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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Purchase of Cold Weather Clothing, Rock Island District, U.S. Army Corps of Engineers.

File: B-289683

Date: October 7, 2002

DIGEST

Without specific statutory authority, cold weather clothing is an employee's personal responsibility, not the government's, and appropriated funds, therefore, are not available for that purpose. Our Office has identified three statutes including the Occupational Safety and Health Act of 1970 (OSHA), that permit the use of appropriated funds to purchase wearing apparel. In the circumstances presented here, two of these three statutes are not available to the Army Corps of Engineers for the purchase of cold weather clothing. Unless the Corps determines that providing suitable cold weather clothing is necessary to satisfy the OSHA standards promulgated by the Secretary of Labor, OSHA is also not available. General statements in the Corps' safety manual about clothing employees should wear to protect themselves from cold weather do not constitute a determination by the agency that it is necessary to provide the clothing in order to satisfy OSHA standards.

DECISION

The financial manager for the Rock Island District of the U.S. Army Corps of Engineers requested an advance decision on the availability of appropriated funds for the purchase of cold weather gear for union employees who work outside in cold weather. The American Federation of Government Employees filed a grievance alleging that the Corps violated its collective bargaining agreement by not providing suitable protective clothing for employees requested to work outdoors in cold weather. The Corps, relying upon the decisions of our Office and contending that such an expenditure was improper, agreed to arbitration by the Federal Mediation and Conciliation Service (FMCS). In August 2001, the arbitrator issued a decision directing the Corps to provide the cold weather gear. The Corps asks whether appropriated funds are available to purchase cold weather gear for district employees who work outdoors year round.

Generally it is the responsibility of the employee to report for duty properly clothed to carry out his or her responsibilities. 68 Comp. Gen. 245 (1984). There are three statutes, including the Occupational Safety and Health Act (OSHA), that permit the purchase of wearing apparel. We address each of the statutes in our analysis below. Two of these statutes are clearly not available as authority to the Corps in the circumstances presented here. Only if the Corps determines that it is necessary to provide protective clothing to satisfy OSHA standards would OSHA provide the necessary authority. The Corps has not made that determination. The general statements in the Corps safety manual do not constitute the necessary determination.

BACKGROUND

The Local 584 bargaining unit representative of the Rock Island District filed a grievance on December 14, 2000, alleging that the Corps had violated Article 21 (Safety) of its negotiated collective bargaining agreement dated April 1, 1997. Article 21 states:

> "Section 1. The employer shall maintain an occupational safety and health program meeting the requirements of the Occupational Safety and Health Act of 1970 (OSHA); Executive Order 12196; 29 CFR Part 1960, Department of Labor Rules and Regulations; and EM [Engineering Manual] 385-1-1. The employer shall make a reasonable effort to provide that conditions detrimental to health are removed, remedied, or kept to a minimum. The Union shall cooperate to that end and encourage employees to perform work assignments safely and in accordance with the requirements of EM 385-1-1 and OSHA regulations.
>
> "Section 11. The Employer will provide suitable protective clothing in accordance with EM 385-1-1."

Specifically, the Union claimed that the Corps does not provide suitable protective clothing to employees working outside in the cold weather in violation of both the collective bargaining agreement and OSHA requirements. The Corps denied the grievance, and in January 2001, the Union appealed to the Deputy District Engineer. This too was denied. The matter was submitted to arbitration. In October 2001, the arbitrator found that the Corps had violated the collective bargaining agreement by failing to provide cold weather clothing. Arbitration Award: U.S. Army Engineer District, Rock Island and National Federation of Federal Employees, Local 584. "Article 21, Safety," FMCS Case No. 01-07519 (Oct. 17, 2001) (hereinafter, Arbitration Award). The arbitrator ruled that the Corps should provide suitable cold weather clothing. Id.

The Financial Manager of the Rock Island District requested an advance decision on whether appropriated funds are generally available to purchase cold weather gear, what exceptions apply if appropriated funds are generally not available for such a purchase, and whether, if there is an exception where the agency makes a determination to furnish such gear as protective equipment under the Occupational Safety and Health Act of 1970, provisions of the Army Corps of Engineers Manual EM 385-1-1 constitute such a determination.

ANALYSIS

At the outset, we should point out the limits of GAO's jurisdiction with regard to this matter. Our function is not to decide whether the arbitrator came to the correct decision or whether these issues are negotiable. We are required by 31 U.S.C. § 3529 to rule on the legality of expending appropriated funds. Hence we shall confine our considerations to the issue of whether appropriated funds are available to purchase cold weather gear.

We generally consider items of clothing such as cold weather gear to be a personal expense of the employee, and appropriated funds are not generally available for personal expenses. B-240271, Oct. 15, 1990. We stated that "every employee of the government is required to present himself for duty properly attired according to the requirements of his position." 63 Comp. Gen. 245 (1984).

