Dalton
SGM
31930

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

FILE: B-213804 **DATE:** August 13, 1985

MATTER OF:
Forest Service -- Grievance Procedure for Accountable Officers

DIGEST:
Grievance and arbitration procedures included in contract between Forest Service and National Federation of Federal Employees are not applicable to determinations of liability of accountable officers for physical losses or deficiencies of public funds. Under chapter 71 of title 5 of the United States Code, management's authority to bargain collectively does not extend to matters which are specifically provided for by Federal statute. 31 U.S.C. § 3527(a) specifically and comprehensively governs the resolution of questions of responsibility of accountable officers for losses of public funds. Consequently accountable officer relief cases may not be adjudicated pursuant to the negotiated grievance and arbitration procedures.

The Assistant Secretary for Administration, Department of Agriculture, requested our decision on whether the use of grievance and arbitration procedures by accountable officers who are seeking relief from liability for physical losses or deficiencies of public funds conflicts with 31 U.S.C. § 3527(a) (1982), the so-called relief statute. As explained below, we do not believe that accountable officer relief cases may be considered under such procedures.

Background

The Forest Service negotiated an agreement with the National Federation of Federal Employees (NFFE) which established a broad scope grievance procedure for Service employees. One provision in the agreement (Article 19, Section 6b) addresses the rights of accountable officers who the Service has determined are liable for a loss or deficiency of public funds. It provides:

> "In cases involving negligence and/or a bill of collection, the bill will also contain written notification explaining the reasons, charges of negligence and the employee's right to grieve and have union representation. The employee will be given 30 days to review any data and grieve the issue * * *". 1/

The agreement with NFFE covers a number of the Service's collection officers and imprest fund cashiers.

As relevant here, 31 U.S.C. § 3527(a) provides that an accountable officer may be relieved of liability for a physical loss or deficiency if his agency head determines, and the Comptroller General subsequently agrees, that he was carrying out official duties when the loss or deficiency occurred or the loss or deficiency occurred because of an act or failure to act by one of his subordinates, and that the loss or deficiency did not result from his fault or negligence.

When shortages occur in these officials' accounts, the Service, like other executive branch agencies, proceeds to determine whether the official suffering the loss should be required to reimburse the Government, or whether relief from liability should be considered under the provisions of 31 U.S.C. § 3527(a) and applicable Comptroller General decisions.

This Office has authorized agencies to administratively grant relief without seeking the Comptroller General's concurrence in cases involving physical losses or deficiencies of less than $750. We originally authorized agency resolution of irregularities up to $150 in a circular letter, B-161457, dated August 1, 1969. We raised the ceiling to $500 in a circular letter B-161457, August 14, 1974, issued simultaneously with a related decision, 54 Comp. Gen. 112 (1974). The current $750 ceiling is set forth in

---

1/ The quoted language would presumably also apply to negligent losses of Government property. Unlike the accountable officer situation, an employee can be held liable for negligent losses to Government property only if the agency has so provided by regulation. E.g., B-212502, July 12, 1984 (discussing the Forest Service regulations). Since the very existence of the liability is a creature of agency regulation, we perceive nothing objectionable in making the negotiated grievance procedure a part of the agency's appellate process. We are concerned with Article 19, sec. 6b in this decision solely as it relates to the relief of accountable officers.

the United States General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies in subsection 28.14(3)(a) of title 7. Administrative resolution of losses under $750 must be in accord with the principles set forth in the applicable Comptroller General decisions. B-204740, November 25, 1981.

Labor-management relations in the Federal Government are governed by Chapter 71 of title 5 of the United States Code. Generally, the Act gives Federal employees the right to organize, bargain collectively and participate through labor organizations of their own choosing in decisions which affect them. 5 U.S.C. § 7121 establishes the right to include procedures for the settlement of grievances in collective bargaining agreements. Either party to the grievance (the employee's exclusive representative or the agency) may, if dissatisfied, invoke binding arbitration, and may file an exception from an arbitration award with the Federal Labor Relations Authority. 5 U.S.C. §§ 7121(b)(3)(C), 7122.

The Issues

In light of this background, the Assistant Secretary notes that there are two situations in which the negotiated grievance procedure possibly could come into play in accountable officer cases: (1) cases involving less than $750 where the agency head determines that the employee is liable, and (2) cases involving $750 or more where the agency head has decided not to recommend to the Comptroller General that relief be granted. In both situations the accountable officer could grieve the agency's finding against him.

