
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CODY L. ADAMS, ROSE M. ADAMSON, JOSEPH P. AGIUS, DARA W. ALLICK,
JENNIFER A. ANGEL, MICHAEL T. ANGELO, SAMMY APONTE, ALICIA K.
AUSTIN-ZITO, LUKE M. BADARACCO, CHAD J. BARGSTEIN, et al.,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

APPEAL FROM THE UNITED STATES COURT OF FEDERAL
CLAIMS IN 1:20-cv-00783-CFL
JUDGE CHARLES F. LETTOW

EN BANC OPENING BRIEF OF PLAINTIFFS-APPELLANTS
CODY L. ADAMS, ET AL.

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August 26, 2022

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT****CERTIFICATE OF INTEREST****Case Number** 21-1662**Short Case Caption** Cody Adams, et al. v. United States**Filing Party/Entity** Plaintiffs-Appellants Cody Adams, et al.

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Attachment A

In response to prompt A in Box 1, pursuant to Fed. Cir. R. 47.4(a)(1), the following are the full names of all entities represented by counsel in this case.

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, undersigned counsel have identified the following related cases that will be directly affected by this Court's decision in the pending appeal:

- *Aaron, et al. v. United States*, Case No. 21-1117C (Fed. Cl.)
- *Abdelrehim, et al. v. United States*, Case No. 21-2254C (Fed. Cl.)
- *Abraham, et al. v. United States*, Case No. 20-1859C (Fed. Cl.)
- *Abrams et al. v. United States*, Case No. 21-1689C (Fed. Cl.)
- *Abrom, et al. v. United States*, Case No. 21-1230C (Fed. Cl.)
- *Ahern, et al. v. United States*, Case No. 21-1493 (Fed. Cl.)
- *Aguero, et al. v. United States*, Case No. 20-1966C (Fed. Cl.)
- *Akano, et al. v. United States*, Case No. 21-807C (Fed. Cl.)
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- *Ackley, et al. v. United States*, Case No. 21-874C (Fed. Cl.)
- *Adams (Chance), et al. v. United States*, Case No. 20-1952C (Fed. Cl.)
- *Adams (Samantha), et al. v. United States*, Case No. 21-1827C (Fed. Cl.)
- *Adams (William), et al. v. United States*, Case No. 21-cv-1509
- *Adegbite, et al. v. United States*, Case No. 22-64C (Fed. Cl.)
- *Albright, et al. v. United States*, Case No. 21-1684C (Fed. Cl.)
- *Allen, et al. v. United States*, Case No. 21-1074C (Fed. Cl.)
- *Allison, et al. v. United States*, Case No. 21-1227C (Fed. Cl.)
- *Andam, et al. v. United States*, Case No. 21-883C (Fed. Cl.)
- *Andreas, et al. v. United States*, Case No. 21-833C (Fed. Cl.)
- *Babcock, et al. v. United States*, Case No. 20-841C (Fed. Cl.)
- *Bassett, et al. v. United States*, Case No. 21-1089C (Fed. Cl.)
- *Mayle, et al. v. United States*, Case No. 20-1818C (Fed. Cl.)
- *Stewart, et al. v. United States*, Case No. 21-1293C (Fed. Cl.)

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants Cody Adams, *et al.* respectfully request oral argument as they believe it would assist this Court in resolving the issues presented by this appeal.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter as an appeal from a final decision of the United States Court of Federal Claims. *See* 28 U.S.C. § 1295(a)(3). On June 26, 2020, Plaintiffs-Appellants Cody Adams, *et al.*, filed a Complaint for money damages against Defendant-Appellee United States for its failure to pay mandatory hazard pay differentials to Plaintiffs-Appellants. The Plaintiffs-Appellants are correctional officers (“Correctional Officers”) at the Federal Correction Institution (“FCI”) Danbury (“FCI Danbury” or “Institution”) who worked with or in close proximity to the novel coronavirus that causes COVID-19. Dkt. No. 19 (Appendix) at 015. The Correctional Officers filed their Complaint pursuant to 5 U.S.C. § 5596 (the Back Pay Act), 5 U.S.C. § 5545(d) (Hazardous Duty Pay), 5 U.S.C. § 5343(c)(4) (Environmental Differential Pay), and 29 U.S.C. § 207(a) (the Fair Labor Standards Act). Appx023-024. The Court of Federal Claims exercised jurisdiction over the Correctional Officers’ claims pursuant to 28 U.S.C. § 1491(a)(1). The court dismissed the Complaint and entered final judgment in favor of Defendant-Appellee on February 5, 2021. Appx001-002. The Correctional Officers timely filed a notice of appeal on February 8, 2021. Appx036; *see* 28 U.S.C. § 2522.

On October 6, 2021, the parties argued the case before a panel of three judges. On June 27, 2022, following a *sua sponte* request on whether to hear this case *en*

banc, and prior to a ruling on the appeal, a majority of judges voted for *en banc* consideration. Dkt. No. 40 (En Banc Request for Further Briefing).

STATEMENT OF THE ISSUES

1) How should the term “unusual[]” be understood in the context of establishing “pay differentials” and “proper differentials” under 5 U.S.C. §§ 5343(c)(4), 5545(d)?

2) In view of *Adair v. United States*, 497 F.3d 1244 (Fed. Cir. 2007), 5 C.F.R. § 550.902 (HDP Regulation), and Appendix A of 5 C.F.R. Pt. 550, Subpt. I (HDP Schedule), what is the meaning of “accident?” What distinction, if any, is there between accidental exposure and incidental exposure?

3) If this Court holds that the HDP Schedule and 5 C.F.R. Pt. 532, Subpt. E, Appx. A (EDP Schedule) are not limited to laboratory-specific duties, what limits, if any, are there to the “work[] with or in close proximity to” language in the HDP and EDP Schedules?

