



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

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May 2, 1973

B-163901

The Honorable Robert F. Froehke
The Secretary of the Army

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Dear Mr. Secretary:

We have for consideration a letter from the President, Local 225, American Federation of Government Employees, Box 777, Dover, New Jersey, concerning the entitlement of certain wage employees of the Picatinny Arsenal to additional retroactive hazard differential under section 8-7 of Federal Personnel Manual Supplement 532-1. This matter was the subject of a report (reference DAPE-CPP) to our Office from the Assistant Director of Civilian Personnel, Department of the Army, dated February 6, 1973.

Local 225
Dover, NJ

On November 1, 1970, the Picatinny Arsenal implemented the hazard differential provision of the Coordinated Federal Wage System promulgated by the Civil Service Commission in paragraph 88-7 of Federal Personnel Manual Supplement 532-1. After that date employees working on bomb production lines in buildings 1090 and 807 at the Arsenal were divided into two classes based upon the jobs they were required to perform and the location at which their duties were performed. Employees working directly with the high explosive components of the bombs in shielded areas including employees such as inspectors who were required to work in close proximity thereto were paid an 8 percent hazard differential. Other employees who performed duties of assembling and loading the bombs and who were shielded from the areas where the direct work on the high explosive charge was being performed were paid a 4 percent hazard differential. The employees who were paid at the 4 percent rate initiated a grievance action, apparently under the procedures prescribed in the applicable labor-management agreement. That grievance was rejected by the Arsenal at the final level of administrative appeal on August 3, 1971. Although the rejection was subject to arbitration at the request of the employees concerned or the union--if requested in writing not later than 20 workdays following final administrative denial--no such request was made. However, the Arsenal agreed to arbitration on or about February 1, 1972. On March 27, 1972, an arbitrator issued an advisory opinion awarding the higher rate of hazard differential to the employees concerned effective retroactively to the date on which he presumed that arbitration

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was requested by the parties, namely February 1, 1972. Apparently, the Department of the Army has made payments to the employees concerned in accordance therewith.

The local union questions the action taken in that regard to the extent that entitlement to the higher rate of hazard differential was not made retroactively effective to the date such differential was first authorized under the provisions of the Coordinated Federal Wage System, that is, the first pay period beginning on or after November 1, 1970.

The entitlement of wage board employees to a hazard differential is a matter primarily for administrative determination by the agency involved and the Civil Service Commission under the regulations contained in FPMR Supplement 532-1. Appendix J thereof provides in pertinent part as follows:

2. Explosives and incendiary material—high degree hazard.

Working with or in close proximity to explosives and incendiary material which involves potential personal injury such as permanent or temporary, partial or complete loss of sight or hearing, partial or complete loss of any or all extremities; other partial or total disabilities of equal severity; and/or loss of life resulting from work situations wherein protective devices and/or safety measures either do not exist or have been developed but have not practically eliminated the potential for such personal injury. Normally, such work situations would result in extensive property damage requiring complete replacement of equipment and rebuilding of the damaged area; and could result in personal injury to adjacent employees.

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3. Explosives and incendiary material—low-degree hazard.

Working with or in close proximity to explosives and incendiary material which involves potential injury such as laceration of hands, face, or arms of the employee

engaged in the operation and possible adjacent employees; minor irritation of the skin; minor burns and the like; minimal damage to immediate or adjacent work area or equipment being used.

