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DECISION

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

FILE: B-199999 **DATE:** October 9, 1981

MATTER OF: Ira Schoen and Melissa Dadant - Claims on matters subject to a negotiated grievance procedure - GAO jurisdiction

DIGEST:

Employees of Library of Congress asserting claims for retroactive temporary promotion and backpay in connection with overlong details filed grievances under collective bargaining agreement. After receipt of agency decision at step two of grievance procedure, union filed claims with GAO pursuant to 4 C.F.R. Part 31, seeking to extend the remedy granted by the agency. The agency objects to submission of the matter to GAO. In instances where a claimant has filed a grievance with the employing agency, GAO will not assert jurisdiction if a party to the agreement objects since to do so would be disruptive to the grievance procedures authorized by 5 U.S.C. §§ 7101-7135. Moreover, the issue of the timeliness of the grievances is primarily a question of contract interpretation which is best resolved pursuant to grievance-arbitration procedures.

The issue in this case is whether the General Accounting Office should assert jurisdiction over a claim filed pursuant to 4 C.F.R. Part 31 where a grievance has been filed under a negotiated grievance procedure and one of the parties to the agreement objects to the submission. We hold that GAO will not assert jurisdiction in such circumstances.

Ms. Melissa Dadant and Mr. Ira Schoen have filed claims with the General Accounting Office pursuant to 4 C.F.R. Part 31 for retroactive temporary promotions and backpay based on alleged overlong details to higher-grade positions in the Copyright Office of the Library of Congress. The two claims were presented by their authorized representative, the American Federation of State, County and Municipal Employees (AFSCME), Capital Area Council of Federal Employees (Local 2910).

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FACTS

Ms. Dadant, a GS-11 employee of the Library of Congress, claims that she was assigned the duties of a GS-12 position for approximately 1 year (October 10, 1978, through October 22, 1979). Similarly, Mr. Schoen, a GS-11 employee, claims that he was assigned duties of a GS-12 position for approximately 15 months (July 3, 1978, through October 22, 1979). On August 23, 1979, both employees filed grievances under the negotiated agreement. In the final agency decision at step two of the grievance procedure the agency admitted that it had violated Article XII, Section 3, of the collective bargaining agreement between the Library and Local 2910, which states, in part that "if a detail to a higher grade-level position extends beyond two months, or if it is known in advance it will extend beyond two months, a temporary promotion shall be made."

The Library of Congress concluded that it had erred in failing to give Ms. Dadant and Mr. Schoen temporary promotions beginning the day following the first 2 months of their respective details. However, the agency refused to grant retroactive pay for the entire overlong period of the respective details because Article XXVIII, Section 12, of the collective bargaining agreement provides that grievances must be filed "within ten (10) work days from the date the grievant knew or should have reasonably known of the condition which prompted the grievance." Having determined that the grievants knew or should have known, on or about the date their detail began, that they were performing the duties of a higher-grade position, the agency granted backpay to Ms. Dadant and Mr. Schoen only for the period starting 10 work days preceding the date that the grievances were filed.

THE AGENCY'S POSITION

If dissatisfied with the agency's position, the union had the right to invoke binding arbitration. Instead, the union filed a claim with GAO under 4 C.F.R. Part 31, the claims settlement authority of this Office, seeking backpay for the entire period of the overlong detail.

This course of action on the part of the claimants prompted the Library of Congress to raise the following objections to our consideration of these claims:

"(1) The Library contends that the instant claim for back pay is premature in view of the binding arbitration provisions (Article XXIX) of the collective-bargaining agreement between the Library and AFSCME (Local 2910). The contract provides for binding arbitration to resolve those agency grievance decisions at step 2 that are unacceptable to the union. By failing to invoke arbitration; the union has, in effect, waived its right to any further adjudication of these grievances. The request for GAO intervention in this matter, at this time, raises questions of jurisdiction, and we argue respectfully that any further adjustment of these grievances would not only interfere with the relevant due process provisions outlined in our contract with AFSCME but subvert and dilute the meaning and intent of these provisions.

"(2) The Library also argues that it is not required to pay claimants any more than the back pay awarded in the attached grievance report and recommendation because the grievants failed to file their complaints within the time prescribed by the collective bargaining agreement between the Library and AFSCME (See attached: Article XXVIII, Section 12). There is no dispute that the grievants and their exclusive representative knew of the circumstances giving rise to the complaint well before the grievances were filed, but did not file the instant grievances until August 23, 1979, almost a year after the details in question took place (October 10, 1978) and 8 months after the details to the higher grade were in process for 60 days (December 10, 1978). The Library contends that the time requirements for filing grievances as incorporated in its contract with AFSCME, must be faithfully followed to prevent prospective grievants from the unreasonable delay of asserting a right which would disadvantage the Library by placing the agency in a position where its rights may be imperiled and its defenses embarrassed."

ANALYSIS

The type of overlong detail provision relied upon by claimants has been discussed in a line of decisions of this Office which predated the passage of the Federal Service Labor-Management Relations statute 1/ and the publication of our rules governing requests for decisions on matters of mutual concern to agencies and labor organizations. 2/ In that line of cases we held that an agency may bargain away its discretion and thereby make a provision of a collective bargaining agreement a nondiscretionary agency policy, if the provision is consistent with applicable Federal law and regulations. The violation of such a mandatory provision in a negotiated agreement which causes an employee to lose pay, allowances or differentials may be found to be an unjustified or unwarranted personnel action under the Back Pay Act, 5 U.S.C. § 5596, thus entitling the aggrieved employees to retroactive compensation for such violation of a negotiated agreement. For a comprehensive analysis of our decisions in this regard, see John Cahill, 58 Comp. Gen. 59 (1978). As a result, under our authority under title 31 of the United States Code, we have in the past reviewed provisions of collective bargaining agreements in this type of case to determine whether the remedy sought is consistent with applicable laws, regulations, and Comptroller General decisions so that it may be validly implemented through the expenditure of appropriated funds for backpay. See, for example, Roy F. Ross and Everett A. Squire, 57 Comp. Gen. 536 (1978).