4) Are infected persons and surfaces “*primary* containers of organisms pathogenic for man,” as recited in the EDP Schedule for distinguishing between high- and low-degree hazards? *See* EDP Schedule, at Microorganisms (emphasis added).

5) If this Court concludes that the Court of Federal Claims properly granted dismissal, to what extent could the underlying complaint be amended to

establish a plausible claim for relief that satisfies the “short and plain statement” standard of RCFC 8?

STATEMENT OF THE CASE

Plaintiffs-Appellants Cody Adams, *et al.*, are 188 Federal Bureau of Prisons (“BOP”) employees working at FCI Danbury in Danbury, Connecticut, in a mix of salaried “General Schedule” positions and non-salaried “Wage Grade” positions. Appx015, Appx024-025. From the start of the global pandemic, and before any vaccines became available, the Correctional Officers worked while locked inside a federal prison where a novel coronavirus that causes the deadly disease known as COVID-19 infected more than 100 inmates and employees.¹ Appx027.

Because the Correctional Officers were assigned to work with or in close proximity to “objects, surfaces, and/or individuals infected with COVID-19,” and were thus regularly exposed to COVID-19, they filed a Complaint in the Court of Federal Claims on June 26, 2020, seeking compensation for their hazardous duties. Specifically, the General Schedule employees sought hazardous duty pay (“HDP”) pursuant to 5 U.S.C. § 5545(d) for their work “with or in close proximity to”

¹ Although the novel coronavirus is SARS-CoV-2 and the disease it causes is COVID-19, the Correctional Officers will refer to both the virus and the disease together simply as “COVID-19.” COVID-19 is the hazard that the Correctional Officers risked encountering each day they worked in a federal prison, such as the institution at Danbury, that was plagued by the deadly disease.

“virulent biologicals,” a hazardous duty listed in the Office of Personnel Management (“OPM”) schedule of HDP hazards. *See* 5 C.F.R., Pt. 550, Subpt. I, App. A. The Wage Grade employees sought environmental differential pay (“EDP”) pursuant to 5 U.S.C. § 5343(c)(4) for their work “with or in close proximity to” “micro-organisms,” a hazardous duty under OPM’s schedule of EDP hazards. *See* 5 C.F.R., Pt. 532, Subpt. E, App. A. The Correctional Officers also sought backpay for unpaid overtime under the FLSA.² Appx029-030.

Defendant-Appellee United States (the “Bureau of Prisons” or the “Government”) filed a motion to dismiss the Correctional Officers’ Complaint for failure to state a claim on October 8, 2020. Appx011. The Government argued primarily that the Correctional Officers’ claims were not compensable under the HDP and EDP regulations because COVID-19 is no different than secondhand tobacco smoke, which this Court previously found to be outside the scope of the HDP and EDP regulations in *Adair v. United States*, 497 F.3d 1244 (Fed. Cir. 2007). On February 5, 2021, the lower court issued an order granting the Government’s

² Appellants’ FLSA claim alleges that the Government failed to include the hazardous duty premiums in their regular rate of pay, and therefore failed to pay the Correctional Officers at time and one-half their regular rate for all overtime hours. *See* 29 U.S.C. § 207(a). This claim is derivative of the hazard pay claims in that hazardous duty pay slightly increases the rate at which overtime is paid under the FLSA. Because the court below erred in dismissing the Correctional Officers’ hazard pay claims, it also erred in dismissing the related FLSA claims. Once the Correctional Officers’ claims for hazardous duty pay premiums are reinstated, their FLSA claims must be reinstated as well.

motion to dismiss. *Cody Adams v. United States*, No. 20-783C, 2021 U.S. Claims LEXIS 55 (Fed. Cl. Feb. 5, 2021) (hereinafter “*Cody Adams*”), Appx002. The court below incorrectly found that this Court’s decision in *Adair* constituted “binding precedent” that foreclosed the Correctional Officers’ claims. *Cody Adams*, 2021 U.S. Claims LEXIS 55 at *2.

Without any discussion of the substantial factual or regulatory differences between secondhand cigarette smoke and COVID-19, the lower court applied *Adair* in an erroneous, wholesale fashion to dismiss the Complaint. Despite the country being, effectively, locked down for more than a year due to the utterly unprecedented global pandemic caused by the novel COVID-19 virus, the court inexplicably found that COVID-19 posed neither an “unusual” hazard under the HDP statute nor an “unusually severe” working condition under the EDP statute. *Cody Adams*, 2021 U.S. Claims LEXIS 55, at *11, 16, Appx007, Appx009.

For HDP specifically, the court concluded that the Correctional Officers’ potential exposure to COVID-19 is not a result of an intermittent assignment, but “appears to stem from their regular duties at FCI Danbury.” *Id.* at *11, Appx007. The court then transplanted a small portion of *Adair*’s discussion on Congressional intent to opine that Congress could not have intended to include COVID-19 within the HDP statute “because at the time the statute was enacted, Congress was unaware of the dangers of the virus.” *Id.* at *12 (quoting *Adair*, 497 F.3d at 1254), Appx007.

Without mentioning the relevant definition of “virulent biological” set forth in the Appendix to OPM’s HDP regulations, the court concluded, mistakenly, that “exposure to the novel coronavirus at FCI Danbury does not qualify as either a ‘duty involving physical hardship’ or a ‘hazardous duty’ as defined by OPM.” *Id.* at 12–13, Appx007-008.

