00701

**DECISION**

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

FILE: B-180010.03 DATE: October 7, 1976

MATTER OF: Naval Air Rework Facility, Pensacola, Florida - Arbitration Awards for Environmental Differential

DIGEST: 1. Navy installation in separate grievances was ordered by two arbitrators to pay environmental differential to certain employees, which the installation began to pay. Navy Headquarters, however, concluded the awards were inconsistent with applicable regulations and directed installation to terminate payments. Navy received an unfair labor practice and seeks a ruling on legality of the terminated awards. GAO holds that arbitrators' findings and conclusions satisfied the regulatory criteria and that awards may be implemented with backpay for period of termination.

2. Navy installation terminated two arbitration awards for environmental differential for certain employees on basis payments were improper. Assistant Secretary for Labor-Management Relations cited the naval installation with an unfair labor practice and ordered awards be reinstated with backpay. To preclude ordering payments that may be illegal, GAO recommends that Assistant Secretary state in orders that payments shall be made "consistent with laws, regulations, and decisions of the Comptroller General." This would permit agency to obtain decision from this Office.

This decision was requested by letter of August 15, 1975, from Joseph T. McCullen, Jr., Assistant Secretary of the Navy for Manpower and Reserve Affairs, concerning the legality of implementing two arbitration awards of environmental differential pay involving the Naval Air Rework Facility, Pensacola, Florida, and the American Federation of Government Employees (AFGE), Local 1960. Mr. McCullen states that, in the Navy's view, the arbitrator's awards are illegal because they are inconsistent with applicable regulations. Because of its grave doubts as to whether the awards may properly

be implemented, the Navy seeks our decision pursuant to 54 Comp. Gen. 312, 320 (1974).

The question submitted is whether the Navy may legally pay the two awards of environmental differential under Federal Personnel Manual Supplement 532-1 and Appendix J thereto.

The Naval Air Rework Facility (NARF), Pensacola, is one of six subordinate field activities of the Naval Air Systems Command engaged in the maintenance and repair of naval aircraft. Local 1660, AFGE, represents an exclusive unit of nonsupervisory employees of the facility. In early 1972, two employees of the facility, A. C. Pereira, an aircraft oxygen equipment repairman, and John W. Melton, an aircraft surface treatment worker, filed separate "class action" grievances under the negotiated grievance procedure, contending that they, and all other employees similarly situated, were entitled to the differential under Federal Personnel Manual (FPM) Supplement 532-1, Appendix J, because of the hazardous nature of the work they were performing. Both the agency and the union agree that the collective bargaining agreement, in effect at the time, between the facility and the union authorized additional pay for employees engaged in hazardous work.

The parties were unable to adjust the grievances among themselves, and the issues in dispute were submitted to binding arbitration. The Pereira grievance resulted in an arbitration award issued October 4, 1972, by Edmund W. Schedler, Jr., Arbitrator. It sustained the grievance of Mr. Pereira, brought on behalf of himself and other similarly situated aircraft oxygen equipment repairmen in the facility's Oxygen Shop, for a 4 percent environmental differential authorized under FPM Supplement 532-1, Appendix J, for employees working in close proximity to explosive and incendiary materials. In his decision, the arbitrator summarized evidence presented during the hearing of several potentially serious accidents that had occurred in the Oxygen Shop involving the explosion of oxygen cylinders and containers. On the basis of this evidence he concluded that employees in the Oxygen Shop are exposed to potentially dangerous accidents, even if they follow prescribed safety procedures, because many materials burn in an incendiary manner when the atmosphere is enriched with oxygen.

The Melton grievance resulted in an arbitration award issued October 25, 1972, by Herbert A. Lynch, Arbitrator. It sustained the grievance of Mr. Melton, brought on behalf of himself and

other similarly situated aircraft surface treatment workers at the facility, for a 4 percent environmental differential authorized under FPM Supplement 532-1, Appendix J, for employees working with or in close proximity to poisons or toxic chemicals. On the basis of evidence produced during the hearing the arbitrator concluded that there was a definite possibility of aircraft surface treatment workers inhaling dangerous quantities of toxic fumes. He pointed out that some of the chemicals employed by these workers, even in low concentrations, can cause unpleasant reactions and in strong concentrations are quite dangerous.