Our Office has identified three statutory provisions that explicitly permit the purchase of items of wearing apparel. First, under 10 U.S.C. § 1593, the Secretary of Defense is authorized to pay an allowance or provide a uniform to each civilian employee of the Department of Defense who is required by law or regulation to wear a prescribed uniform while performing official duties. The record indicates that apparently some districts provide uniforms for members of bargaining units. Arbitration Award, at 10. However, the only uniform policy for the relevant employees in the Rock Island District is that they wear U.S. Army Corps of Engineers hats. Id. These employees are not required by law or regulation to wear a prescribed uniform other than a hat. Thus this exception would not apply.

Second, under 5 U.S.C. § 7903, enacted as part of the Administrative Expenses Act of 1946, "Appropriations available for the procurement of supplies and material or equipment are available for the purchase and maintenance of special clothing and equipment for the protection of personnel in the performance of their assigned tasks." In order for an item to be authorized by 5 U.S.C. § 7903, it must satisfy three tests: (1) the item must be "special" and not part of the ordinary and usual furnishings an employee may reasonably be expected to provide for himself; (2) the item must be for the benefit of the government, that is, essential to the safe and successful accomplishment of the work, and not solely for the protection of the employee, and (3) the employee must be engaged in hazardous duty. See 32 Comp. Gen. 229 (1952); B-193104, January 9, 1979.

We have generally been unwilling to hold that cold weather gear meets these standards. B-230820, Apr. 25, 1988. We view such gear as personal to the employee. In rare circumstances, we have recognized an exception. For example, in 1984, we applied these standards to allow the procurement of down-filled parkas for Office of Surface Mining employees working in Alaska and western high mountain regions. 63 Gen. 245 (1984). In that case, however, the employees were assigned to temporary duty in these regions and could not be expected to own clothing suitable for such extreme environments. Id. at 247. Because the item was not solely for the benefit of the employee, the expenditure was authorized.

In applying the three-part test here, that there is nothing in the record to indicate that the cold weather gear at issue is "special." By contrast with the situation faced by the Office of Surface Mining employees, the situation here involves weather that is uncomfortable rather than intolerable, and the weather encountered on the job is no different from that encountered by millions in the midwest during their day-to-day activities. The only issue is whether the requirement to perform outside for long periods of time creates a situation different from that where the employee is only outside for the passage from parking lot to building, or from building to building, or while attending sporting events. To the extent that operators working outside on the locks and dams suffer more exposure from the cold weather than those who merely encounter the weather briefly, the District's practices of providing sheltered or heated enclosures, with the work day punctuated by frequent breaks, appears adequate to protect the employees.

The third statute permitting the purchase of wearing apparels with appropriated funds is OSHA. Section 668 of title 29 of the U.S. Code requires each federal agency to establish and maintain an effective and comprehensive occupational safety and health program consistent with standards promulgated by the Secretary of Labor pursuant to the Act. See, generally, 51 Comp. Gen. 446 (1972). Under section 668, protective clothing may be furnished by the government if the agency determines that it is necessary under OSHA and its implementing regulations. 57 Comp. Gen. 379, 382 (1978); B-187507, Dec. 23, 1976.

There is nothing in the record here to indicate that the Corps has designated cold weather gear as required equipment pursuant to OSHA regulations. While the Corps EM 385-1-1 (referenced in section 11 of Article 21 of the collective bargaining agreement) incorporates American Council of Government and Industrial Hygienists (ACGIH) standards into the collective bargaining agreement, it does not designate cold weather gear as required equipment pursuant to OSHA regulations. Paragraph 06.J.02 of EM 385-1-1 requires that each installation develop a site-specific plan for monitoring heat/cold stress in accordance with ACGIH guidance. There is no reference in that paragraph to provide clothing to the employees. Subsequent paragraphs do list specific circumstances where the agency will provide wearing apparel: (1) paragraph 06.J.06 states that employees who become "immersed in

water" will be provided a change of clothing and treated for hypothermia; and (2) paragraph 06.J.07 states that employees "shall be provided" gloves at certain temperatures.

By contrast, paragraph 06.J.10, which deals specifically with "cold weather clothing requirements," does not provide that the agency will supply such clothing. Rather, those requirements address the individual employee's obligation to provide and maintain equipment adequate to protect himself from the environment.

There is no determination in the Engineering Manual that specific items of cold weather gear are required to satisfy OSHA requirements. The general statements found in the manual do not constitute a determination for purposes of OSHA. See B-191594, Dec. 20, 1978 (Forest Service Manual provided authority to local line officers to determine, for their local job situations, the personal protective equipment and clothing necessary to satisfy OSHA requirements).

CONCLUSION

Without specific statutory authority, cold weather clothing is an employee's personal responsibility, not the government's. The purchase of cold weather clothing by the Army Corps of Engineers for employees required to perform work outside on locks and dams during midwestern winters is not a proper use of appropriated funds unless the agency determines that providing suitable cold weather clothing is necessary to satisfy the standards promulgated by the Secretary of Labor pursuant the OSHA. The general language of EM 385-1-1, requiring employees to wear clothing that protects them from the weather, does not constitute a determination that the agency must provide that clothing to comply with OSHA standards.

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