For EDP, the court ignored the regulatory *definition* of micro-organisms and found that the regulatory *examples* for micro-organisms in the EDP Schedule foreclosed the Correctional Officers’ claims. *Id.* at *17–18, Appx009. Strangely, the court likened the incidental smokers in *Adair* to “‘inmates who incidentally’ have COVID-19.” *Id.* at *17, Appx009. Finally, although the court acknowledged that *Adair* dealt with “toxic chemicals,” a separate hazard in the HDP and EDP regulations, and the Correctional Officers’ claims here allege exposure to “virulent biologicals” and “micro-organisms,” it nonetheless concluded that “the Federal Circuit’s interpretation of the phrase ‘with or in close proximity to’ in the context of [toxic chemicals] is binding on this court.” *Id.* at *18, Appx009-010.

The Correctional Officers timely appealed. Appx037. A panel of three judges on the United States Court of Appeals for the Federal Circuit heard arguments on appeal on October 6, 2021. Thereafter, before the panel released a decision, a *sua sponte* request for a poll on whether to hear this case *en banc* was made. *See* En Banc Request for Further Briefing. A majority of judges voted for *en banc* consideration.

Id. On June 27, 2022, the Court ordered that the case be heard *en banc* under 28 U.S.C. § 46 and Federal Rule of Appellate Procedure 35(a). *Id.* In its Order, the Court asked the parties to submit supplemental briefing on the specific issues that are set forth in the Statement of Issues above, and which are addressed herein.

SUMMARY OF THE ARGUMENT

The lower court’s order dismissing the Complaint for failure to state a claim should be reversed. The decision below directly contradicts an earlier decision of the Court of Federal Claims, *Charles Adams v. United States*, 151 Fed. Cl. 522 (Fed. Cl. 2020) (“*Charles Adams*”), which correctly found that correctional officers had cognizable HDP and EDP claims for their exposure to COVID-19 in the course of their assigned duties. *Id.* at 524. Further, in answer to this Court’s questions on rehearing *en banc*, prior to the widespread availability of effective vaccines, COVID-19 was an “unusual hazard” to which the Correctional Officers were accidentally, and not incidentally, exposed in the course of performing their singularly difficult and unique job duties in which they risked being exposed to COVID-19 as they were regularly compelled to be within six feet of individuals in their workplace who were infected with the virulent biological COVID-19. Under these circumstances, and consistent with the court’s conclusion in the *Charles Adams* case, the plain text of the HDP and EDP statutes and their implementing

regulations support the conclusion that the Correctional Officers are entitled to HDP and EDP.

Congress mandated that employees are “*entitled to be paid*” HDP “for any period in which [they are] subjected to physical hardship or hazard [identified by OPM] *not usually involved in carrying out the duties of [their] position[s]*.” 5 U.S.C. § 5545(d) (emphasis added); *see also* 5 U.S.C. § 5343(c)(4) (mandating EDP differentials for “duty involving unusually severe working conditions or unusually severe hazards”). Unquestionably here, and as pled in the Complaint, the Correctional Officers were subjected to COVID-19, a new and deadly hazard, through their duties requiring interactions with infected inmates and work facilities. Moreover, exposure to virulent biologicals such as COVID-19 was not taken into account in their position descriptions. No more is required to state a claim for HDP and EDP.

As set forth above, this Court asked for supplemental briefs on five questions. The Court’s first question concerns how the term “unusual” should be understood in the context of the HDP and EDP statutes. The term “unusual” should be analyzed in the context of the job description and responsibilities at issue, and in doing so here it is clear that exposure to a potentially deadly infectious disease such as COVID-19, the invisible monster that plagued the Institution during the pandemic, was an unusual hazard encountered by the Correctional Officers.

The second question asks the parties to define the term “accident” and clarify if there are any distinctions between incidental and accidental exposure. Here, the term “accident” means an unplanned event that leads to injury, illness, or death. The accident faced by the Correctional Officers was the potential exposure to COVID-19 from performing their normal job responsibilities without the availability of vaccines and without adequate protective equipment and also working with or in close proximity to individuals who are asymptomatic but who are later determined to have COVID-19. Due to the nature of a job requiring up close interactions with inmates through transport, pat-downs, and face-to-face exchanges in which COVID-19 may be accidentally transmitted, the Correctional Officers faced potential exposure to COVID-19. So, while an accidental exposure occurs through the performance of required job responsibilities, an incidental exposure does not. There is nothing “incidental” about the correctional officers’ proximity to COVID-19. ***Their job is to be proximate to the inmates***, and during the pandemic this meant that they were regularly accidentally exposed to the virus while performing their normal job duties. Without doubt, they worked with or in close proximity to COVID-19.

Third, the Court seeks information on whether there are limits to the “work with or in close proximity to” language in the HDP and EDP schedules. To “work with or in close proximity” to virulent biologicals or micro-organisms, the nature of the employees’ job must require proximity to infected or potentially infected

persons. An employee must show that someone had COVID-19 in the area where they were assigned or where their job required them to respond (e.g., here, as a result of a body alarm or other emergency) such that they may be required to be in contact or in proximity with the infected person due to their job. Although the precise definition of “close proximity” is an issue to be determined after discovery rather than on a motion to dismiss, one readily applicable definition for “close proximity” would be coming within six feet of an individual who is infected with COVID-19, as widely publicized by the Centers for Disease Control and Prevention (“CDC”).

Fourth, the parties are prompted to address whether infected persons and surfaces are “primary containers of organisms pathogenic for man” as set forth in an example in the EDP Schedule. Because infected humans are the primary carriers of the virus, they are the vessels for incubating and shedding the virus, and thus are primary containers of organisms pathogenic to man.

Lastly, the Court is concerned with whether the Complaint could be amended should it conclude that dismissal was properly granted. The answer to this depends on whether this Court adopts the Government’s myopic “scientist” rule. If it does, the Complaint cannot be amended to meet that untenable and impermissibly narrow rule. However, although the Correctional Officers do not believe it necessary to satisfy the pleading standard, the Complaint, could be amended to add additional

details concerning the Correctional Officers’ specific job tasks that forced them to work in close proximity to COVID-19.

