



United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-248942

June 11, 1992

The Honorable Stuart M. Gerson
Assistant Attorney General
Civil Division
U.S. Department of Justice

Attention: Mr. Brad Fagg
Commercial Litigation Branch

Dear Mr. Gerson:

Subject: [REDACTED], et al. v. United States
Claims Court No. 92-371C

We refer to your May 29, 1992 letter, your reference SMG:DMC:BFagg:jep 154-92-371, in which you request our report on the above-captioned action filed in the United States Claims Court. The plaintiffs contend they are entitled to a hazard pay differential in addition to their usual rate of pay in accordance with 5 U.S.C. § 5545(d) (1988). 4

Our records do not reveal any claim against any of the listed plaintiffs. We have no factual information regarding this case beyond that contained in the Complaint, and we know of nothing that would form the basis for a counterclaim or setoff.

However, as pointed out in the Complaint, this Office issued a decision on this matter, FAA Employees, 70 Comp. Gen. 292 (1991). Our decision was limited to the very narrow issue of whether an exception can be made to the 6-year statute of limitations in 31 U.S.C. § 3702(b) (1988) where the employees were unaware of the presence of a particular toxic substance in their workplace until recently. We held that an exception could not be made and the 6-year limitation was applicable. 4

This Office did not rule on the question of whether or not the employees were entitled to a hazard pay differential because the submission from the Federal Aviation Administration, Regional Administrator, Northwest Mountain Region, dated January 11, 1990, stated that "The region's Human Resources Division has determined that the presence of the

toxic substances in the workplace constituted a hazard to the workers to a degree that entitled them to hazardous pay differential, and that these hazardous conditions have existed since January 1, 1973." Apparently, the Federal Aviation Administration's Washington Headquarters has overruled that determination.

Although it was not necessary for us to rule on the merits of the employee's claim for environmental differential pay, we have consistently 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. AFGE Local 2413, 67 Comp. Gen. 489 (1988), and cases cited, overruled on jurisdictional grounds, Cecil E. Riggs, et al., B-222926.3, Apr. 23, 1992, 71 Comp. Gen. ____.

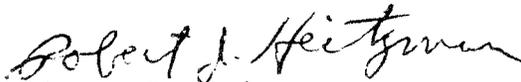
There is also for consideration the issue of whether or not the court will take jurisdiction in this matter since the documents attached to the Complaint indicate that the plaintiffs are union members subject to a collective bargaining agreement. The employees filed a grievance in this matter, but then discontinued the grievance procedure after the first step grievance was denied. The Court of Appeals for the Federal Circuit in Carter v. Gibbs, 909 F.2d 1452, cert. denied, 111 S. Ct. 46 (1990), has held that courts lack jurisdiction over various pay claims by federal employees because of the "exclusivity" provision of the Civil Service Reform Act, 5 U.S.C. § 7121(a) (1988), which makes collective bargaining grievance procedures the exclusive means for resolving disputes falling within their coverage. The collective bargaining agreement must specifically exclude hazardous duty pay differential from its negotiated grievance procedures before the court will consider the issue. The Court's rationale has been applied to hazardous duty pay differential. See Adkins v. United States, 16 Ct. Cl. 294 (1989).

Finally, you should be aware that GAO's data base of debt cases has become quite limited. When GAO and the Justice Department amended the Federal Claims Collection Standards in 1984, the requirement that agencies routinely refer uncollectible debts to GAO was deleted (4 C.F.R. § 105.1). Since that time, our data base has been decreasing as the older cases are disposed of. Therefore, to obtain a more reliable indication of outstanding indebtedness, you may wish to selectively consult other sources. Depending on the identity of the plaintiff(s), these might include the Army

Holdup List (government contractors), Department of Education (student loans), Department of Veterans Affairs, or Small Business Administration.

We are enclosing copies of the decisions of this Office we have cited to, as well as the submission letter from the Federal Aviation Administration Regional Administrator referred to above. If you have any further questions concerning this matter, I can be reached at 202-275-6410.

Sincerely yours,



Robert J. Heitzman
Senior Attorney

Enclosures

CIVILIAN PERSONNEL

Compensation

Hazardous duty differentials

Eligibility

Statutes of limitation