DECISION

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

w2295

FILE: B-180010 DATE: DEC 11 1975 97601 u97601

MATTER OF:

DIGEST: Community Services Administration and AFGE Local 2677: arbitrator's award of punitive damages

Grievance charged violation of provision in collective bargaining agreement that consultants would not be hired to perform work that could be performed by agency employees. Agency stipulated that it had violated agreement but refused union's demand that consultant repay salary to U.S. Treasury. Prior to arbitration hearing, the consultant resigned. Arbitrator's award of punitive damages to be paid by agency to union may not be implemented since there is no authority to award punitive damages against the United States or one of its agencies.

This decision is in response to a request from the Director of the Community Services Administration (hereinafter referred to as the "agency") as to whether it may disburse appropriated funds to implement an arbitrator's award of punitive damages to be paid by the agency to the union local (FMCS Case #74K07852, J. Lawrence McCarty Grievance). The Federal Labor Relations Council has also requested a decision whether the arbitrator's award (Office of Economic Opportunity and American Federation of Government Employees, Local 2677 (Doherty, Arbitrator), FLRC No. 75-A-23) violates applicable law.

The facts in this case, which for the most part are not in dispute, are as follows. On July 28, 1973, Mr. J. Lawrence McCarty was employed by the Office of Economic Opportunity (now the Community Services Administration) as a consultant. On December 7, 1973, Local 2677 of the National Council of OEO Locals, American Federation of Government Employees (hereinafter the "union"), filed a grievance with the agency alleging that Mr. McCarty's employment was in violation of section 4 of the September 11, 1973 Amendment to the National Agreement between the agency and AFGE which provides:

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> "SECTION 4. CONSULTANTS AND EXPERTS
> Consultants and experts will not be used to perform work that could be performed by OEO employees, and prior to any such employment, the union will be appraised as to the person, his qualifications for the position and the role this person is to perform."

The union sought Mr. McCarty's immediate removal, reimbursement of his salary to the U.S. Treasury, and an assurance that the agency would not hire any other consultants in violation of this provision.

The agency refused the union's request for arbitration and sought a decision from the Labor-Management Services Administration (Department of Labor) as to whether the matter was arbitrable. The parties were advised on February 14, 1974, that the matter was arbitrable, and an arbitration hearing was held on April 10, 1974. The agency stipulated that it had violated section 4 of the National Agreement, but it noted that Mr. McCarty had resigned from the agency on March 15, 1974. The record also indicates that the Civil Service Commission directed the agency on April 11, 1974, to terminate Mr. McCarty's appointment on the ground that he was not performing proper consultant work.

The arbitrator's opinion and award, dated January 22, 1975, stated that neither the union nor any employee in the bargaining unit could show any direct damage as a result of the agency's admitted violation of the collective bargaining agreement. Nevertheless, the arbitrator concluded that the agency had not complied with the letter or the spirit of the agreement, and he, therefore, sought to fashion a remedy to undo any harm done and to ensure speedy and fair resolutions of future grievances of this type. After rejecting several suggested remedies, he directed the agency to pay the union a penalty payment, as follows (Opinion and Award, p. 7):

> "It is my decision that the Agency pay over to the Union an amount equal to five consulting days at the rate paid to McCarty. Such funds may be used by the Union for any purpose which is of direct benefit to all employees in the bargaining unit regardless of their membership in the Union. I further direct that the Agency shall have a report on how these funds are spent so that they may assure compliance with this award."

The arbitrator stated that such an award was "consonant with the guidelines set by arbitrators in the non federal sector" and was not strange to the Federal sector in that:

> "The applicable agreement in this case providing as it does for assessment of the Arbitrator's fee is a direct monetary payment on the employee's behalf by the Agency as a form of penalty, and such payment inures directly to the Union for the benefit of all employees."

The Community Services Administration filed a petition for review with the Federal Labor Relations Council which was accepted, and the Council issued a stay of the arbitrator's award on April 16, 1975.

Executive Order 11491, as amended, 3 C.F.R. 254 (1974), governs labor-management relations between agencies of the executive branch and Federal employees and organizations representing those employees. Section 12 provides, in pertinent part:

> "SEC. 12 Basic provisions of agreements. Each agreement between an agency and labor organization is subject to the following requirements --
>
> "(a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level * * * ."

The arbitrator in his opinion and award states that the payment of damages is consonant with the guidelines set by arbitrators in the non-Federal sector. However, there are fundamental differences between the objectives of and the authorities governing collective bargaining in the private and Federal sectors. See 54 Comp. Gen. 921 (1975). As noted above, under Executive Order No. 11491 all Federal sector collective bargaining agreements are subject to existing or future laws and regulations. Therefore, where an arbitrator's award is not authorized under such laws or regulations, it may not be implemented.

In the absence of any finding of direct damage to the union or any employee as a result of the agency's violation, we believe the award must be characterized as a penalty or punitive damages. We find no authority for awarding punitive damages against the United States or one of its agencies. Missouri Pacific Railroad Co. et al. v. Ault, 256 U.S. 554 (1921); Painter v. Tennessee Valley Authority, 476 F. 2d 943 (5th Cir. 1973); Littleton v. Vitro Corporation of America, 130 F. Supp. 774 (N.D.Ala. 1955); Wilcox v. United States, 76 F. Supp. 581 (D.Md. 1948). In addition, the Federal Tort Claims Act specifically excludes recovery for punitive damages. 28 U.S.C. § 2674 (1970). It is, therefore, not legally permissible for the agency to pay to the union a sum amounting to $500 which has been awarded in the nature of punitive damages. Nor can the award be sustained as an assessment of the arbitrator's fee because it is clearly intended as a penalty, entirely separate from the arbitrator's fees and expenses.

Accordingly, it is our decision that the arbitrator in this case exceeded his authority in ordering the agency to pay the union for five days of consultant's pay, and the award may not be implemented.

R.F. KELLER

Deputy Comptroller General
of the United States