ARGUMENT

I. Standard of Review

The Federal Circuit reviews the Court of Federal Claims’ grant of a motion to dismiss for failure to state a claim *de novo*. *Frankel v. United States*, 842 F.3d 1246, 1249 (Fed. Cir. 2016). Pursuant to Rule 8 of the Rules of Court of Federal Claims (“RCFC”), a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” When ruling on a RCFC 12(b)(6) motion to dismiss for failure to state a claim under RCFC 8, the Court “accepts as true all uncontroverted factual allegations in the complaint and construes them in the light most favorable to the plaintiff.” *Estes Express Lines v. United States*, 739 F.3d 689, 692 (Fed. Cir. 2014) (citation omitted).

To survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell All. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). For a complaint to be “plausible,” it “does not need detailed factual allegations.” *Twombly*, 550 U.S. at 555; see *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (RCFC 8 “does not require the plaintiff to set out in detail the facts upon which the claim is based, but enough facts to state a claim to

relief that is plausible on its face”). It simply must contain enough detail “to raise a right of relief above the speculative level.” *Twombly*, 550 U.S. at 555.

A trial court errs in dismissing a complaint on a motion to dismiss based on its belief that a plaintiff may not be able to ultimately prove their claims. It is not the court’s duty to determine “whether the claimant will ultimately prevail” when ruling on a 12(b)(6) motion to dismiss. *Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 938 (Fed. Cir. 2007). “[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the facts alleged] is improbable, and that a recovery is very remote and unlikely.” *Twombly*, 550 U.S. at 556 (citations and internal quotation marks omitted).

II. How Should the Term “Unusual” Be Understood in the Context of Establishing “Pay Differentials” and “Proper Differentials” Under 5 U.S.C. §§ 5343(C)(4), 5545(D)?

In the context of establishing “pay differentials” and “proper differentials” for HDP and EDP, the term “unusual” should be understood as an abnormal, uncommon, or out-of-the ordinary hazard or risk that the employees would not normally confront in performing their job duties. Prior to the widespread availability of effective vaccines, COVID-19 constituted an “unusual” hazard for the correctional officers at FCI Danbury because exposure to such an infectious disease was not a part of their usual job responsibilities, nor was it accounted for in their job descriptions. Moreover, COVID-19 was an “unusual” hazard to society at large

because it was a new and novel disease that completely altered how every aspect of society functioned.³

a. *An “Unusual” Hazard or Risk is One That is Not Accounted For in the Employee’s Job Description and That is Unexpected, Such as Working with Infected Individuals during a Global Pandemic*

In establishing hazardous duty pay, Congress directed OPM to “establish a schedule or schedules of pay differentials for duty involving *unusual physical hardship or hazard*.” 5 U.S.C. § 5545(d) (emphasis added). Congress further directed OPM to establish environmental differential pay for prevailing rate employees by providing for “proper differentials . . . for duty involving *unusually severe* working conditions or *unusually severe* hazards.” 5 U.S.C. § 5343(c)(4) (emphasis added). Thus, HDP and EDP are for “regularly assigned duties [that] are performed under *unusually hazardous* [or severe] conditions.” *Adair*, 497 F.3d at 1253–54 (emphasis added) (quoting H.R. Rep. No. 89-31 (1st Sess. 1965)).

However, while the HDP and EDP statutes unambiguously cover “unusual” hazards, nowhere in the statutes or implementing regulations does Congress or OPM define what “unusual” means. *See* 5 U.S.C. § 5545(d); 5343 § (c)(4); 5 C.F.R. § 550.902; 5 C.F.R. § 532.501; 5 C.F.R. Pt. 550, Subpt. I, App. A; 5 C.F.R. Pt. 532,

³ The previously “unusual” hazard of COVID-19 may no longer be considered uncommon or abnormal because the introduction of vaccines reduces the risk of severe illness or death to a level below that necessary to require the payment of HDP. However, the determination of when the hazard became “usual” is one that will be made through experts in discovery and not at the motion to dismiss stage.

Subpt. E, App. A. When a term is undefined, “[i]t is a basic principle of statutory interpretation” that the undefined term shall be given its “ordinary meaning.” *Best Power Tech. Sales Corp. v. Austin*, 984 F.2d 1172, 1177 (Fed. Cir. 1993) (citation omitted). At its most basic definition, “unusual” means “not usual, common, or ordinary.” *Unusual*, Dictionary.com, <https://www.dictionary.com/browse/unusual> (last visited Aug. 23, 2022); *see also Unusual*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/unusual> (last visited Aug. 23, 2022) (defining unusual as “uncommon” or “rare”).

Although the dictionary definition of “unusual” is simple, it does not fully explain how the term should be understood in the context of the HDP and EDP statutes. Of course, the common definition of a word is not the end of the analysis, because the court must “interpret a statute, not a word.” *United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1366 (Fed. Cir. 1983); *see also Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”); Carol M. Hayes, *Comparative Analysis of Data Breach Laws: Comprehension, Interpretation, and External Sources of Legislative Text*, 23 Lewis & Clark L. Rev. 1221, 1229 (2020) (“The various nuances of language complicate statutory interpretation, so understanding context is often critically important.”). This means that in the context of the HDP

and EDP statutes and regulations, “unusual” must be understood in terms of the relationship of the hazard to the employee’s regular job duties. *See Adair*, 497 F.3d at 1254 (stating that hazard pay is for the types of “unusual risks not normally associated with [the] occupation and for which added compensation is not otherwise provided”) (quoting H.R. Rep. No. 89-31 (1st Sess. 1965)). For this reason, the term “unusual” does not and cannot have one set definition; it must be interpreted and understood on a case-by-case basis depending on the employee’s regular job duties and those responsibilities and risks that were considered in classifying the position. Indeed, an employee is not eligible for hazard pay when their job description “takes into account [the hazard] involved in the performance of the duties.” 5 U.S.C. § 5545(d).

