

Date: January 30, 2006

Claimant: [name]

File Number: 06-0001

OPM Contact: Robert D. Hendler

The claimant occupies a [position] with the U.S. Department of the Army with a duty station of Heidelberg, Germany. He requests that the U.S. Office of Personnel Management (OPM) direct his agency to give him retroactive hazard pay, computed with three times liquidated damages based on willful acts by his employer, plus interest, retroactively to January 22, 1999. For the reasons discussed herein, the claim is denied.

The claimant provided voluminous documentation, much of it repetitive, regarding his deployment in Kosovo. The underlying basis of his claim is that he was:

routinely exposed to fumes, dust, noise and environmental hazards. I developed a sever skin rash that was chronic for 2 ½ years after I departed Kosovo....This condition finely [sic] went away in the spring of 2004. No medical professional has any idea what I contracted in Kosovo and the Army refuses to acknowledge that it was deployment related.

The claimant asks that the results of his claim be:

paid to every federal employee that ever set foot in Kosovo or Macedonia for every hour they clocked while in the country....I am also asking that all Americans be alerted to potential birth defects for anyone who spent time in Kosovo....

With regard to the hazards encountered, the claimant asserted that:

Everyone was also exposed [to] high levels of noise. This included artillery firing from the base camp at all times of the day and night. Helicopter low level flight and landing zone operations out the door from my work area....in the outlying and remote communications areas the noise was noticeable from the smaller generator units. First hint might have been the hearing protection signs on the generators....Old fashion [sic] dust was such a problem (when it wasn't mud knee deep)....Although this paving work was completed on the primary ring road around Camp Bondsteel in the last months that I was deployed, the secondary

roads and parking lots were still compacted decomposed granite. The dust was severe...Not to mention the mud that came out when I blew my nose and the nearly constant bloodshot eyes, with little mud balls in the tear ducts.

The claimant stated that:

Even if wording in position descriptions would have prevented payment under this chapter, the circumstances changed when USAREUR [U.S. Army, Europe] willfully withheld the CHPPM [U.S. Army Center for Health Promotion and Prevention Medicine] studies...CPD [Civilian Personnel Department] has also stated that I was provided protective equipment. This is a generally false statement. Yes most federal employees are required to work in Battle Uniforms. I did on occasion. My first line supervisor told me to due to many reasons...not to wear uniforms. I do not think in any case rolling my sleeves down provided protection as USAREUR has informed me was a standard safety procedure we all supposable [sic] were to follow. I had never heard that until April 2004. Goes with the cover up, don't provide protective direction, someone will think there is a reason to be worried.

The claimant stated that:

My request for Hazard Pay was likewise based on simply the substandard health conditions...Hazard Pay is warranted under federal OPM regulations for exposure to sub-standard health conditions such as dust, smoke and fumes, as well as exposure to environmental noise (artillery firing at all times of day and night, helicopters landing just outside my work area). All of these conditions were experienced in Kosovo, and do not fall under the danger pay incentive. The withholding of Hazard Pay incentive by USAREUR is a willful and vengeful act.

The claimant described what he considered to be the hazardous conditions to which he was exposed. Under the topic of "Explosives," the claimant stated, in part, that:

Ammunition holding areas on Camp Bondsteel and Montieth are in the immediate work areas I was at and the direct issue of reloading main battle tanks while exhaust temperatures were present to ignite the rounds...RF radiation could cause the fuse to activate on high explosive devices...[and] We were working in this explosive arch...as RF generating systems were working all around us.

He said that "the primary gate I used for 90% of my time living at Camp Bonsteel was located within the explosive arch of the ammunition holding area as was the road leading to this point" and that 155mm artillery firing points were within the blast zone of the communications center where he worked. He pointed to gun crews "smoking in close proximity to power [sic]," noting that "Granted powder will not explode in this state, it will burn very easily.

Under the topic of "Microwave Radiation," he pointed to his exposure to RF radiation as the "least hazardous hazard portion of my duties," but that "continuous exposure to RF radiation

causes internal organ damage that takes years to develop or fester into life threatening conditions.”

Under the topic of “Toxic Substances,” the claimant pointed to six CHPPM studies “that make some reference to elevated risks due to exposure to identified substances and elements.” He stated that his exposure was longer than the six months addressed in the survey which is “based on ‘young, healthy personnel,” and stated that he was never told to take the standard precautions discussed in the studies.

