

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

FILE: B-180109

DATE: January 2, 1976

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MATTER OF: James H. Lee - Reconsideration of environmental differential for cold work

DIGEST: Civil Service Commission (CSC) requests reconsideration of prior decision (53 Comp. Gen. 789) which held that environmental differential for cold work must be paid notwithstanding the furnishing of protective clothing to employee. GAO reaffirms prior decision because the work was performed under circumstances listed in Appendix J, FPM Supplement 532-1. Also, CSC states there are inconsistencies in the wording of Appendix J and regulations and plans to revise regulations.

The Chairman of the Civil Service Commission (CSC), by letter of April 3, 1975, requests that we reconsider our decision, 53 Comp. Gen. 789 (1974), B-180109, which held that an environmental differential for cold work must be paid notwithstanding the furnishing of protective clothing to the employee.

In that case Mr. James H. Lee, a food service worker employed by the Veterans Administration (VA), claimed that he should receive environmental differential for cold work under Appendix J of the Federal Personnel Manual (FPM) Supplement 532-1. The Veterans Administration claimed that protective clothing furnished the employee practically eliminated the discomfort, and, therefore, under subchapter S8-7, FPM Supplement 532-1 (Jan. 16, 1973), payment of an environmental differential was not warranted.

Subchapter S8, FPM Supplement 532-1 provides in part that:

"Objective. Each agency should have as its objective the elimination or reduction to the lowest level possible of all hazards, physical hardships, and working conditions of an unusually severe nature. When the agency action does not overcome the unusually severe nature of the hazard, physical hardship, or working condition, an environmental differential is warranted. Even though an environmental differential is authorized, there is an agency responsibility to initiate continuing positive action to eliminate danger and risk which contribute or cause the hazard, physical hardship, or working

condition of an unusually severe nature. The existence of environmental differentials is not intended to condone work practices which circumvent Federal safety laws, rules, and regulations.

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"d. Authorization for pay for environmental differential. (1) Pay is authorized for exposure to an unusually severe hazard which could result in significant injury, illness, or death, such as on a high structure when the hazard is not practically eliminated by protective facilities or on an open structure when adverse conditions such as darkness, lightning, steady rain, snow, sleet, ice, or high wind velocity exists.

"(2) Pay is authorized for exposure to an unusually severe physical hardship under circumstances which cause significant physical discomfort or distress not practically eliminated by protective devices.

"(3) Pay is authorized for exposure to an unusually severe working condition under circumstances involving exposure to fumes, dust, or noise which cause significant distress or discomfort in the form of nausea, or skin, eye, ear, or nose irritation or conditions which cause abnormal soil of body and clothing, etc., and where the distress or discomfort is not practically eliminated."

The VA's contention was that the above conditions determine when environmental differential should be paid, even though a category of work is listed in Appendix J as one for which an environmental differential is authorized. "Cold work" is listed in Appendix J, Part 1, para. 5, as one category for which the environmental differential is authorized without qualifying conditions, as follows:

"Cold work. Working in cold storage or other climate-controlled areas where the employee is subject to temperatures at or below freezing (32 degrees Fahrenheit)."

Our decision in 53 Comp. Gen. 789, supra, was based on the fact that paragraphs S8-7a and d, quoted above, are general statements, whereas paragraphs S8-7e, f, and g, quoted below, explain that inclusion of a category of work in Appendix J amounts to a determination that such work meets the general criteria and objectives for payment of an environmental differential set forth in paragraphs a and d. Paragraphs S8-7e, f, and g provide that:

"e. Establishment of environmental differentials.

(1) Appendix J is a schedule of environmental pay differentials which defines methods of payment and various degrees of hazards, physical hardships, and working conditions, each of an unusually severe nature, for which the differentials are payable. The amount of the differentials are listed in appendix J. Environmental differentials are authorized only when the exposure is under the circumstances described in the category listed in appendix J, except as provided in paragraph i. * * *

"(2) Environmental differentials are stated as percentage amounts and are authorized for the categories of exposures as described in appendix J. * * *

"f. When environmental differential is paid.

(1) An agency shall pay the environmental differential in appendix J to a wage employee paid under a Federal Wage System wage schedule when the employee is performing assigned duties which expose him to an unusually severe hazard, physical hardship, or working condition listed in appendix J, on or after the effective date specified.