While providing a definition of “unusual” that applies across the board may be difficult in many circumstances, here, the Court can use common sense to determine that the hazard posed by COVID-19 is unusual for this particular set of plaintiffs — i.e., “I know it when I see it.” *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). When examining the Correctional Officers’ job duties and the risk of exposure to COVID-19, it is obvious that the Correctional Officers encountered an “unusual” hazard. “Unusual” may not have one fixed meaning in the context of the HDP and EDP statutes, but the deadly and unprecedented risks posed by COVID-19

in a prison setting unmistakably constitutes an unusual hazard for Correctional Officers.

b. *COVID-19 Was an Unusual Hazard For Correctional Officers Who Were Compelled by the Nature of their Job Duties to be Exposed to It*

Because “unusual” does not have a set definition, the Court should look to the normal job duties of the employees and the known and usual hazards they face to resolve whether a particular hazard is unusual for the employees seeking HDP and/or EDP. As an initial matter, we know that COVID-19 can qualify as “unusual” or an “unusually severe” hazard because OPM has already determined that infectious diseases that meet the regulatory definition of “virulent biologicals” or “micro-organisms” found in the HDP and EDP Schedules are qualifying hazards. *See* 5 C.F.R. Pt. 550, Subpt. I, App. A; 5 C.F.R. Pt. 532, Subpt. E, App. A. This conclusion is further supported by the fact that the definition of “micro-organisms” contains language that alludes to infectious diseases, such as vaccines and antiserums. *See* 5 C.F.R. Pt. 532, Subpt. E, App. A (defining a “micro-organism” hazard as one where “vaccines and antiserums and other safety measures” are insufficient). COVID-19 indisputably meets the regulatory definition of “virulent biological” and “micro-organism,” therefore making it a potentially unusual hazard creating HDP and/or EDP entitlement.⁴

⁴ The test for whether COVID-19 is an unusual hazard is simply whether it meets the regulatory definition of “virulent biological” or “micro-organism” in the HDP

In examining the job descriptions and the known and accounted-for risks faced by correctional officers, it is evident that COVID-19 constitutes an “unusual” or “unusually severe” hazard that entitles the Correctional Officers to HDP and EDP. Correctional officers face a multitude of known risks due to their jobs, including threats of violence and physical injury.⁵ However, direct exposure to an infectious airborne disease such as COVID-19 is not one of these known and accounted-for hazards. The job description for correctional officers at FCI Danbury lists several hazards that the Correctional Officers could expect to encounter, such as being in “hostile or life-threatening situations” including as “riots, assaults, and escape attempts” and “daily stress and exposure to potentially dangerous situations such as physical attack.” *See* Addendum at 60 (Position Description for Correctional Officers).⁶

and EDP Schedules. *See* 5 C.F.R. Pt. 550, Subpt. I, App. A; 5 C.F.R. Pt. 532, Subpt. E, App. A. The test is not whether Congress considered COVID-19 or any other single virus *in particular* to be unusual at the time the statutes were enacted, as that would lead to the absurd result of foreclosing any novel diseases from being considered unusual hazards warranting HDP and EDP.

⁵ *See* Strinivas Konda, et al., *U.S. Correctional Officers Killed or Injured on the Job*, National Library of Medicine, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4699466/> (describing how correctional officers face risks of assault, violence, and transportation-related injuries).

⁶ Because this case is being heard on a motion to dismiss, the record has not yet been developed. However, in light of the Court’s questions, the Correctional Officers refer the Court to the attached position description, which is incorporated and tied to the Complaint. *See Athena Diagnostics, Inc. v. Mayo Collaborative Serv., LLC*, 915

Furthermore, due to the unusual nature of the COVID-19 hazard, the Bureau of Prisons took unusual measures at the prisons such as quarantining inmates known to have COVID-19 and providing gloves and masks to correctional officers, in an attempt to lessen the risk of exposure. Of course, due to the nature of their job duties requiring their interaction with inmates, the Correctional Officers nonetheless were exposed to COVID-19 at federal prisons.⁷

Additionally, the potential exposure to COVID-19 faced by the Correctional Officers is incomparable to the commonplace hazard faced by the plaintiffs in *Adair*. In *Adair*, this Court found that environmental tobacco smoke (“ETS”) or second-hand smoke was not an unusual hazard because it was a commonplace, expected

F.3d 743, 755 (Fed. Cir. 2019); Appx029 at ¶¶ 25–27. If the Government’s motion is denied, the attached document and additional position descriptions revealed through discovery will be produced.

⁷ Kathryn M. Nowotny, et al., *Risk of COVID-19 Infection Among Prison Staff in the United States*, 21 BMC Public Health 1036 (Jun. 2, 2021) available at <https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-021-11077-0> (finding that prison staff consistently reported higher rates of COVID-19 compared to the general population, with prison staff rates closely mirroring the incarcerated population case rates); Luke Barr, *Over 5,000 Corrections Officers Have Contracted COVID-19*, ABC News (May 5, 2020), <https://abcnews.go.com/US/5000-corrections-officers-contracted-covid-19/story?id=70520117>; Keri Blakinger & Keegan Hamilton, *“I Begged Them to Let me Die”; How Federal Prisons Became Coronavirus Death Trap*, The Marshall Project (Jun. 18, 2020), <https://www.themarshallproject.org/2020/06/18/i-begged-them-to-let-me-die-how-federal-prisons-became-coronavirus-death-traps>; Roni Caryn Rabin, *Vulnerable Inmates Left in Prisons as Covid Rages*, N.Y. Times (Feb. 27, 2021), <https://www.nytimes.com/2021/02/27/health/coronavirus-prisons-danbury.html>.

condition in a prison, specifically in areas where inmates were allowed to smoke. *See Adair*, 497 F.3d at 1253 (concluding that ETS is not unusual because exposure was an “expected condition of employment” and ETS was “commonly encountered indoors and outdoors”). Further, the risks of second-hand smoke were a class of risks completely unknown at the time the statute was enacted, making it impossible for it to be an “unusual” hazard at the time. *See id.* at 1254 (“Congress . . . could not have intended to have included ETS as an unusual risk” because Congress “was unaware of the dangers of ETS”).

