

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548AGAZARIAN
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FILE: B-159295

DATE: March 28, 1983

MATTER OF: Ralph Von Dane

DIGEST:

Supervisory Special Agent of Fish and Wildlife Service who agency determined piloted hazardous flights on a regular and recurring basis is not entitled to hazardous duty pay under 5 U.S.C. 5545(d) since that statutory provision permits the payment of differential only for irregular or intermittent exposures to hazard. The Comptroller General will overturn the agency's decision on employee's entitlement to hazardous duty differential only where there is clear and convincing evidence that agency's decision was wrong or arbitrary and capricious.

By letter dated April 18, 1982, Mr. Ralph Von Dane, a retired employee of the U.S. Fish and Wildlife Service, has appealed the April 6, 1982 action of our Claims Group which disallowed his claim for hazardous duty differential under 5 U.S.C. 5545(d) in connection with the piloting of an aircraft on low level flights. For the reasons set forth below, we hold that Mr. Von Dane is not entitled to the payment of hazardous duty differential.

Mr. Von Dane, who retired from the Service on June 15, 1979, has claimed entitlement to hazardous pay differential for various flights he undertook during the period from October 16, 1975, to May 22, 1979. He contends that these flights were made under circumstances which would entitle him to the payment of hazardous duty differential.

The record shows that Mr. Von Dane was employed as a Supervisory Special Agent, grade GS-12, during the period in question. He has claimed hazardous duty differential for flying duties on 80 days where he believes the flights met the applicable criteria for payment of hazardous duty differential. He states that these flights were made at altitudes of 200 feet or less and were over water or rough terrain. Mr. Von Dane has excluded from his claim those flights for which he states he received hazardous duty differential - the annual December goose survey or the

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annual mid-winter waterfowl and eagle survey. The agency has informally confirmed that Mr. Von Dane was paid the hazardous duty differential for certain survey flights.

The agency has stated its belief that Mr. Von Dane is not entitled to hazardous pay differential since his piloting duties constituted a regular and recurring function of his former position as a Special Agent. The agency's position is predicated upon a December 1980 classification appeal decision involving a Fish and Wildlife Service Special Agent. In that decision the Office of Personnel Management decided that the agent's operation of an aircraft involved skills, knowledge, and abilities essential to the position which should be recognized through the position classification process and not through the payment of hazardous duty differential. The Service advises that as a result of the classification appeal decision it reviewed Special Agent and Supervisory Special Agent positions, including the position formerly occupied by Mr. Von Dane to determine the nature and extent of pilot duties which were performed by incumbents of these positions. Upon having apparently determined that Mr. Von Dane's former position involved regular and recurring flying, the Service states that it evaluated the classification of that "mixed series" position in the light of the Position Classification Standards for GS-1810/1811 Investigator positions as well as the GS-2181 Aircraft Operation Classification Series, which takes into account the degree of hazard of flying duties and determined that his position had been properly classified. Thus, the Service states that the claimant is not due any additional compensation. The Service further states that it had determined that the pilot duties associated with Mr. Von Dane's former position met the standards set forth at the grade GS-12 level under the GS-2181 Aircraft Operation Series. The applicable position classification standards show that pilot duties at the grade GS-12 level may include assignments which involve flying at minimum speed or altitude, or both, over unfavorable terrain and are characterized by a "substantial degree of hazard" and are for such purposes as tracking game.

Subsequent to the Service's denial of his claim Mr. Von Dane submitted his claim for hazardous duty differential to our Claims Group which received the claim on February 2, 1982. On April 6, 1982, the Claims Group

disallowed Mr. Von Dane's claim on the basis that it was barred in part by 31 U.S.C. 71a, now set forth as 31 U.S.C. 3702, and that the situation for which the differential was claimed was of a regular nature and an inherent part of his position. Section 3702 of title 31, United States Code, provides that every claim for settlement by the General Accounting Office shall be barred unless received in this Office within 6 years after the date the claim accrued. We have held that the date of accrual of a claim for the purposes of that provision of law is to be regarded as the date the services were rendered and that the claim accrues on a daily basis. 29 Comp. Gen. 517 (1950). Thus, that part of his claim which accrued prior to February 2, 1976, is barred from consideration.

Statutory authority for the payment of a hazardous duty differential is set forth at 5 U.S.C. 5545(d) which provides:

"(d) The Office shall establish a schedule or schedules of pay differentials for irregular or intermittent duty involving unusual physical hardship or hazard. Under such regulations as the Office may prescribe, and for such minimum periods as it determines appropriate, an employee to whom chapter 51 and subchapter III of chapter 53 of this title applies is entitled to be paid the appropriate differential for any period in which he is subjected to physical hardship or hazard not usually involved in carrying out the duties of his position. However, the pay differential--

"(1) does not apply to an employee in a position the classification of which takes into account the degree of physical hardship or hazard involved in the performance of the duties thereof; and

"(2) may not exceed an amount equal to 25 percent of the rate of basic pay applicable to the employee."

