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DECISION

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

FILE: B-202182 DATE: January 19, 1982

MATTER OF: Joseph Contarino, et al. - Hazardous Duty Differential

DIGEST:

1. Claims of employees otherwise eligible for hazardous duty differential under 5 U.S.C § 5545(d) are denied because their exposure to the hazard was not irregular or intermittent as required by statute.

2. Whether particular situation warrants payment of a hazardous duty differential is decision vested primarily in the employing agency and GAO will not substitute its judgment for that of agency officials unless that judgment was clearly wrong or was arbitrary and capricious.

3. In absence of statutory provision so authorizing, costs and attorney's fees arising out of claim against Government are not recoverable.

Are General Schedule employees who are otherwise eligible for a hazardous duty differential under 5 U.S.C. § 5545(d) entitled to it when their assigned duty involves regular and constant exposure to toxic chemical materials? This is the question presented by this case. For the following reasons, we answer it negatively.

This decision is in response to consolidated appeals by Messrs. Joseph Contarino, Malcolm Brandenburg, Charles J. Triantafillos, Ms. Madlyn Stroud, Messrs. Marlow B. Ludwig and Albert J. May (claimants) from our Claims Group's actions of July 3, 1979, Settlement Cortificate Nos. Z-2814101 to Z-2814106, respectively, which denied their claims for hazardous duty differential under 5 U.S.C. § 5545(d). The claimants are presently (or formerly) employed as General Schedule employees by the Dental Clinic Prosthodontics Laboratory (DCPL) at Walter Reed Army Medical Center (WRAMC), Washington, D.C., and seek hazardous duty differential for

the period from August 22, 1973, to September 20, 1976, plus their costs and attorney's fees for this appeal.

As briefly summarized, the extensive record in this case demonstrates the following. A survey of the DCPL at WRAMC, conducted in July 1973, disclosed that poor ventilation in the laboratory exposed workers to lung disease from beryllium and asbestos. The claimants who were dental technicians in the DCPL were exposed to grinding, buffing and abrasing beryllium alloy, fumes from invested burn out, use of chloroform and miscellaneous solvents and cleaners that are considered physical and biological hazards. On August 22, 1973, specific recommendations were made concerning these conditions by the Chief, Health and Environment Office, WRAMC. What steps, if any, were taken to correct them are unclear, but a subsequent official Army investigation was conducted, and on September 15, 1976, the current Chief, Health and Environment Office, WRAMC, noted in his report that the DCPL:

> "* * * has a poor ventilation system and that there is a health hazard to the workers. Recommend that the Laboratory be closed until adequate controls are installed.
>
> "* * * It appears that the skin rashes [of claimants] are caused by the exposure to acrylics or other toxic materials as a result of the inadequate exhaust ventilation. The environmental deficiencies in the laboratory also expose the workers to the hazard of lung disease from beryllium and asbestos."

Another Army memorandum signed by the Chief of the WRAMC Dental Clinic notes that the claimants:

> "* * * have worked in the Department of Dentistry Prosthodontic Laboratory which has been considered a hazard area since 1973.

* * * * *

> "Because of the lack of proper ventilation, the combined toxic fumes were not eliminated, thus causing Laboratory Technicians to break out in a rash. (Medical documentation has been submitted to your office). The Laboratory was investigated by Health and Environment and, as a result of this investigation, the laboratory was closed 20 September 1976, until the hazards could be eliminated.
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> "Steps were taken to eliminate the hazards; however, because of the excessive expense, all of the hazards could not be eliminated at this time. It was recommended that the Laboratory be reopened on a limited basis and this was accomplished [in August 1977]. One employee, Mr. Charles Triantafillos, was unable to return to the laboratory because of his sensitivity to the toxic fumes and dust in the air caused by poor exhaust and ventilation."

The statutory authority for the payment of a hazardous duty differential during the period of this claim (1973 to 1976) is found at 5 U.S.C. § 5545(d) (1970 and 1976) which provided:

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

With one minor technical amendment which substituted "Office [of Personnel Management]" for "[Civil Service] Commission," found at 5 U.S.C. § 5545(d) (Supp. III, 1979), the above law is currently in force.

The implementing regulations for this provision since 1968 have provided:

> "(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.
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> "(b) For the purpose of this section:
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> "(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."

5 C.F.R. § 550.904 (1980).

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) (1980).

The Army now concedes that the condition in question fits an officially established category in Appendix A to 5 C.F.R. Part 550, namely, "Exposure to Hazardous Agents, (3) Toxic Chemical Materials." Thus, the only question remaining for resolution is whether these claimants who are otherwise eligible for a hazardous duty differential under 5 U.S.C. § 5545(d) are entitled to it when their assigned duty involves regular and constant exposure to toxic chemical materials.

The language of the statute above quoted 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 found in the legislative history of H.R. 1535, 89th Cong., 1st Sess. (1965), which became 5 U.S.C. § 5545(d). As H.R. Rep. No. 31, 89th Cong., 1st Sess. (1965), at 2 states:

> "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, B-177580, August 21, 1973. In the latter case, the employees concerned performed quality control duties to assure that ammunition items accepted for the Government met all contractual requirements. Since employees were exposed to explosive materials on a daily basis

as the normal duties of their positions, the hazardous duty which they performed was not irregular or intermittent, and payment of a hazardous duty differential was denied.

Furthermore, the implementing regulation quoted supra, cannot and does not require a contrary result. While the regulation contemplates that hazardous duty performed on a regular basis be considered 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, supra.

In view of the clear statutory mandate and the legislative intention that the differential be paid only where the employee is exposed to the hazard on an irregular or intermittent basis, the differential authorized by 5 U.S.C. § 5545(d) may not be paid in connection with a hazard encountered on other than an irregular or intermittent basis. Thus, where, as here, the claimants performed hazardous duty on a recurring and substantial basis, the differential cannot be paid. B-177580, supra., 5 U.S.C. § 5101 et seq.; 5 C.F.R. Part 511. See also Bendure v. United States, 554 F.2d 427 (Ct. Cl. 1977).

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 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. Leroy J. Pletten, B-197978(1), June 5, 1980.

In regard to claimants' request for their costs and attorney's fees for this appeal, we note that even if they had prevailed, legal costs and fees arising out of a claim are not recoverable in the absence of a statutory provision authorizing them. See Martha B. Poteat, B-196019, April 23, 1980.

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On the record before us, we cannot say that the Department of the Army was either wrong or arbitrary and capricious in disallowing the claims. We hereby sustain our Claims Group's prior disallowance.

Milton J. Socolar

Acting Comptroller General
of the United States