



The Comptroller General
of the United States

Washington, D.C. 20548

R. Redinger

140161

Decision

Matter of: Robert J. Miranda - Hazardous Duty Differential Pay

File: B-236269

Date: November 16, 1989

DIGEST

An employee whose duties required him to be at a construction site to monitor the activities of construction workers appeals an agency action disallowing his claim for hazardous duty pay. The agency determined that the duty was not hazardous. The employing agency has primary responsibility to determine entitlement to hazardous duty pay under 5 U.S.C. § 5545(d). The Comptroller General will not overturn an agency's action unless its determination was clearly erroneous, or arbitrary or capricious. Since we cannot so conclude here, the agency's action is sustained.

DECISION

This decision is in response to Mr. Robert J. Miranda's appeal of our Claims Group Settlement Z-2866193, Apr. 17, 1989, which disallowed his claim for hazardous duty differential pay. We sustain that disallowance for the reasons set forth below.

BACKGROUND

Mr. Robert J. Miranda was employed as a technical security officer, GS-12, by the Central Intelligence Agency. During the period July 21, 1986, through July 7, 1987, he performed his duties at the construction site of its new office building in Langley, Virginia. By his own description of duties, he was required to monitor the activities of the workers on the construction site on a full-time basis.

Based on the circumstances under which his duty was performed, the agency concluded that his work was such that he did not qualify for hazardous duty differential pay. On submission of a claim here, our Claims Group upheld the agency's position.

On appeal, Mr. Miranda contends that he was in fact subjected to numerous hazards at the construction site. To support his position, he included a copy of a memorandum dated September 23, 1986, describing the results of a safety survey made earlier that month outlining a number of unsafe conditions found on the 2 days of the survey. Mr. Miranda expresses the view that since his exposure to these hazards was intermittent and not inherent in his position, he is entitled to hazardous duty differential.

ANALYSIS AND CONCLUSION

The statutory authority for the payment of a hazardous duty differential is found in 5 U.S.C. § 5545(d) (1982), which provides:

"(d) The Office [of Personnel Management] shall establish a schedule or schedules of pay differentials for irregular or intermittent duty involving unusual physical hardship or hazard. Under such regulations . . . an employee . . . 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. . . ."

We have held that the determination of whether a particular work situation warrants payment of a hazardous duty differential is primarily vested in the employing agency. We will not overturn an agency's determination as to entitlement to hazardous duty pay unless there is clear and convincing evidence that the agency's determination was erroneous or that it was arbitrary and capricious. Joseph Contarino, et al., B-202182, Jan. 19, 1982; Pavone and Wilgus, B-222948, Jan. 9, 1987, and decisions cited.

Also, the statutory language clearly indicates that the differential was not intended to be paid where the hazard recurs regularly or is inherent in an employee's position. See 5 C.F.R. § 550.904 (1988). Thus, we 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 a position. INS Pilots, B-189645, Dec. 21, 1977, and Ralph Von Dane, B-159295, Mar. 28, 1983. Even where the position classification system fails to take into account the hazardous duty for classification purposes, there is no entitlement if the hazardous duties are regular and recurring. William A. Lewis, B-216575, Mar. 26, 1985.

In the present case, we cannot say that agency management acted unreasonably in concluding that Mr. Miranda's duties were not hazardous. Construction sites, especially during actual construction activities by the workmen, normally involve conditions which could create some risk of injury, but it is not obvious to us that the conditions described warrant hazardous duty pay. Further, since Mr. Miranda performed his duties exclusively on the building project for nearly a year, it appears that exposure to these general conditions occurred on a daily basis and was not irregular or intermittent.

Accordingly, the action taken by the agency and our Claims Group disallowing his claim is sustained.

for James F. Anderson
Comptroller General
of the United States