



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

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B-170182

December 26, 1973

The Honorable
The Secretary of the Navy

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Dear Mr. Secretary:

We have for consideration a letter from the President, Federal Employees Metal Trades Council, Box 2195, Vallejo, California, concerning the entitlement of certain wage grade employees of the Mare Island Naval Shipyard to additional payments of environmental differential under subchapter 58-7 and Appendix J of Federal Personnel Manual (FPM) Supplement 532-1. The issue of their entitlement is the subject of a report from your Office of Civilian Management dated October 23, 1973, reference OCM 01A/5321:brf.

The employees involved are painters who, in the course of their duties, perform work from personnel boxes suspended from cranes. On or about July 13, 1971, seven painters initiated a grievance, claiming entitlement to payment of an environmental differential for such work in accordance with Appendix J which, in pertinent part, authorizes payment of a 25 percent differential for work at a height of less than 100 feet above the ground, deck, floor or roof, or from the bottom of a tank or pit "if the footing is unsure or the structure is unstable." After attempts to adjust the grievance proved fruitless the parties invoked the contractual arbitration procedure.

On January 12, 1972, Mr. Wayne L. McNaughton, Arbitrator, rendered an award and opinion holding that the employees had established entitlement, in accordance with the criteria set forth at Appendix J, to payment of an environmental differential of 25 percent for work at "lower heights." He held them so entitled "as of the start of the nearest pay period" following date of award.

On January 21, 1972, the Mare Island Naval Shipyard acknowledged that it would accept the award. The Federal Employees Metal Trades Council, however, petitioned the Federal Labor Relations Council for review of the arbitrator's award insofar as it restricted payment of the differential to the period subsequent to award. In its petition, the Trades Council argues that:

"* * * the Arbitrator in FLRC 72A-14 * * *
exceeded his authority when he restricted the payment

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to the period following his decision, since the hazard was found to exist at the time of the decision, and was evidence of past and current performance. In this context, the pay was payable for all periods of hazard existing after the authority to pay was enunciated. This being true, the Arbitrator's act in denying pay for the past hazardous work, was in conflict with his decision stating it was hazardous and pay therefor was payable. * * *"

By letter dated July 10, 1972, the Federal Labor Relations Council denied the petition for review holding that the appeal had been untimely filed.

The propriety of the arbitrator's limitation of entitlement to periods after the date of award, January 12, 1972, is here questioned in view of the fact that Appendix J lists November 1, 1970, as the effective date for payment of the 25 percent differential for high work including work at lesser heights than 100 feet.

No exception is taken by your department to the arbitrator's finding that work from personnel boxes constitutes high work at a lesser height within the criteria set forth at Appendix J. Subchapter 88-7g(3) of FPM Supplement 532-1 provides for determination of whether a particular situation comes within the standards set forth for payment of the differential as follows:

"(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."

In view of the reservation of that determination to the collective bargaining process, we defer to the arbitrator's determination as to the coverage by Appendix J of the particular work here in question insofar as we find that determination not subject to laws or regulations which would compel a different result.

The question of the effective date for payment of an environmental differential for a situation within one of the categories set forth at

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Appendix J which is not identified until subsequent to November 1, 1970, is addressed in Attachment 2 to FPM Letter 532-19, January 14, 1971, as follows:

"9. Question. As of November 1, 1970, an employee is exposed to a situation under one of the categories set forth in Appendix J. However, an example within a category (such as an example of Dirty Work) is not identified until after November 1, 1970. Will payment of the differential for the new example be prospective after identification of the example, or retroactive to the first pay period beginning on or after November 1, 1970?

"Answer. The examples in Appendix J illustrate situations for which differentials are required to be paid. If a differential is authorized for a particular category on November 1, 1970, and the employee in fact is exposed to a situation under that category but the agency does not identify the situation to the category until a later date, the employee is entitled to the differential retroactive to November 1. The employee would of course receive the differential (under Part I or Part II) only for those periods the agency determines he was, in fact, exposed to the situation for which the environmental differential is authorized."

Although the FPM Letter which contains the above-quoted question and answer has been superseded by inclusion in FPM Supplement 532-1 and the particular language does not appear therein, it nevertheless indicates the Civil Service Commission's interpretation of its statement at Appendix J that the effective date for payment of an environmental differential for high work including work at a lesser height is November 1, 1970.

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 and Department of Defense regulations provide that applicable laws and regulations will be controlling over the labor management agreement. See section 12(a), Executive Order 11491, October 29, 1969, as amended by Executive Order 11616, August 26, 1971; paragraphs VII B.3.c and VIII E.1 of Department of Defense Directive 1426.1. In that the

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subject of payment of environmental differential for a subsequently identified hazard has been clearly addressed by the Civil Service Commission in interpreting its own regulation, we find the arbitrator's prospective limitation of payment contrary to existing law and regulation, and thus without effect. See also B-163901, May 2, 1973, copy enclosed, wherein we held that an environmental differential payable for a hazard identified through arbitration subsequent to November 1, 1970, could not be limited to payment prospectively from the date the arbitrator determined that arbitration had been requested by the parties.

Regarding the amounts of additional differential to which employees are entitled for the period from November 1, 1970, through January 12, 1972, we note that letter dated October 23, 1973, from the Office of Civilian Manpower Management states:

"* * * We have been informed by the Mare Island Naval Shipyard that there are no records which identify employees with the particular work operation or periods of exposure prior to the date of the applicable arbitration award. The ordinary system for identifying such work for pay is to annotate time sheets. There was no regular system in existence to record such work at that time. * * *

We recognize that the determination of the amounts due poses a difficult problem because of the lack of records. However, in cases where it is known that over a period of time employees have performed duty for which they are entitled to additional pay and doubt exists only as to the particular days or hours on which the qualifying work was performed this Office has approved payment therefor based upon the most reasonable estimate after consideration of all available records. See 50 Comp. Gen. 767 (1971) and B-150646, B-178272, letters dated May 29, 1973, and October 10, 1973, copies enclosed.

In view of the above additional environmental differential payments may in the instant case be processed administratively in accordance with the decisions cited.

Sincerely yours,

H. F. Koller

Deputy }
Comptroller General
of the United States