The primary question involved is whether under the above regulations all of the employees working in buildings 1090 and 807 where bombs were manufactured and loaded were entitled to the 8 percent high hazard differential regardless of whether they worked directly with the explosive charge or whether they worked on assembly of nonexplosive parts and with loading. A second question is whether such higher compensation, if payable, would be retroactive to the first pay period beginning on or after November 1, 1970. The arbitrator's award of the higher rate of differential to those employees who had been paid at the lower rate was based for the most part on his interpretation of the regulations to the effect that an employee working on the loading and assembly of the bombs could be killed if one of the bombs on which he was working accidentally detonated just as easily as an employee who was performing operations on the high explosive components of the bombs if a similar accident occurred. The Department of the Army interpreted the regulations in a different manner based on a reading of the total regulation including the examples given which are not quoted above. One of the examples given under low degree hazard is "all operations involving loading, unloading, storage and handling of explosives and incendiary ordnance material other than small arms ammunition," and another is "load, assembly, and packing of primers, fuses, propellant charges, lead cups, boosters, and time-train rings." On the other hand the illustrations given of high risk work include so far as pertinent here operations which involve working directly with high explosive charges. The Department believes that the regulations taken as a whole did not intend to authorize the higher hazard differential rate when the assembly and loading of explosive devices involved little risk of accidental detonation. Thus the Department differentiates between different jobs on the basis of the relative risk of accidental detonation whereas the arbitrator's award would not permit such relative risk to be taken into account allowing distinctions to be made only on the basis of the severity of probable injury if accidental detonation should occur. Although the regulation in question is not entirely clear we believe that the Department's interpretation thereof is not unreasonable and that a low risk hazard differential may be paid based upon the fact that in certain operations there is a lower risk of accidental detonation.

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This, however, does not dispose of the question presented because the arbitrator's award was also based on the proximity of the employees working on assembly and loading to the recognized high risk area in which employees worked directly with high explosive charges. The arbitrator quotes from an arsenal regulation which defines proximity as including all persons "handling or working directly with someone who is handling the agents (i.e., the same room, on the same machine, or on the same conveyor line)." The arbitrator determined that regardless of the risks involved in assembly and loading operations the employees involved in such tasks worked in close proximity to the high degree hazard area because they were not protected from the high risk area in a manner which would practically eliminate the possibility of serious injury to them as the result of an accidental detonation in the high risk area. Thus, although the Department did not accept or adopt the arbitrator's reasoning with respect to the use of degrees of risk of accidental detonation it did accept the arbitrator's finding to the extent that it was based on the proximity of all employees in the buildings concerned to the high risk area. The Department's position in that regard is apparent from the fact that the Arsenal was directed to erect additional barriers which would provide a further shield between the areas involved to prevent more effectively the effects of an accidental explosion in the high risk area from reaching the rest of the building and to prevent employees not assigned to the high risk area from entering in or approaching that area. Upon erection of such additional barriers the Arsenal was to reduce the differential paid employees working outside the shielded area.

It is apparent, therefore, that the Department has determined that the fixing of hazard differential for some of the employees in buildings 1090 and 807 at the 4 percent rate was incorrect and that prior to erection of added protection for those employees they should have been paid hazard differential at the 8 percent rate. It follows that the employees concerned who received a hazard differential under the erroneous application of the regulations which were effective the beginning of first pay period on or after November 1, 1970, should have their pay adjusted from the date their pay was first fixed in a manner not consistent with the applicable regulation. We are aware of no basis for limiting their recovery of back pay to the period commencing February 1, 1972, as recommended by the arbitrator.

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As to the effect of an arbitration award which is not in keeping with controlling laws and regulations we point out that the applicable Executive Order, Department of Defense regulation and labor-management agreement all provide that applicable laws and regulations will be controlling over the labor-management agreement. See section 12(a), Executive Order No. 11491, October 29, 1969; paragraphs VII.B.3.c. and VIII.E.1, DOD Directive 1421.1; chapter I, article 4, section C, of the agreement between Picatinny Arsenal and Wage Board Unit, Local 225, AFGE approved June 21, 1971, as revised and extended by the agreement approved October 22, 1971.

For the reasons stated we hold that the employees concerned were entitled as long as they were employed in buildings 1090 and 807 without adequate protection from the area where work was performed on explosive charges to the high hazard pay of 8 percent as computed under section S8-7 of FPM Supplement 532-1, retroactive to the effective date of that regulation. You are authorized to take the necessary action to process the additional payments as soon as possible. It may be you should suggest to the Civil Service Commission that the applicable regulation be clarified so as to eliminate any similar questions arising in the future.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States