

13938 PLM-

DECISION



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

FILE: B-197978

DATE: June 5, 1980

Claim for
MATTER OF: Leroy J. Pletten - Hazardous Duty Differential J

DIGEST: Employee claims hazardous duty differential under 5 U.S.C. § 5545(d) for exposure to allegedly toxic compounds in tobacco smoke. The claim was disallowed by employing agency and that disallowance is sustained because whether a particular situation warrants payment of a hazardous duty differential is a decision which is 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.

The issue presented is whether a General Schedule employee may receive a hazardous duty differential under 5 U.S.C. § 5545(d) for exposure to the allegedly toxic substances in tobacco smoke. For the reasons set forth below we hold that the claimant is not entitled to the payment of a hazardous duty differential under these circumstances. AG

On August 2, 1979, Mr. Leroy J. Pletten, a position classification specialist with the Army Tank-Automotive Material Readiness Command in Warren, Michigan, filed a claim for past and future payment of a hazardous duty differential for exposure to "toxic chemical materials when there is a possibility of leakage or spillage." This category of hazard is listed in FPM Supplement 990-2, subchapter S9, Appendix A, which provides for a 25 percent hazard pay differential. A review of the record indicates that Mr. Pletten is basing his claim on his exposure to tobacco smoke in the course of his normal duties. Mr. Pletten has included in the record a list of the substances in tobacco smoke that are alleged to be toxic and harmful to an individual's health, and he relies upon various public documents and laws that recognize smoking as a hazard to health.

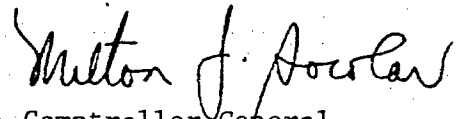
On August 23, 1979, and again on November 2, 1979, Mr. Pletten's claim was summarily disallowed by his employing agency. By Settlement Certificate Z-2819894, January 31, 1980,

010759
112464

B-197978

our Claims Division affirmed that disallowance on the basis that his exposure to the hazard was not irregular or intermittent as required by the statute.

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. Matter of Cecil C. Frederici, B-197142, February 12, 1980; Matter of Victor C. Spencer, B-194289, June 27, 1979; and Matter of National Association of Government Employees, B-181498, January 30, 1975. On the record before us, we cannot say that Mr. Pletten's agency was either wrong or arbitrary and capricious in disallowing his claim, and we hereby sustain the prior disallowance.



For the Comptroller General
of the United States