The Assistant Secretary asks whether the accountable officer's use of the grievance procedure in these two situations would conflict with 31 U.S.C. § 3527(a). He also asks whether the submission of accountable officer cases to binding arbitration with the attendant right to file an exception with the FLRA would conflict with the relief statute. The discussion which follows pertains to the use of the negotiated grievance procedures in accountable officer cases involving $750 or more and in cases involving less than $750.

Discussion

The grievance procedures do not apply to accountable officers because the relief statute constitutes the exclusive administrative remedy in such cases.

Under chapter 71, the right of Federal employees to bargain collectively with respect to conditions of

employment, and management's corresponding duty to do so, does not extend to matters which are covered otherwise by a Federal statute. 5 U.S.C. § 7102(2) grants to Federal employees the right "to engage in collective bargaining with respect to conditions of employment * * *." 5 U.S.C. § 7103(a)(14) in essence, defines "conditions of employment" as personnel policies, practices and matters affecting working conditions. Subparagraph (c) provides that conditions of employment do not include matters affecting working conditions to the extent that "such matters are specifically provided for by Federal statute."

The relief statute specifically and comprehensively governs the resolution of questions of responsibility of accountable officers for losses of public funds; consequently, accountable officer relief questions are within the subparagraph 7103(a)(14)(c) exception. Prior to the passage of the relief statute, an accountable officer could be relieved of liability only through the passage of special relief legislation by the Congress or by filing a suit in the United States Court of Claims at his own expense. Congress enacted the relief statutes to provide a more economical and efficient procedure for relieving accountable officers. In so doing, it established a statutory relief scheme designed for the protection of the Government's interests. The Senate Committee on Expenditures in the Executive Departments in its report on the bill later enacted as the original relief statute (S.1350, 80th Cong. 1st Sess.) stated:

> "The Committee is fully aware of the necessity for maintaining a firm control over the granting of relief for physical loss or deficiency in Government funds, vouchers, records, checks, securities, or papers, and has given thorough consideration to the bill wich is reported herewith. The Committee has concluded that the establishment, as is done in the bill, of a system whereby final decision will be made by the Comptroller General, in the light of facts presented to him by the head of the agency involved, provides an adequate safeguard to the best interests of the Government. * * *"

S. Rep. No. 379, 80th Cong. 1st Sess., reprinted in 1947 U.S. Code Cong. & Ad. News 1546, 1548.

Furthermore, included in this statutory scheme is the accountable officer's right under 5 U.S.C. § 5512(b) to have

the courts adjudicate the question of his liability if he believes that his agency head or the Comptroller General has wrongfully determined that he is liable for a loss.

Moreover, we note that an analogous Federal Labor Relations Authority opinion, dated March 16, 1984, tends to support our conclusion in this case. In National Treasury Employees Union and Internal Revenue Service, 14 FLRA No. 15, the Authority considered whether it was consistent with 31 U.S.C. § 3528 (then 31 U.S.C. § 82c) to approve a union proposal which would have permitted certifying officials to submit agency determinations of financial liability to binding arbitration. 31 U.S.C. § 3528 (together with 31 U.S.C. §3527(c)) is the statute which states the liability of certifying officials for erroneous payments and the basis for their relief. The Authority held that the proposal (which contained several provisions) was inconsistent with 31 U.S.C. § 3528 stating:

> "Although the Union characterizes its proposal as procedural, the proposal as a whole would prescribe requirements governing the liability of certifying officers for erroneous payments of Government funds which are contrary to law. * * * Parts F and G of the proposal would permit employees who have improperly certified a payment to 'appeal' the Agency's determination to binding arbitration. As such, these parts of the proposal conflict with the exclusive means by which certifying officers may seek relief, i.e., a request to the Comptroller General, pursuant to section 82c. * * * Accordingly, based upon the foregoing, Union Proposal 2, taken in its entirety, is inconsistent with 31 U.S.C. § 82c and, therefore, outside the duty to bargain."