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"g. Determining local situations when environmental differentials are payable. (1) Appendix J defines the categories of exposure for which the hazard, physical hardships, or working conditions are of such an unusual nature as to warrant environmental differentials, and gives examples of situations which are illustrative of the nature and degree of the particular hazard, physical hardship, or working condition involved in performing the category. The examples of the situations are not all inclusive but are intended to be illustrative only.

"(2) Each installation or activity must evaluate its situations against the guidelines in appendix J to determine whether the local situation is covered by one or more of the defined categories.

"(a) When the local situation is determined to be covered by one or more of the defined categories (even though not covered by a specific illustrative example), the authorized environmental differential is paid for the appropriate category."

The Civil Service Commission, in its request for reconsideration, states that the conditions set forth in S8-7, paragraphs a and d, were meant to qualify the categories of work listed in Appendix J and that subchapter 8 of FPM Supplement 532-1 was meant to provide overall guiding criteria to be applied to each and every category listed in Appendix J. However, the April 3, 1975 letter from the Chairman of the Civil Service Commission acknowledges that "some inconsistencies exist in the wording of Appendix J and Subchapter 8 of FPM Supplement 532-1. Accordingly, we plan to revise the material so it will be more consistent with the original philosophy and intent arrived at during the development of the FPM Supplement 532-1 at the meetings of the National Wage Policy Committee."

At the outset, we should state that we have no objection to the plan of CSC to revise this material to carry out its original intentions. Our prior decision and this decision are based on the material as it presently exists. If the Commission had a different intent, we believe that it was not adequately expressed in the CSC materials now before us.

In pertinent part, with reference to Appendix J, 53 Comp. Gen. 789 states as follows:

"Payment of the differential for certain categories of work included at Appendix J is conditioned upon the discomfort, condition or hazard not being to some extent alleviated. We refer in this regard to the following categories of work listed at Part I of Appendix J: high work at lesser heights, dirty work, and work involving welding of preheated metals. At Part II of Appendix J, payment of a differential for the following categories of work is

similarly conditioned: work with explosives and incendiary materials involving a high degree of hazard, work with poisons involving a high degree of hazard, and with work with micro-organisms involving a high degree of hazard. Other categories of work, of which cold work is one, are not so conditioned. These unconditioned categories listed at Part I of Appendix J include flying, high work at 100 feet or above, work on moving targets, hot work, cold work, and micro-soldering or wire welding and assembly. Unconditioned categories of work listed at Part II of Appendix J include duty aboard submerged vessels, work with explosives and incendiary materials involving a low degree of hazard, work with poisons involving a low degree of hazard, and work with micro-organisms involving a low degree of hazard.

"To adopt the VA's construction of the regulation--that the language of paragraphs a and d regarding elimination of the hazard, hardship or severe working condition involved is a condition to payment to be imposed in addition to such conditions as may be included in the definition of categories of work defined at Appendix J--is to render redundant the language as is used in defining the categories listed at Appendix J. There is a strong presumption against construction of a statute or regulation which renders any language thereof redundant and we are offered and find no compelling reason to adopt such a construction in this case.

"Work in a cold storage area, such as Mr. Lee performed, entitles for payment of the 5 percent differential because the employee is subjected to temperatures of or below freezing. On the record, we find no dispute of fact as to whether the work Mr. Lee performed was of such nature and thus affirm the finding of our Transportation and Claims Division that Mr. Lee is entitled to payment of the differential." (Emphasis added.)

The CSC states that the conditions set forth in S8-7, FPM Supplement 532-1, provide the overall guiding criteria to be applied

B-180109

to each and every category listed in Appendix J. In this connection paragraphs a and d contain general provisions for determining when a differential may be paid. On the other hand paragraphs e, f, and g specifically prescribe conditions when a differential is to be paid. Generally, it is a rule in the construction of statutes or regulations that specific provisions take precedence over general provisions. Therefore, we view the provisions of paragraphs e, f, and g as taking precedence over those in paragraphs a and d. Accordingly, it is our opinion that when an employee performs work under the circumstances described in a category listed in Appendix J he is entitled to an environmental differential. However, when the work performed is not performed under the circumstances specified in Appendix J or one of the examples listed therein, then the agency would be required to examine claims for environmental differentials to determine whether the working conditions meet the general criteria in paragraphs a and d.

In the instant case, Mr. Lee performed work for the Veterans Administration under conditions which are listed in Appendix J as qualifying him for the environmental differential for cold work. In view of this we hereby reaffirm 53 Comp. Gen. 789.

~~FRANK G. BIRNBAUM~~
Acting Comptroller General
of the United States