The Commanding Officer of the Naval Air Rework Facility accepted the awards and began paying the approximately 50 employees affected by the awards a 4 percent environmental differential. However, the two arbitration awards were later reviewed by the Office of Civilian Manpower Management (OCMM), Department of the Navy, which reached the conclusion that its interpretation of Appendix J of the environmental pay regulations was in conflict with the standards applied by the two arbitrators. In an effort to resolve this conflict, OCMM decided to write a letter requesting a technical opinion from the Civil Service Commission (CSC) as to whether or or not it would be proper for an agency to pay employees an environmental differential under the "explosives and incendiary materials" and "poisons (toxic chemicals)" categories of Appendix J, where employees work with oxygen in one situation and with caustics in the other. The OCMM letter dated May 22, 1973, summarized the findings, conclusions and rationale of the two arbitration awards and indicated how the OCMM interpretation of the environmental pay regulations was at variance with that of the arbitrators and invited the Commission to express its views on the correctness of OCMM's interpretations. The OCMM letter however, did not provide copies of the arbitration awards, nor did it request the Commission to review the awards or the specific cases involved.

In a letter dated August 20, 1973, the Commission's Pay Policy Division, Bureau of Policies and Standards, expressed its agreement with the OCMM interpretation of the environmental differential pay regulations as follows:

> "We agree with your position regarding the application of the categories covering explosives and incendiary material, and poisons (toxic chemicals), to the Navy

situations described in your letter. Your interpretations of subchapter S8-7 of FPM Supplement 532-1, and of Appendix J of the Supplement, with respect to the propriety of differential payments by your department are, in our opinion, fully in accord with the intent and the requirements as delineated in the FPM Supplement concerning the payment of environmental differentials."

Although the Commission's letter expressed agreement with the Navy's interpretation of the regulations, it did not purport to address the specific factual issues raised in the two arbitration awards.

On the basis of the Commission's reply, OCMM decided that the arbitrators had misinterpreted and misapplied the FPM Supplement governing environmental differential pay. However, the arbitration awards had already been implemented by Naval Air Rework Facility, Pensacola, and, under the regulations of the Federal Labor Relations Council, it was too late to seek that agency's review of the awards. Therefore, OCMM forwarded a letter dated October 26, 1973, to the facility directing that it discontinue environmental differential payments to the aircraft surface treatment workers and the aircraft oxygen repairmen in the Oxygen Shop, except when the former class of employees worked with phenol, if the hazards associated with its use had not been practically eliminated. Upon receipt of the letter, the Commanding Officer of the facility notified the local union president of the directive to terminate payments and offered to consult on the matter prior to time he had set for the payments to cease. No written reply was received from the union, and, on December 8, 1973, the facility terminated the payment of an environmental differential under the two arbitration awards.

The union filed an unfair labor practice complaint with the Department of Labor alleging that the Naval Air Rework Facility had violated sections 19(a)(1) and (6) of Executive Order No. 11491, as amended, when it terminated the environmental differential pay of the affected employees, and that CCMM, Headquarters, Department of the Navy, had violated 19(a)(1) of the Order when it directed the facility to cease making the payments. An Administrative Law Judge heard the case, found that both Headquarters, Department of the Navy, and the Naval Air Rework Facility had committed unfair labor practices, and ordered the Navy to post the customary notices and directed the

facility to reinstate the two arbitration awards and to maintain them in effect for the remaining life of the collective bargaining agreement. Also the Administrative Law Judge ordered backpay to restore differentials that were lost by affected employees as a result of the Navy's order to terminate such payments.

The Department of the Navy appealed to the Assistant Secretary of Labor for Labor-Management Relations who considered the matter in Naval Air Rework Facility, Pensacola, Florida, A/SLMR No. 608 (January 26, 1976), and affirmed the ruling of the Administrative Law Judge and issued an order that, among other things, directed the facility to:

> "2. Take the following affirmative actions in order to effectuate the purposes and provisions of Executive Order 11491, as amended:
>
> "(a) Reimburse to each of the affected employees all monies deducted or withheld from them since December 8, 1973, by reason of the termination of environmental differential pay awarded pursuant to the Schedler-Lynch arbitration awards.
>
> "(b) In the future, either file timely exceptions with the Federal Labor Relations Council, or abide by arbitration awards issued under negotiated procedures contained in any negotiated agreement with the American Federation of Government Employees, AFL-CIO, Local 1960."

The Department of the Navy has petitioned the Federal Labor Relations Council for review of the Assistant Secretary's decision and for a stay of his order; both of which were granted by the Council. Eventually, the Council will issue its decision on the labor relations issues presented by the case. Accordingly, we shall confine our consideration to the issues of the legality of Federal expenditures and matters related thereto.