The NFFE contends that accountable officer relief matters are within the agency's duty to bargain based upon its interpretation of 5 U.S.C. § 7103(a)(14)(c), discussed above, because they constitute conditions of employment about which agencies must negotiate under 5 U.S.C. § 7102(2). The NFFE would have us conclude then that the Service can legally follow the relief procedures in question since they are a proper subject for negotiation.

The NFFE argument is that relevant FLRA decisions and legislative history indicate that relief matters are not within a specific statutory working condition exception

and therefore are included among the working conditions over which agencies must bargain. As noted, subparagraph (c) provides that conditions of employment do not include matters affecting working conditions to the extent that "such matters are specifically provided for by Federal statute." The NFFE refers to the remarks of Congressman Clay during the debates on the Civil Service Reform Act as providing an explanation of the test for what constitutes a matter specifically provided for by Federal statute. The Congressman stated, "Where a statute merely vests authority over a particular subject with an agency official with the official given discretion in exercising that authority, the particular subject is not excluded by this subsection from the duty to bargain over conditions of employment." 124 Cong. Rec. H9638 (daily ed. Sept. 13, 1978). (The NFFE also cites American Federation of Government Employees and General Services Administration, 11 FLRA No. 54 (1983) in support of its view.) The NFFE then reasons that relief matters under 31 U.S.C. § 3527(a) meet the test stated by Congressman Clay because the statute gives the agency head discretion concerning charges of liabilities against Forest Service employees.

We do not think that the test, though it may be applicable in other circumstances, should be applied to a statute which is intended to govern the subject matter it covers exclusively and specifically as the relief statute does. Moreover, we again note that the National Treasury Employees Union decision (decided after the FLRA decisions the NFFE cites) appears to support our conclusion.

The Forest Service's Director of Personnel Management points out that we have established a policy of deferring to grievance and arbitration proceedings conducted under negotiated collective bargaining agreements in a number of our previous decisions. In particular, he notes that in 61 Comp. Gen. 20 (1981), we set forth the jurisdictional policies which we will apply to claims filed under 4 C.F.R. Part 31[2/] as follows:

> 1. GAO will not review or comment on the merits of an arbitration award which is final and binding pursuant to 5 U.S.C. § 7122(a) or (b).

2/ 4 C.F.R. Part 31 prescribes the general procedures applicable to claims against the United States subject to GAO's claims settlement jurisdiction.

2. Where a grievance has been filed and one of the parties to the agreement objects to our jurisdiction, GAO will decline to assert jurisdiction.

3. Where no grievance has been filed and where otherwise appropriate, GAO will consider a claim on a matter subject to a negotiated grievance procedure over the objection of one of the parties only where the right relied upon is based on law or regulation or other authority existing independently of the collective bargaining agreement. Claims based upon rights which arise solely under the collective bargaining agreement will not be adjudicated by GAO where a party to the agreement objects to consideration of the matter by GAO.

The Director believes that agency accountable officer determinations would be subject to grievance and arbitration under this policy. However, it was never our intent that the policy apply to accountable officer cases.

As stated in 61 Comp. Gen. 20, the policy is applicable to claims filed by Government employees under 4 C.F.R. Part 31. It does not extend to employee matters brought for our consideration pursuant to some other authority, such as 31 U.S.C. § 3527. Thus, strictly speaking, the policy does not apply to accountable officer cases.

The NFFE questions our jurisdiction to issue a decision on this matter as well. It also argues that this Office has indicated its intent to defer to grievance and arbitration procedures, but it cites 4 C.F.R. §§ 22.7(b) and 22.8 to support its argument. 4 C.F.R. § 22.7(b), entitled "Matters subject to a grievance procedure," provides that "The Comptroller General will not issue a decision or comment on the merits of a matter which is subject to a negotiated grievance procedure authorized by 5 U.S.C. § 7121, except upon the request of an authorized certifying or disbursing officer, or the joint request of an agency and labor organization.* * *" The part of section 22.8 NFFE relies on provides that the Comptroller General in his discretion will decline to issue a decision on any matter which he finds is more properly within the jurisdiction of the FLRA.

These regulations state our policy on issuing decisions in individual cases which are already covered by negotiated grievance procedures. This decision concerns the broader question of whether grievance procedures may be applicable to a class of cases, accountable officer cases. Accordingly, these two regulations do not prohibit us from issuing this opinion.

Milton J. Socolar

for Comptroller General
of the United States