The analysis from the *Adair* Court is inapplicable to analyzing whether COVID-19 was an unusual hazard faced by the Correctional Officers. Unlike second-hand smoke, the presence and potential exposure to COVID-19 was not an expected condition of employment for the Correctional Officers, nor was it commonly encountered at the time. Further, the risks of infectious diseases were well-documented and considered in the HDP and EDP Schedules, as Congress clearly intended to include such diseases as unusual hazards. *See* 5 C.F.R. Pt. 550, Subpt. I, App. A; 5 C.F.R. Pt. 532, Subpt. E, App. A.⁸ Therefore, reliance on *Adair* to conclude that COVID-19 was not an unusual hazard is fundamentally flawed.

⁸ Although the deadly COVID-19 virus is new, coronaviruses themselves have been a known hazard since at least 1937. *See* Elijah N. Mulabbi et al., *The History of the Emergency and Transmission of Human Coronaviruses*, 88 Onderstepoort J. of Veterinary Research 1 (Feb. 10, 2021) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7876959/>.

Because the Correctional Officers’ job descriptions lack any reference to infectious or communicable disease, potential exposure to COVID-19 was clearly not an accounted-for hazard for correctional officers, making it “unusual” for purposes of HDP and EDP.

c. That COVID-19 Was an Unusual Hazard and Occurrence for the Correctional Officers Is Also Reflected in the Fact That It Was an Unusual Hazard and Occurrence for All of Society

It is clear from the statutes and case law that the term “unusual” must be understood in context of the specific employee’s job duties and known risks. Although a hazard being “unusual” in society at large is not a requirement to qualify for HDP or EDP, such circumstances strongly support the assertion that a specific hazard is unusual for the Correctional Officers at issue. Here, COVID-19 was unquestionably – as a matter of science, historical fact, and common sense – an “unusual” or “unusually severe” hazard in society, as well as specifically to correctional officers, that may create entitlement to HDP and EDP. Society has not seen a global pandemic on the scale of COVID-19 in more than 100 years, since the Spanish flu.⁹

⁹ See Elizabeth Gamillo, *COVID-19 Surpasses 1918 Flu to Become Deadliest Pandemic in American History*, Smithsonian Magazine (Sept. 24, 2021), <https://www.smithsonianmag.com/smart-news/the-covid-19-pandemic-is-considered-the-deadliest-in-american-history-as-death-toll-surpasses-1918-estimates-180978748/>.

Indeed, one only needs to look to the Government's (and in particular, this Court's) reaction to the COVID-19 pandemic as proof that COVID-19 created unusual circumstances: when the invisible specter of COVID-19 reared its head in early 2020, virtually all governmental and private undertakings ceased to function normally. Stores were closed, planes stood empty on the tarmac, rites of passage – from graduations to weddings to funerals – were canceled, children were barred from classrooms and forced into the frustrating isolation of online learning, the sick died alone in overcrowded and overwhelmed hospitals, any employee who could work from home did, and eventually, remote proceedings became the norm.¹⁰

¹⁰ In an effort to curb the spread of the pandemic, the Government took aggressive steps to limit human-to-human contact within the federal workforce. See Memorandum from Russel T. Vaught, *Federal Agency Operational Alignment to Slow the Spread of Coronavirus COVID-19*, M-20-16 at 1 (Mar. 17, 2021) (“[T]he Government must immediately adjust operations and services to minimize face-to-face interactions, especially at those offices or sites where people may be gathering in close proximity or where highly vulnerable populations obtain services.”), available at <https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-16.pdf>. Such restrictions were also implemented in this court. See, e.g., Administrative Order 2021-07, *Restricting Court Access to the National Court's Building Through April 30, 2021*, United States Court of Appeals for the Federal Circuit & United States Court of Federal Claims (Mar. 25, 2021) (“Based on continuing declared public health emergencies impacting Washington, D.C. and the National Capital Region, as well as ongoing efforts to mitigate community transmission and the impact of COVID-19, there is an ongoing need for the United States Court of Appeals for the Federal Circuit and the United States Court of Federal Claims to continue to restrict public access to the Howard T. Markey National Courts Building.”).

Contrast the extraordinary disruptions caused by the COVID-19 pandemic to the disruptions, or lack thereof, caused by the second-hand smoke in *Adair*, and *Adair*'s inapplicability here becomes obvious. In *Adair*, the Court, in part, reasoned that second-hand smoke was not “unusual” because it was commonplace in society at the time, and the risks from it were unknown. This reasoning is inapposite to COVID-19. The alarm bells were sounded on the risks from COVID-19 as early as December 2019,¹¹ and it quickly became known around the world that COVID-19 was a dangerous and infectious disease that could cause severe illness or death. COVID-19 was the opposite of commonplace; it was novel and dangerous. COVID-19 was an unexpected, unusual hazard faced by society in general, and not surprisingly, it was, therefore, an unusual hazard for the Correctional Officers to face in the course of performing their job duties and responsibilities.

Generally, society, including the courts and other workplaces, reacted to COVID-19 by requiring individuals to work from home. But this option was unavailable to the Correctional Officers. In an unusual situation, with respect to both historically and contemporaneous general experience, Correctional Officers were compelled to face this dangerous disease while locked inside a crowded federal prison where it was impossible to be socially distant and where they continued to

¹¹ *CDC Museum COVID-19 Timeline*, <https://www.cdc.gov/museum/timeline/covid19.html>.

perform their hands-on job duties interacting with inmates, including those infected with COVID-19, while the rest of us worked safely from home.