The sole issue raised by the Department of the Navy before this Office is that the two arbitrators misapplied the Civil Service Commission's Environmental Differential regulations (contained in Appendix J of Federal Personnel Manual Supplement 532-1) to the

working conditions of aircraft oxygen equipment repairmen and aircraft surface treatment workers at the facility. Specifically, the Navy contends that the arbitrators erred in finding that oxygen falls within the category of "explosives and incendiary material low-degree hazard," and that caustics fall within the category of "poisons (toxic chemicals) - low degree hazard." The Navy does not take exception to the arbitrators' right to determine the facts, but argues that, even though the arbitrators found the work to be hazardous, there is no regulatory authority to pay an environmental differential for these particular working conditions. Further, the Navy states that it obtained CSC confirmation of this.

In order to determine whether the arbitration awards in question may lawfully be implemented, we have examined the law and regulations and considered the arguments of the agency and the union. The governing statute is 5 U.S.C. § 5343(c)(4) (Supp. II, 1972), which directs the Civil Service Commission to provide by regulations "for proper differentials, as determined by the Commission, for duty involving unusually severe working conditions or unusually severe hazards * * *."

The Commission's regulations are found in subchapter S8-7 of Supplement 532-1, Federal Personnel Manual. In general, they authorize the payment of an environmental differential to wage employees who are exposed to hazards, physical hardships, or working conditions of an unusually severe nature listed under the categories in Appendix J thereto.

Although the Navy claims that it obtained CSC confirmation of its views on these matters, the Commission provided further information concerning this case in a letter dated August 19, 1974, to the National Headquarters of the American Federation of Government Employees, Washington, D.C. In that letter, signed by the same official who had signed the earlier letter to the Navy Department, the Commission's Pay Policy Division, Bureau of Policies and Standards, gave the following guidance:

> "Under the Federal Wage System, environmental differentials are paid to Federal wage employees who are exposed to a hazard, physical hardship, or working condition of an unusually severe nature as listed under the categories of situations contained

in Appendix J of Federal Personnel Manual Supplement 532-1. While the Civil Service Commission considers proposals for broad categories of situations for which payment of a differential may be authorized, the system is designed so that it is incumbent upon individual installations or activities to evaluate their own situations against these broad guidelines. When the local situation is determined to be covered by one or more of the defined categories the authorized environmental differential is paid for the appropriate category. The FPM Supplement specifically permits, where otherwise appropriate, negotiations through the collective bargaining process for determining the coverage of additional local situations under appropriate categories in Appendix J or for determining additional categories not included in Appendix J for which environmental differential is considered to warrant referral to the Civil Service Commission for prior approval.

* * * * *

"If a question arises concerning interpretation of the Commission's regulations or instructions, we would provide pertinent clarification and needed guidance. We would, of course, expect the agency to utilize this guidance as well as the basic regulation or instruction in determining which, if any, differentials are appropriate to be paid in any given case. However, the Commission has consistently refrained from acting as an appellate source in disputes between agencies and their employees on specific cases; rather, this authority has been delegated to the agencies. Whether or not an arbitrator had exceeded his authority in a specific case would be an appropriate matter for the Federal Labor Relations Council." (Emphasis supplied.)

The letter of August 19, 1974, also explains that the reply made to the Navy letter of May 22, 1973, was only intended to clarify the meaning and intent of the regulations and to confirm the propriety of the Department of the Navy's interpretation of the application of the regulations, and that, although the Commission expected the Navy to utilize the guidance in particular work situations, "* * * we have

made no determinations regarding a specific case nor do we contemplate doing so." (Emphasis supplied.)

The above-quoted letter shows clearly that the Commission's earlier letter of August 20, 1973, to the Navy Department, did not, and was not intended to, consiute a ruling on the legality of the two arbitration awards in question. In fact, the second letter specifically disavowed any intention to make determinations regarding specific cases and stated that such authority had been delegated to the agencies. The correctness of this view is demonstrated by paragraph g of subchapter S8-7, FPM Supplement 532-1, which reads as follows:

> "g. Determining local situations when environmental differentials are payable. (1) Appendix J defines the categories of exposure for which the hazard, physical hardships, or working conditions are of such an unusual nature as to warrant environmental differentials, and gives examples of situations which are illustrative of the nature and degree of the particular hazard, physical hardship, or working condition involved in performing in the category. The examples of the situations are not all inclusive but are intended to be illustrative only.
>
> "(2) Each installation or activity must evaluate its situations against the guidelines in appendix J to determine whether the local situation is covered by one or more of the defined categories.
>
> "(a) When the local situation is determined to be covered by one or more of the defined categories (even though not covered by a specific illustrative example), the authorized environmental differential is paid for the appropriate category. * * *"

Furthermore, in collective bargaining situations between an activity and a union, the FPM Supplement expressly allows the

parties to agree to the coverage of additional local situations under Appendix J, as follows (§ S8-7g(3) of FPM Supplement 532-1):

> "(3) Nothing in this section shall preclude negotiations through the collective bargaining process for determining the coverage of additional local situations under appropriate categories in appendix J or for determining additional categories not included in appendix J for which environmental differential is considered to warrant referral to the Commission for prior approval as in (2) above."