However, since the enactment of the Federal Labor-Management Relations Statue, we have reconsidered our jurisdictional policies on matters of mutual concern to agencies and labor organizations in recognition of the intent of Congress in establishing a statutory basis for the Federal labor-management program. We have already established the jurisdictional policies which will apply to such matters when filed pursuant to 4 C.F.R. Part 22 (1981). See 45 Fed. Reg. 55689-91, August 21, 1980, for a full explanation of these policies. In this case, and in our

1/ Title VII, Civil Service Reform Act of 1978, Pub. L. 95-454 October 13, 1978, 5 U.S.C. §§ 7101-7135.

2/ 4 C.F.R. Part 22 (1981) (originally published as 4 C.F.R. Part 21 at 45 Fed. Reg. 55689-92, August 21, 1980).

companion case of today, Samuel R. Jones, B-200004, we consider the jurisdictional policies which will apply when matters of mutual concern are filed as claims under 4 C.F.R. Part 31.

GAO's jurisdiction over Federal personnel matters is based upon title 31 of the United States Code. The claims settlement authority invoked in this case by filing pursuant to 4 C.F.R. Part 31 is based primarily on 31 U.S.C. § 71 which provides that all claims by or against the Government of the United States shall be settled and adjusted in the General Accounting Office.

The Federal Labor-Management Relations Statute did not amend title 31. Accordingly, except to the extent that Congress has expressed a contrary intent, individuals still have a right to file a claim with GAO on any matter involving the expenditure of appropriated funds. However, as a matter of policy, and in an effort to fulfill our statutory responsibilities in a manner which will facilitate the smooth functioning of the labor-management program, we believe some restrictions on our willingness to assert jurisdiction over matters of mutual concern to agencies and labor organizations is appropriate.

One area in which GAO will decline jurisdiction concerns arbitration awards. Consistent with the intent of Congress, the Comptroller General 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). 4 C.F.R. 22.7; Gerald M. Hegarty, B-202105, July 7, 1981, 60 Comp. Gen. ____; H. R. Rep. No. 95-1403, 95th Cong., 2d Sess. 56 (1978); S. Rep. No. 95-1272 and H. Rep. No. 95-1717, 95th Cong., 2d Sess. 158 (1978). This restriction applies equally to claims filed under 4 C.F.R. Part 31 and to requests for decisions filed under 4 C.F.R. Part 22. 3/

The second area in which GAO will decline to assert jurisdiction, either under 4 C.F.R. Part 31 or Part 22, involves instances where to do so would be disruptive to the

3/ However, payments made pursuant to a final and binding arbitration award do not serve as precedent for payment in similar situations not covered by the award. See, 45 Fed. Reg. 55690, August 21, 1980.

procedures authorized by the Federal Service Labor-Management Relations Statute. 4/ Thus, while the enactment of that statute did not amend title 31 of the United States Code, it is our intent to exercise discretion in determining which cases are appropriate for adjudication by GAO so as to insure compatibility with the labor-management program.

We believe our adjudication of the claims of Ms. Dadant and Mr. Schoen in the circumstances of this case would be disruptive to the grievance-arbitration process authorized by the labor-management statute. Therefore, we are declining to assert jurisdiction.

Having elected to invoke the negotiated grievance procedure, neither the claimants nor the union should now be permitted to abandon that procedure over the agency's objection and seek redress in another forum. While we will generally consider matters filed under either Part 22 or Part 31 of title 4 of the Code of Federal Regulations where neither party to the collective bargaining agreement objects to submission of the matter to GAO, we will not, in the circumstances of this case, assert jurisdiction over the objection of one of the parties to the agreement. See, Samuel R. Jones, B-200004, our companion case of today, for an explanation of when we will assert jurisdiction over claims filed under 4 C.F.R. Part 31 over the objection of one of the parties to the collective bargaining agreement. If the union was dissatisfied with the agency's decision at step two of the grievance procedure, the matter should have been pursued through the provisions in the contract for binding arbitration. The claims settlement authority of GAO is not an appropriate forum in which to seek review or reversal of a grievance decision.

We also note that in order to adjudicate these claims we would necessarily have to address not only the overlong detail provisions of Article XII, Section 3, of the negotiated agreement, but also, the timeliness issues raised in connection with Article XXVIII, Section 12, of

4/ GAO will also decline to consider matters which are more properly within the jurisdiction of other administrative bodies or courts of competent jurisdiction, or matters which are unduly speculative or otherwise inappropriate for decision. See, 4 C.F.R. § 22.8 (1981).

that agreement. We would have to make a determination as to whether the 10-day period allowed for filing grievances under the negotiated agreement barred the claimants from receiving backpay for the entire overlong period of the detail. This timeliness issue is primarily an issue of contract interpretation which is customarily adjudicated solely under the grievance-arbitration provisions of the contract. While GAO frequently considers the type of overlong detail issue presented by this case, the timeliness issue is not appropriate for consideration by GAO. Such labor-management issues are best resolved pursuant to the procedures authorized by Congress with the enactment of the Federal Service Labor-Management Relations Statute.

Therefore, without reaching the merits of the compensation claims presented by Ms. Dadant and Mr. Schoen, we are, for the reasons stated above, declining to exercise jurisdiction over these claims.

Milton J. Socolar

Acting Comptroller General
of the United States