As I say, no one ever told me to wear gloves while working, no one ever told me to wear long sleeve shirts....I as well as most deployed 5<sup>th</sup> Signal federal employees worked in blue jeans, t-shirt and open sandals. I was directed by the Task Force G1 to get in uniform after another DCAC reported me to him.

The claimant included working with local nationals (LNs) and contractors under this topic:

In many cases, I spent extensive time inside very enclosed tent [sic] or Seahut with Unysis team. Besides the obvious bad odor, these persons had filth and grime that was noticeable on their body and clothing. None of these LNs was ever tested for any medical condition. Fortunately, I have tested negative for TB and other known and tested for health issues. I stress tested for, I have no idea what caused my skin condition, or any future medical condition that I may develop.

The claimant commented on his supervisor’s failure to assist him in filing for Workers’ Compensation and his problems in seeking treatment for his skin condition. He said that:

My skin condition, for the first time in about four years, has cleared up. I can only assume whatever toxic element I was exposed too [sic] finely [sic] worked out of my system, or has now moved into my central nervous system or some other internal medicine [sic] problem.

The claimant commented on “Military Aircraft Operations,” including what he believed to be inappropriate use of military aircraft to move civilians. He stated that he:

spent extensive time on armed combat aircraft with no approved flight helmet or flight suit. In some cases in civilian clothes and no flack jacket or helmet....The VIP landing zone on Camp Bondsteel was just outside the TOC and slightly further distance from the Communication Communications [sic] equipment building that my desk was in. All aircraft landing and departing this LZ blew rotor wash debris into the open door of my office.... The main footpath to the hospital and PX was closed just passed [sic] our building when aircraft operations were ongoing due to the immediate safety hazard to personnel.

Commenting on “Hostile Small arms fire,” the claimant stated that:

Besides the obvious of being issued a fragment protection jacket, commonly called a flak jacket. That I should note is not designed to stop combat caliber assault rifle rounds. The issuance of a Kevlar helmet was added to protect me from horse flies....The camps all have three levels of small arms fire protection if not more. A bomb shelter outside every group of living Seahuts....I admit that the dangerous work conditions in Kosovo are financially compensated for by the Danger Pay. But to say that there is no proof of high explosives, toxic substances, small arms fire and the like is an outright false statement.

The agency claim denial included a memorandum dated April 14, 2004, for the Headquarters 5<sup>th</sup> Signal Command, Deputy Chief of Staff, G-1 from the Headquarters USAEUR, Assistant Deputy Chief of Staff, G-1, advising disapproval of hazardous duty pay for the period of the claimant’s assignment in Kosovo during the summer of 2000. The memorandum stated that: (1) the claimant’s position description did not indicate exposure to hazardous duty or physical hardship; (2) the U.S. Army Center for Health promotion and Preventive Medicine-Europe (USACHPPMEUR) reports referenced by the claimant indicate that exposure to toxic substances is manageable, does not subject employees to long-term negative health effects, and that environmental factors are at an acceptable level with standard precautions; and (3) such factors as hostile fire, political unrest, austere conditions, sanitation, and environmental pollution are all considered when establishing the levels for post hardship differential and danger pay which the claimant received when he became eligible. The memorandum goes on to say that the claimant’s assigned duties did not require him to work directly with explosives or deal with environmental hazards and other hazardous materials as a regular and recurring part of his position and, therefore, “did not meet any of the hazardous duty pay position requirements as described in 5 CFR 550, Appendix A.”

The claimant looks to the definitions in title 5, Code of Federal Regulations (CFR), section 551.902, to establish his entitlement to hazardous duty pay. Specifically, he points to part of the definition for duty involving physical hardship; i.e., “causes extreme physical discomfort or distress that is not adequately alleviated by protective or mechanical devices, such as duty involving exposure to extreme temperatures for long periods of time, arduous physical exertion, or exposure to fumes, dust, or noise that cause nausea, skin, eye, ear, or nose irritation.” However, this definition must be read in conjunction with the other section of 5 CFR part 550, subpart I. Appendix A to that subpart provides for payment for exposure to hazardous agents when it involves “work with or in close proximity to” the listed and approved circumstances in the appendix including explosive or incendiary materials which are unstable and highly sensitive, conducting test on fire retardant materials when tests are performed in ventilation-restricted rooms where the atmosphere is continuously contaminated by obnoxious odors and smoke which causes irritation to the eyes and respiratory tract, and participating as a member of a firefighting crew in fighting forest and range fires on the fireline.

