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DECISION



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

AUG 19 1976 50535

FILE: B-184858

DATE:

MATTER OF: Oil, Chemical and Atomic Workers International Union - Entitlement of Prevailing Rate Employees Who Negotiate Wages to Statutory Night Differentials

DIGEST: Prevailing rate employees who negotiate their wages as part of their collective-bargaining agreement are exempted by section 9(b) of Pub. L. 92-392 (5 U. S. C. § 5343 note) from the statutory pay provisions including night differentials of the amended prevailing rate statute. (5 U. S. C. § 5341 et seq.) Thus, so long as they negotiate their wages they are not entitled to the statutory pay provisions of 5 U. S. C. § 5341 et seq., however they can become entitled to the provisions of the law by failing to extend their collective-bargaining agreement.

This action involves a request from the Oil, Chemical and Atomic Workers International Union (OCAWIU), hereinafter referred to as the union, for a ruling by this Office as to whether certain ungraded employees of the Helium Activity (Operations) Bureau of Mines, Department of the Interior, hereinafter referred to as the agency, are entitled to night-shift differential pay provided by 5 U. S. C. § 5343(f). The union is the exclusive collective-bargaining representative of the employees involved. These prevailing rate employees are somewhat unique, inasmuch as they have, through their union, negotiated their wages as a part of their collective-bargaining agreement since 1952.

The current wage agreement is comprehensive in scope and provides for base pay and for overtime and holiday rates of pay. In addition the current agreement provides for a shift differential of 20 cents additional pay per hour during the 4 p. m. -to-midnight shift and 40 cents additional pay per hour during the midnight-to-8 a. m. shift.

On August 19, 1972, Pub. L. 92-392 (86 Stat. 564) was enacted into law and codified as subchapter IV of title 5, United States Code. It amended the then existing prevailing wage law by a statutory scheme for the prevailing wage rate system which prior to that time had been largely governed by administrative regulations. Shift differentials were provided in 5 U. S. C. § 5343(f) as follows:

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"(f) A prevailing rate employee is entitled to pay at his scheduled rate plus a night differential--

"(1) amounting to 7-1/2 percent of that scheduled rate for regularly scheduled non-overtime work a majority of the hours of which occur between 3 p. m. and midnight; and

"(2) amounting to 10 percent of that scheduled rate for regularly scheduled non-overtime work a majority of the hours of which occur between 11 p. m. and 8 a. m.

A night differential under this subsection is a part of basic pay."

The above-quoted subsection read by itself would appear to entitle all prevailing rate employees to the stated night differentials when they work during the prescribed hours. However, subsection 9(b) of Pub. L. 92-392 serves to exempt prevailing rate employees who negotiate their wages and working conditions from the effects of the law, as follows:

"(b) The amendments made by this Act shall not be construed to--

"(1) abrogate, modify, or otherwise affect in any way the provisions of any contract in effect on the date of enactment of this Act pertaining to the wages, the terms and conditions of employment, and other employment benefits, or any of the foregoing matters, for Government prevailing rate employees and resulting from negotiations between Government agencies and organizations of Government employees;

"(2) nullify, curtail, or otherwise impair in any way the right of any party to such contract to enter into negotiations after the date of enactment of this Act for the renewal, extension, modification, or improvement of the provisions

of such contract or for the replacement of such contract with a new contract; or

"(3) nullify, change, or otherwise affect in any way after such date of enactment any agreement, arrangement, or understanding in effect on such date with respect to the various items of subject matter of the negotiations on which any such contract in effect on such date is based or prevent the inclusion of such items of subject matter in connection with the renegotiation of any such contract, or the replacement of such contract with a new contract, after such date."

The legislative history of the above-quoted subsection 9(b) is explicit as to what that subsection was intended to accomplish:

"Savings clause for existing agreements"

"Section 9(b)(1) of the bill, with the committee amendment, provides that the amendments made by the Act shall not be construed to abrogate, modify, or otherwise affect the provisions of any existing contract pertaining to the wages, conditions of employment, and other employment benefits of Government employees, which contract resulted from negotiations between agencies and employee organizations. Paragraph (2) of section 9(b) states that the provisions of any contract in effect on the date of enactment of the Act may be renewed, extended, modified or improved through negotiation after the enactment date of the Act. Paragraph (3) of section 9(b) provides that the Act shall not affect any existing agreement between agencies and employee organizations regarding the various items which are negotiable, nor shall the Act preclude the inclusion of new items in connection with the renegotiation of any contract.

"The provisions of section 9(b) are directed at those groups of Federal employees whose wages and other terms or benefits of employment are fixed in accordance with contracts resulting from negotiations

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between their agencies and employee organizations.
* * * It is not this committee's intent to affect, in any way, the status of such contracts or to impair the authority of the parties concerned to renegotiate existing contracts or enter into new agreements. However, the prevailing rate employees who are now covered by such contracts will be subject to the provisions of this Act when such contracts expire and are not renewed or replaced by new contracts."
H. R. Rep. No. 339, 92d Cong., 1st Sess. 22 (1971).

From the foregoing, it is clear that Congress intended to exempt prevailing rate employees who negotiate their wages from the effects of the amended prevailing rate law. This does not mean that such employees are forever barred from obtaining the benefits of the amended law. Such benefits may be obtained in one of two ways. First, if these employees desire to retain their unique status as employees who negotiate their wages, they can bargain with the agency for benefits similar to those granted other prevailing rate employees under the law. In the alternative, these employees can simply elect not to extend their collective-bargaining agreement when it expires. In this event, the employees would become subject to all the provisions of the amended prevailing rate law.

Therefore, we hold that prevailing rate employees who negotiate their wages are not entitled to night-shift differentials provided in 5 U. S. C. § 5343(f).

R.F.KELLER

[Deputy] Comptroller General
of the United States