In sum, the term “unusual” must be understood within the context of the specific job description at issue, and the known and accounted for risks of the job. For the Correctional Officers, exposure to COVID-19 is the exact type of “unusual risk[] not normally associated with [their] occupation and for which added compensation is not otherwise provided” for which Congress intended to provide hazardous duty pay. *Adair*, 497 F.3d at 1254 (quoting H.R. Rep. No. 89-31 (1st Sess. 1965)). The Correctional Officers are therefore entitled to be paid HDP and/or EDP for working with or in close proximity to this virulent biological/micro-organism.¹²

III. In View of *Adair v. United States*, 497 F.3d 1244 (Fed. Cir. 2007), 5 C.F.R. § 550.902 (HDP Regulation), and Appendix A Of 5 C.F.R. Pt. 550, Subpt. I (HDP Scheduled), What Is the Meaning Of “Accident?” What Distinction, If Any, Is There Between Accidental Exposure and Incidental Exposure?

An accident is an unforeseen event that can lead to an injury, illness, or death, and for the Correctional Officers, the accident they faced is the potential exposure to COVID-19 when performing their job duties without adequate safety protection.

¹² Of course, once the Court reinstates this lawsuit, the parties can develop the record in the lower court. As part of that process, discovery will likely reveal that even in a prison setting, effective vaccines ultimately transformed the hazard such that those who were vaccinated were no longer at risk of serious illness or death, meaning COVID-19 would no longer be a hazard for which extra HDP/EDP compensation is due.

The regulations make clear that *the exposure to the hazard itself is the accident* when working with virulent biologicals. Further, the difference between an accidental and incidental exposure concerns whether the exposure occurred because the employee's job responsibilities and duties put the employee at risk of exposure versus random exposure to individuals unrelated to one's job duties.

a. *During a Pandemic, the Prison Environment is an Accident Waiting to Happen*

In promulgating regulations to implement the hazardous duty pay statute, OPM defined "hazardous duty" as a duty "performed under circumstances in which an *accident* could result in serious injury or death, such as duty performed on a high structure where protective facilities are not used or on an open structure where adverse conditions such as darkness, lightning, steady rain, or high wind velocity exist." 5 C.F.R. § 550.902 (emphasis added); *see also Adair*, 497 F.3d at 1254 ("Thus, Congress intended the statute to cover assignments that were inherently dangerous because they posed a risk of accident."). Then Civil Service Commission Chairman John W. Macy Jr. explained that "in most regularly recurring hazardous work situations safety training and precautions have been developed which so greatly reduce the possibility of accident that the degree of hazard becomes negligible," but that compensable hazardous duties "go beyond such conditions." *Id.* (citing H.R. Rep. No. 89-31 (1st Sess. 1965)). "They take into consideration . . . exposure to elements or conditions over which little or no control can be exercised,"

and “are accompanied by the undeniable awareness of the inherent danger of the activity and the knowledge that an accident, should it occur, would almost certainly be fatal.” *Id.* Accidents are generally and commonly defined as an “unforeseen and unplanned event or circumstance” that leads to injury. *Accident*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/accident> (last visited Aug. 23, 2022); *see also Accident*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/accident> (last visited Aug. 23, 2022).¹³

Here, the duties performed are the standard correctional officer tasks and responsibilities;¹⁴ the circumstances are the combination of the nature of the prison

¹³ *What is the Real Difference Between an Accident and an Incident*, Conserve, <https://www.conserve.com.au/blog/difference-between-accident-and-incident> (last visited Aug. 23, 2022) (defining accident as an “unexpected event that results in serious injury or illness of an employee and may also result in property damage”); Jackson Williams, *A Quick Guide to Define Workplace Accidents*, Attorney at Law (Dec. 26, 2019), <https://attorneyatlawmagazine.com/a-quick-guide-to-define-workplace-accidents> (an accident is an unplanned event that “leads to the injury of an employee”); Ramesh Nair, *Accidents v. Incidents – What are the Main Differences*, Safety Mint (Mar. 30, 2022), <https://www.safetymint.com/blog/accidents-incidents-difference/> (stating that accidents in the workplace can happen due to “poor working conditions”).

¹⁴ Among other things, the Correctional Officers’ job responsibilities include “supervis[ing] and instruct[ing] inmates regarding proper sanitation,” “maintain[ing] the control and discipline of inmates,” “escort[ing] inmates to various cities or states for court appearances,” “initiat[ing] . . . the searching of inmates, inmate housing units or inmate work areas,” and “enforce[ing] rules and regulations governing facility security.” Addendum at 60–62.

setting and the presence of a novel, airborne, highly contagious, infectious disease that can lead to serious illness or death; and the accident is the potential exposure to COVID-19 due to the nature of the Correctional Officers' job and the fact that precautions and safety measures did not completely eliminate the hazard. Thus, the meaning of "accident" in this case is the potential exposure to COVID-19 through an infected or potentially infected inmate without proper safety precautions while performing assigned job duties.

