DECISION

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

FILE: B-193824 DATE: March 22, 1979

MATTER OF: General Services Administration, Region 3, and American Federation of Government Employees, Local 2151, Environmental Differential Entitlement To

DIGEST: General Services Administration questions legality of Federal Labor Relations Council decision requiring payment of environmental differential for "high work." GSA believes payment is unauthorized because of mistakes of fact concerning height of structure and existence of protective wall. Grievance agreement upheld by Council may be implemented since under Federal Personnel Manual the parties may determine entitlement through collective bargaining process. Furthermore, authorization of environmental differential in the present case does not appear to be contrary to law or regulation or arbitrary or capricious.

This decision is in response to a request dated December 18, 1978, from the Acting Administrator, General Services Administration (GSA), for an advance decision regarding the entitlement of certain employees of GSA, Region 3, to environmental differential. This matter has already been the subject of decisions by the Assistant Secretary for Labor-Management Relations, A/SLMR No. 996, dated March 2, 1978, and the Federal Labor Relations Council, FLRC No. 78A-39, dated November 6, 1978, which directed GSA to pay environmental differential for "high work" pursuant to a grievance settlement agreement. In requesting our decision, GSA states that there have been mistakes of fact and that it has been ordered by the Federal Labor Relations Council to make payments which are without legal or regulatory basis.

BACKGROUND

The facts in this case, as summarized from the prior decisions, are as follows. The union, American Federation of Government Employees, AFL-CIO, Local 2151, filed a grievance in 1974 under the negotiated collective bargaining agreement alleging that there were "hazardous working conditions" which existed at the Central Heating Plant of GSA, Region 3, and which entitled certain employees to environmental differential. To resolve the grievance, GSA conducted a study of conditions at the Central Heating Plant,

and the agency reported on February 26, 1976, that an environmental differential in the amount of 25 percent was warranted for work on the roof of the Central Heating Plant under the criteria for "high work." Payment was authorized by GSA on March 8, 1976, for the workers who were exposed to these working conditions. The grievances concerning environmental differential for "dirty work," "hot work," and "toxic chemicals" were submitted to arbitration and were subsequently denied.

Shortly thereafter, GSA reconsidered its decision authorizing environmental differential for "high work" when it was determined that there was a protective wall around most of the heating plant roof and after GSA received an informal advisory opinion from the Civil Service Commission (CSC) (now Office of Personnel Management). As a result, GSA decided that the conditions did not meet the "high work" criteria set forth in Federal Personnel Manual (FPM) Supplement 532-1, Appendix J, and GSA rescinded the pay authorization on June 28, 1976.

The union filed an unfair labor practice complaint alleging that the agency had violated section 19(a)(1) and (6) of Executive Order 11491, as amended. The complaint alleged that when GSA rescinded the grievance settlement agreement authorizing environmental differential pay, the agency interfered with, restrained, or coerced employees in the exercise of their rights and refused to consult, confer, or negotiate with the union as required by the Order. The unfair labor practice charge was heard by an Administrative Law Judge of the Department of Labor who concluded that the agency had properly rescinded the settlement agreement on the basis of the mistake of fact regarding the existence of a protective wall. He recommended that the complaint be dismissed.

However, on review, the decision of the Assistant Secretary of Labor was that the agency had violated section 19(a)(1) and (6) of the Order by unilaterally terminating the authorization of environmental differential. The decision held that the grievance settlement agreement had the same standing as an award by an arbitrator and constituted an extension of the negotiated agreement and an established term and condition of employment. Further, his decision held that the payment of environmental differential was not contrary to law and that the informal verbal opinion provided by the CSC did not constitute a policy interpretation which rendered the settlement invalid.

The agency appealed the Assistant Secretary's decision to the Federal Labor Relations Council which rendered its decision, No. 78A-39, on November 6, 1978. The Council held that the decision of the Assistant Secretary was not arbitrary and capricious since (1) the relevant provisions of the FPM were incorporated by reference in the negotiated agreement, (2) the agency had agreed to authorize environmental differential under the grievance settlement, and (3) there was no showing that the CSC had declared the settlement invalid. The decision of the Council sustained the Assistant Secretary's order directing the agency to reinstate the grievance settlement and, "to the extent consonant with law, regulations, and decisions of the Comptroller General," reimburse each affected employee the environmental differential authorized pursuant to the grievance settlement for "high work."

ARGUMENT

The General Services Administration argues that there are two mistakes of fact which preclude the payment of environmental differential under the FPM. As noted above, GSA argues that the existence of a protective wall surrounding the inner roof level where all of the work in question is performed greatly reduces the hazard of working on a high structure. In addition, GSA points out that when the Central Heating Plant was measured in 1978 the area outside the protective wall was found to be 89 feet above ground level and the area inside the protective wall was found to be 95 feet above ground level. Thus, GSA concludes that since the roof is less than 100 feet above ground and since there is a protective wall surrounding the inner roof where all work is performed, the hazard does not exist and payment of environmental differential is not warranted under the regulations.

The union argues that the environmental differential payments are legal since a mistake of fact is not grounds for contract avoidance under the circumstances and that the agency should be estopped from claiming that the agreement was based upon a mistake. In addition, the union contends that the agreement reached in this case was based upon the FPM provisions which allow environmental differential payments to be authorized through labor-management negotiation. Finally, the union argues that the advisory opinion by the CSC in this case was not, and could not, be binding on the agency, citing Naval Air Rework Facility, 56 Comp. Gen. 8, B-180010.03, October 7, 1976.

