labor disputes. Those decisions focus on the Congressional intent, as reflected in the Labor-Management Relations Act, 29 U.S.C. § 141, et seq., 61 Stat. 136, that industrial labor disputes be settled by arbitration. However, the definition of 'employer' in the Labor-Management Act specifically excludes the United States, 29 U.S.C. §§ 142(3) and 152(2). Consequently, those cases, which limit judicial review and accord finality to decisions of arbitrators, including their construction of provisions of collective bargaining agreements, have no application to an arbitrator's decision made pursuant to a collective bargaining agreement between the Government and a union."

Federal employee pay and allowances are governed by a large and complex body of statutes and regulations that establish the entitlements and obligations of each employee. Arbitration awards providing make-whole remedies for Federal employees must conform to these laws. All payments in the Federal sector must be authorized by law. In contrast to the statutory compensation system in the Federal sector, the compensation of private sector employees is largely at management's discretion and therefore is generally covered by a provision in the collective-bargaining agreement. For this reason make-whole remedies in Federal arbitration awards are far more likely to be in conflict with statutes and regulations than are make-whole remedies in private sector arbitration awards.

The Federal Labor Relations Council by letter of November 18, 1977, has informed this Office that, under the Council's rules and procedure, the Labor Department's appeal of this award lacked the necessary facts and circumstances to support its exception. The Council based its refusal to accept the agency's petition for review on the following rationale:

"In denying review, the Council noted that the arbitrator had specifically examined appropriate regulations and, applying those regulations to the case before him, had concluded that the agency had relinquished administrative control to the private contractor over the course schedule and hence over the time the employees had to travel. The Council found that the agency's exception was addressed to the arbitrator's findings as to the facts in the case and, consistent with the practice of courts in the private sector, applied the principle that in such circumstances an arbitrator's findings as to the facts are not subject to challenge on appeal."

We must respectfully disagree with the Council on this matter. It is not the arbitrator's findings of fact that are in dispute; its his application of the Federal Personnel Manual to those facts. We believe, as stated above, that the arbitrator misread the FPM provisions in question and that, therefore, his conclusions are erroneous as a matter of law.

Based upon the foregoing, the arbitration award in this case conflicts with 5 U.S.C. § 5542 and the implementing provisions of the Federal Personnel Manual and therefore may not be implemented.

F. J. Kelly

Deputy Comptroller General
of the United States