Two separate provisions of the above-quoted regulation authorize an appropriate authority to determine whether particular working conditions satisfy the criteria outlined in Appendix J. First, subparagraph S8-7g(2) of FPM Supplement 532-1 authorizes officials of installations or activities to evaluate local working conditions against the standards prescribed in Appendix J and determine whether such working conditions are covered by the stardards so as to entitle the employees involved to an environmental differential. Where a collective bargaining agreement contains a mandatory provision on environmental differentials and provides for binding arbitration of disputes, the coverage determination may properly be made by an arbitrator. Second, subparagraph S8-7g(3) of FPM Supplement 532-1 authorizes negotiations through the collective bargaining process for determining the coverage of additional local situations under appropriate categories in Appendix J. Inasmuch as binding arbitration may be considered an extension of the collective bargaining process, where the agreement contains an appropriate provision on environmental differentials, the arbitrator may also properly determine that additional local situations come within the purview of appropriate categories in Appendix J. See for example B-170182, December 26, 1973, where, pursuant to the same provision of the FPM Supplement, we accepted an arbitrator's finding that Appendix J covered a particular work situation at the Mare Island Naval Shipyard.

Here, the collective bargaining agreement between these parties provided for the payment of an environmental differential for hazardous working conditions, and the arbitrators in the two grievance proceedings found that the local working conditions for the two classes of workers were covered under the specified categories of Appendix J.

We have held that the decision of an arbitrator pursuant to an agreement provision constituting a nondiscretionary agency policy, if otherwise proper, becomes, in effect, the decision of the head of the agency involved. Absent a finding that the arbitration award is contrary to applicable law, appropriate regulations, Executive Order No. 11491, as amended, or decisions of this Office, binding arbitration awards must be given the same weight as any other exercise of administrative discretion. That is, the authority to implement the award should be refused only if the agency head's own decision to take the same action would be disallowed by this Office. 54 Comp. Gen. 312, 316 (1974). Under FPM Supplement 532-1, as elaborated upon in the Commission's letter of August 19, 1974, to AFGE, the authority to determine local coverage of the guidelines in Appendix J has been delegated to each agency. Since the Navy could have decided that the hazards involved here justified the differential, the arbitrator's decisions to the same effect may not be refused.

Since the Commission's regulations delegate authority to determine local coverage to each agency and expressly permit the collective bargaining process to determine additional coverage under appropriate categories in Appendix J, we find that the arbitrators were authorized to decide that the local working conditions at the Naval Air Rework Facility were covered by the specified categories of Appendix J of FPM Supplement 532-1. Further, on the basis of the record before us, we are unable to conclude that the arbitrators erred in their determinations that the working conditions of aircraft oxygen equipment repairmen came under the Appendix J category of "explosives and incendiary material - low degree hazard" and that the working conditions of the aircraft surface treatment workers came under the Appendix J category of "poisons (toxic chemicals) - low degree hazard," so as to entitle these employees to an environmental differential. We therefore have no reason to object to the two awards here in question.

Accordingly, we are of the opinion that both arbitration awards are legal and may be reinstated. Employees who lost the environmental differential after the awards were terminated on December 8, 1973, are entitled to backpay under 5 U.S.C. § 5596 (Supp. V, 1975), as ordered by the Assistant Secretary of Labor.

Finally, we note that in the unfair labor practice proceedings before the Administrative Law Judge and the Assistant Secretary of Labor,

both these officials ordered the Department of the Navy to immediately reinstate the awards with backpay for employees involved, despite the Navy's good faith doubt as to the legality of payments required by the awards. We should like to point out that, under the provisions of 31 U.S.C. § 74, agency heads have a statutory right to apply for and obtain a ruling from this Office on the legality of any payment to be made by them from appropriated funds and that our decisions are binding on the executive branch of the Federal Government. Pettit v. United States, 203 Ct. Cl. 207 (1973).

Therefore we recommend that future orders of Administrative Law Judges and the Assistant Secretary requiring payments contain a statement that such payments shall be made "consistent with applicable laws, regulations, and Comptroller General Decisions." A caveat of this type, would preclude orders requiring payment from conflicting with the statutory right of agency heads to obtain decisions from this Office on payments required to be made.

Deputy Comptroller General
of the United States