DISCUSSION AND CONCLUSION

The statutory authority for environmental differential pay for wage schedule employees is contained in 5 U.S.C. § 5343(c)(4) which provides that the CSC shall prescribe regulations for the administration of the prevailing rate system, including regulations which provide "for proper differentials, as determined by the Commission, for duty involving unusually severe working conditions or unusually severe hazards." The regulations promulgated by the CSC are contained in FPM Supplement 532-1, subchapter S8-7 and Appendix J, and they provide guidance to the agencies for the payment of an environmental differential for exposure to various degrees of hazards, physical hardships and severe working conditions. With regard to the local determination of conditions under which a differential could be paid, subchapter S8-7 provided at the time of the grievance herein, 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 the category. The examples of the situations are not all inclusive but are intended to be illustrative only.
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> "(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.
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> "(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.

"(b) When the local situation is not covered by one of the defined categories but is considered to be unusual in nature so as to warrant payment of an environmental differential, a differential may not be paid (except as provided by i below), but action is to be initiated to request the Commission to consider authorizing the payment of an environmental differential.

"(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." (Emphasis added.)

Appendix J to FPM Supp. 532-1 provides, in pertinent part, as follows:

"2. High work.

"a. Working on any structure at least 100 feet above the ground, deck, floor or roof, or from the bottom of a tank or pit:

"b. Working at a lesser height:

"(1) If the footing is unsure or the structure is unstable; or

"(2) If safe scaffolding, enclosed ladders or other similar protective facilities are not adequate (for example, working from a swinging stage, boatswain chair, a similar support); or

"(3) If adverse conditions such as darkness, steady rain, high wind, icing, lightning or similar environmental factors render working at such height(s) hazardous."

In the present case, it is the contention of the agency that the existence of the protective wall and the fact that the roofs are less than 100 feet above ground level precludes payment of environmental differential under the above-cited regulations.

We believe that the present case is controlled by Naval Air Rework Facility, 56 Comp. Gen. 8, supra. In that decision, the Navy requested our opinion as to the legality of implementing two arbitration awards of environmental differential pay which the Navy had concluded were inconsistent with the applicable regulations. We pointed out that the Civil Service Commission has declined to make determinations regarding specific cases involving the payment of environmental differential and that the CSC has refrained from acting as an appellate source in disputes between agencies and their employees in specific cases. 56 id. 8, at 13. In addition, we noted that the regulations authorize the agencies to evaluate local working conditions to determine whether such conditions are covered by the standards (subchapter S8-7g(2)) and permit negotiations through the collective bargaining process for determining the coverage of additional local situations (subchapter S8-7g(3)). Thus, we concluded that the arbitrator could properly determine coverage under the appropriate regulations and that the arbitrator's award would be considered binding absent a finding that it was contrary to applicable law, regulations, or decisions of our Office.

In the present case, we are considering a grievance settlement agreement instead of an arbitrator's award. We note that the Federal Labor Relations Council declined to pass upon or adopt the statement of the Assistant Secretary that a grievance settlement agreement has the same standing as an arbitration award. (See FLRC No. 78A-39, footnote 6. Nevertheless, in view of the FPM provisions permitting the parties to determine coverage through the collective bargaining process, we shall consider the settlement agreement under the standards set forth in our decision in B-181498, January 30, 1975. In that decision, we held that where the agency had declined to authorize environmental differential for certain employees, our Office would not substitute its judgment for that of the agency absent clear and convincing evidence negating the information in the agency report or indicating that the agency determination was arbitrary or capricious.

In the present case, the agency's action of unilaterally terminating the authorization of environmental differential has been

reviewed by the Assistant Secretary of Labor and the Federal Labor Relations Council. GAO will not substitute our judgment for that of the Assistant Secretary or the Council where we are unable to conclude that implementation of the grievance settlement agreement is contrary to law or regulation or that the agreement itself is arbitrary or capricious. Assuming all the facts presented by the agency concerning the height of the structure, the degree of the hazard, and the existence of protective devices, we are not convinced that environmental differential cannot be authorized for work under the circumstances in the present case. We note that the applicable regulations clearly state that the examples listed in the categories in Appendix J are illustrative only and are not intended to be exclusive of other exposures under other circumstances. See FPM Supp. 532-1, subchapter S8-7e(1). Furthermore, as provided in subchapter S8-7(g)(3), the regulations allow for negotiations through the collective bargaining process for determining coverage of additional local situations under the categories listed in Appendix J.

To further emphasize the fact that the authorization of environmental differential is left to local determination and is subject to the collective bargaining process, we point out that, subsequent to GSA's action in this case, the CSC revised its regulations concerning local determinations through the collective bargaining process. See FPM Letter No. 532-89, January 12, 1977. Those revised regulations have been incorporated into the FPM Supp. 532-1, Inst. 14, May 31, 1978, and they appear in subchapter S8-7(g)(3) as follows with the new material underscored:

> "(3) Nothing in this section shall preclude negotiations through the collective bargaining process for:
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> "(a) determining the coverage of additional local situations under appropriate categories in Appendix J and application of Appendix J categories to local work situations. For example, local negotiations may be used to determine whether a local work situation is covered under an appropriate category, even though the work situation may not be described under a specific illustrative example.

"(b) determining additional categories not included in Appendix J for which enviromental differential is considered to warrant referral to the Commission for prior approval as in (2), above. For example, labor and management may negotiate locally whether to submit a joint request for a new environmental differential category or a different percentage differential for an existing category to the Commission through either of their respective headquarters." (Emphasis added.)

Accordingly, ~~we affirm~~ the decisions of the Assistant Secretary of Labor and the Federal Labor Relations Council and ~~conclude that~~ will approved the order to reinstate the grievance settlement agreement authorizing payment of an environmental differential for "high work" may be legally implemented.

R. F. Keller

Deputy Comptroller General
of the United States