That language clearly indicates that the differential was not intended to be paid where the hazard recurs regularly or is inherent in a position. Further confirmation of this interpretation is set forth in the legislative history of H.R. 1535, 89th Cong., 1st Sess. which became 5 U.S.C. 5545(d). As H.R. Rep. No. 31, 89th Cong. 1st Sess. states at 2:

"Extra compensation may be provided Classification Act employees through the regular position classification process when the unusual physical hardship or hazard is inherent in the position, when it regularly recurs, and when it is performed for a substantial part of the working time. * * *"

Accordingly, our cases have held that the statute authorizes a pay differential only for irregular and intermittent duty involving physical hardship or hazard and then only if those factors were not used as a basis for classifying the position. B-189645, December 21, 1977, and Matter of Contarino, B-202182, January 19, 1982.

The implementing regulation promulgated by the Civil Service Commission (now Office of Personnel Management) and set forth at 5 C.F.R. 550.904 (1982), does not require a contrary result. This regulation provides that:

"(a) An agency shall pay the hazard pay differential listed in Appendix A to an employee who is assigned to and performs any irregular or intermittent duty specified in the appendix when that duty is not usually involved in carrying out the duties of his position. Hazard pay differential may not be paid an employee when the hazardous duty has been taken into account in the classification of his position.

"(b) For the purpose of this section:

"(1) 'Not usually involved in carrying out the duties of his position' means that even though the hazardous duty may be embraced within the employee's position

description it is not performed with sufficient regularity to constitute an element in fixing the grade of the position.

"(2) 'Has been taken into account in the classification of his position' means that the duty constitutes an element used in establishing the grade of the position."

In this context "position" is defined as "the work consisting of the duties and responsibilities assigned by competent authority for performance by an employee." 5 C.F.R. 511.101(e) (1982).

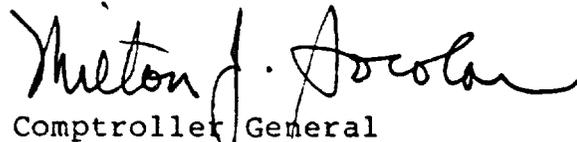
While that regulation contemplates that hazardous duty performed on a regular basis will be considered as a factor in classifying the position, it does not authorize payment of the differential for hazardous duty performed with regularity, where such duty is not a factor in the classification of a particular employee's position. B-189645, cited above.

The Office of Personnel Management's classification appeal decision of December 1980, would not by itself establish that Mr. Von Dane's pilot duties regularly involved flying under hazardous conditions since the classification decision was rendered subsequent to Mr. Von Dane's retirement and apparently involved a special agent in a lower grade position than that occupied by Mr. Von Dane. However, as stated above, the Service has advised that it then conducted its own review of similar Special Agent and Supervisory Special Agent positions including the position formerly occupied by Mr. Von Dane, to determine the nature and extent of flying duties which were performed by incumbents of these positions. In its review of these positions the Service found that the flying duties of the position formerly occupied by Mr. Von Dane were regular and recurring and at the grade GS-12 level. As previously noted, flying duties at the GS-12 level may involve hazardous low altitude and/or low speed flying such as that for which Mr. Von Dane has claimed hazardous duty differential. While the Service's findings would not provide a basis for a retroactive classification action (see 5 C.F.R. 511.702 (1982)), they would be a proper basis for determining the matter of entitlement to hazardous duty differential.

In this area we have uniformly held that the authority to determine whether a particular situation warrants payment of a hazardous duty differential is a decision which is vested primarily in the employing agency. We will not substitute our own judgment for that of the agency officials who are in a better position to investigate and resolve the matter, unless there is clear and convincing evidence that the agency's decision was wrong or that it was arbitrary and capricious. Matter of Pletten, B-197978, June 5, 1980, and Matter of Contarino, cited above. On the record before us, we are unable to conclude that the Service was either wrong or arbitrary and capricious in its determination that Mr. Von Dane is not entitled to the payment of hazardous duty differential. Thus, we sustain the Claims Group's disallowance of his claim.

Mr. Von Dane has also contended that he should be allowed the hazardous duty differential on the basis that other Special Agents who flew on similar flights received hazardous duty differential. We are not aware of the facts surrounding any of these alleged payments of hazardous duty differential, so we are unable to comment on this matter. However, the fact that other employees may have been improperly allowed payment of hazardous duty differential would not provide a basis upon which to allow similar payments to Mr. Von Dane.

Since Mr. Von Dane's duties have been found to have involved flying under hazardous conditions on a regular and recurring basis, the prior payments to him of hazardous duty differential were not authorized under 5 U.S.C. 5545(d) and, thus, were erroneous. Section 5584 of title 5, United States Code, provides that erroneous payments of pay may be waived where collection of the erroneous payments of pay would be against equity and good conscience and not in the interest of the United States. Since on the record before us there is no indication of fraud, fault, or lack of good faith on the part of Mr. Von Dane in this matter the erroneous payments of hazardous duty pay are waived in accordance with the standards set forth in subchapter G, chapter 1, title 4, Code of Federal Regulations (1982).



Acting Comptroller General
of the United States