It is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001)

(internal quotation marks omitted); see *United States v. Menasche*, 348 U.S. 528, 538-539, 75 S.Ct. 513, 99 L.Ed. 615 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.' " (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S.Ct. 391, 27 L.Ed. 431 (1883))). " *TRW Inc. v. Andrews* 534 U.S. 19, \*31, 122 S.Ct. 441, \*\*449 (U.S.,2001).

This same principle applies to the application and interpretation of regulations. The hazardous pay differential authorized in 5 CFR 550.904 may only be paid for the specific hazardous duties listed in appendix A of 5 CFR part 550, subpart I. Based on the record, it is reasonable to conclude that the claimant was exposed to dust, fuel fumes, and similar environmental pollutants while in Kosovo. However, the conditions that he describes fail to match any of the specific duties or types of work listed in appendix A of 5 CFR part 550, subpart I. The claimant misconstrues the underlying purpose of hazardous duty pay which is to compensate individuals whose work and duties meet the specific delineated duties or types of work listed in that appendix. It is not, as he posits, intended to compensate employee for "substandard health conditions," working in combat areas, exposure to dust and grime from unpaved roads, exposure to unhygienic co-workers, or exposure to toxins and pollutants within less-developed countries.

The claimant would ask us to find that his working in a military camp in which ammunition is both stored and fired by members of the United States military meets the definition of "work with or in close proximity to explosive or incendiary materials which are unstable and highly sensitive." Such conditions would be found in ammunition development and testing facilities and not, as the claimant admits, when military members may smoke around powder that "will not explode in this state." The claimant's assertions regarding his work site proximity to aircraft operations is equally without merit in that he asks us to equate and credit helicopters flying in and out of an area near his work site to "Ground Work Beneath Hovering Helicopter: Participating in ground operations to attach external load to helicopter hovering just overhead." The claimant's description of conditions; i.e., "The main footpath to the hospital and PX was closed just passed [sic] our building when aircraft operations were ongoing due to the immediate safety hazard to personnel," undermines his own rationale on this matter given the precautions that management took to prevent the claimant and others from venturing into that restricted area. Similarly, working in close proximity to people with less than impeccable hygiene or personal medical histories is not the same as "work with or in close proximity to... *Virulent biologicals*: Materials of micro-organic nature which when introduced into the body are likely to cause serious disease or fatality and for which protective devices do not afford complete protection." The claimant's ruminations on the potential long-term medical impact of his stay in Kosovo and other matters would require inference upon speculation for a fact-finder to conclude that the claimant performed any of the specific hazard duties listed in appendix A of 5 CFR part 550, subpart I.

OPM does not conduct adversary hearings, but settles claims on the basis of the written record involved in the claim. 5 CFR 178.105; *Matter of John B. Tucker*, B-215346, March 29, 1985. Where the agency's factual determination is reasonable, we will not substitute our judgment for that of the agency. See, e.g., *Jimmie D. Brewer*, B-205452, March 15, 1982. We find the agency's factual determinations in the instant case well reasoned. Therefore, the claim is denied in its entirety.

OPM's authority to adjudicate compensation and leave claims flows from 31 U.S.C. §3702, is narrow, and is limited to adjudication of compensation and leave claims. OPM's authority to order the payment and interest due to unjustified personnel action is derived from 5 U.S.C. 5596. Neither section of law includes any authority to order the payment of liquidated damages based on willful acts by a Federal agency. Therefore, OPM may not rely on 31 U.S.C. §3702 as a jurisdictional basis for considering such issues within the context of the claims adjudication function that it performs under §3702. Similarly, 5 CFR 178.102(a) provides for individuals to file claims. Therefore, OPM may not rely on 31 U.S.C. 3702 to order Federal agencies to "pay every federal employee that ever set foot in Kosovo or Macedonia for every hour they clocked while in the country" as requested by the claimant. The claims adjudication process is also not the correct forum to pursue occupational injury and illness claims which fall under the jurisdiction of the U.S. Department of Labor's Office of Workers' Compensation Programs.

This settlement is final. No further administrative review is available within OPM. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States Court.