In prisons, COVID-19 runs rampant. *See* Meg Anderson & Huo Jingnan, *As COVID Spread in Federal Prisons, Many At-Risk Inmates Tried and Failed to Get Out*, NPR (Mar. 7, 2022), [https://www.npr.org/2022/03/07/1083983516/as-covid-spread-in-federal-prisons-many-at-risk-inmates-tried-and-failed-to-get-](https://www.npr.org/2022/03/07/1083983516/as-covid-spread-in-federal-prisons-many-at-risk-inmates-tried-and-failed-to-get-out) ("Prisons were likely to be a petri dish for COVID-19."); Saher Kahn, *When this Virus Gets Behind Bars, it Runs Like Wildfire, Experts Warn*, PBS News (Jun. 9, 2020), <https://www.pbs.org/newshour/nation/when-this-virus-gets-behind-bars-it-runs-like-wildfire-experts-warn> (stating that the "infrastructure and way that prisons are run contribute to the spread of the virus: close living quarters, overcrowding, intake pens, squalor"). The well-established methods of reducing potential exposure and slowing the spread of COVID-19 are impossible in a prison environment. There is no social distancing; indeed, close contact is required, the areas are crowded and poorly ventilated, mask usage may not be accurate nor fully effective in crowded

indoor environments, and sanitation methods are often not easily accessible. *See How to Protect Yourself and Others*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/> (last updated Aug. 11, 2022); Kristin L. Andrejko et al., *Effectiveness of Face Mask or Respirator Use in Indoor Public Settings for Prevention of SARS-CoV-2 Infection*, CDC (Feb. 11, 2022), <https://www.cdc.gov/mmwr/volumes/71/wr/mm7106e1.htm>.

Due to the environment at FCI Danbury and other correctional facilities, inmates are essentially “accidents waiting to happen.” Inmates often will not or cannot comply with social distancing, mask wearing, or orders from correctional officers, and at any moment, a situation may arise that would require a correctional officer to have prolonged physical contact with a potentially infected inmate. Further, because of the incubation period of COVID-19, it is impossible to know who is infected and contagious with COVID-19 at any given time. A correctional officer may be required to be in contact with a seemingly healthy inmate who is later diagnosed with COVID-19 and deemed to have been contagious during the contact or close physical proximity. The unstable and fraught nature of inmates confined in prisons, the necessity of close proximity, the invisible and unknown nature of COVID-19, and the lack of adequate safety precautions created a recipe for accidental exposure to COVID-19. Therefore, the Correctional Officers are entitled to HDP because they performed their duties under circumstances in which an

accident (exposure to COVID-19) could result in serious injury or death. 5 C.F.R. § 550.902

b. Correctional Officers' Exposure to Virulent Biologicals in a Prison Environment is an Accident under the HDP Schedule

In the context of the hazardous duty definition, an accident means an unplanned event that could result in serious injury, illness, or death. *See* 5 C.F.R. § 550.902. For the correctional officers at FCI Danbury who were working with or in close proximity to COVID-19, the accident is the potential exposure to COVID-19 through the performance of their official job duties without adequate safety protections. Thus, the Correctional Officers are entitled to HDP because they worked with or in close proximity to a virulent biological (COVID-19) in a situation where an accidental exposure could lead to serious illness or death.¹⁵

¹⁵ In discovery, on remand, it may be revealed that COVID-19 no longer fits into the “virulent biological” or “micro-organism” categories after the introduction of widely available, effective vaccines because it is no longer likely to cause serious illness or death. The vaccines have been reported to be highly effective at preventing serious illness or death from COVID-19. *See* Mayo Clinic Staff, *Comparing the Differences Between COVID-19 Vaccines*, Mayo Clinic (July 1, 2022), <https://www.mayoclinic.org/coronavirus-covid-19/vaccine/comparing-vaccines> (showing an 85-94% effective rate at preventing severe illness depending on the vaccine); *see also* Mark W. Tenforde et al., *Effectiveness of mRNA Vaccination in Preventing COVID-19 – Associated Invasive Mechanical Ventilation and Death – United States, March 2021 – January 2022*, CDC (Mar. 25, 2022), <https://www.cdc.gov/mmwr/volumes/71/wr/mm7112e1.htm>; Bryan Christie, *COVID-19: Vaccines are Highly Effective in Preventing Deaths from Delta Variant, Study Indicates*, 375 *The BMJ* n2582 (Oct. 21, 2021) available at <https://www.bmj.com/content/375/bmj.n2582>. Because the HDP and EDP Schedules require a virulent biological to “cause serious disease or fatality” and for

The regulatory definition of virulent biological makes clear that potential exposure to such a hazard is, in and of itself, an accident. In the HDP Schedule, it is a hazardous duty to work with or in close proximity to a virulent biological, which are “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.” 5 C.F.R. Pt. 550, Subpt. I, App. A. Compare this hazard definition to the toxic chemical hazard definition — it is a hazardous duty to work with or in close proximity to “toxic chemical materials *when there is a possibility of leakage or spillage.*” *Id.* (emphasis added). In this definition, OPM specifically added the limiting language of requiring the possibility of a leak or a spill, rather than just requiring potential exposure from working with the hazard. This type of language is notably absent from the virulent biological category. Other hazards, such as fire-retardant materials and asbestos also lack such limiting language. *Id.*¹⁶

a micro-organism to cause “death” or “acute, prolonged, or chronic disease,” COVID-19 may no longer fit into those categories after the introduction of vaccines. *See* 5 C.F.R. Pt. 550, Subpt. I, App. A; 5 C.F.R. Pt. 532, Subpt. E, App. A.

¹⁶ For fire-retardant material, the schedule states that it is a hazard to “conduct[] tests on fire retardant materials when the 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.” 5 C.F.R. Pt. 550, Subpt. I, App. A. Asbestos is a hazard when the worker is with or in close proximity to a “significant risk of exposure to airborne concentrations of asbestos fibers in excess of the permissible exposure limits . . . when the risk of exposure is directly connected with the performance of assigned duties.” *Id.*

Therefore, OPM purposefully distinguished between hazards where mere exposure is an accident waiting to happen, and hazards where something else, *i.e.*, the possibility of leaks or spills, is required to qualify as a hazardous duty in which an accident can occur.

Furthermore, the comparison between exposure to COVID-19 and exposure to second-hand smoke in *Adair* is flawed, and the differences between the two hazards provide further support that, for the Correctional Officers, potential exposure to COVID-19 without proper safety precautions is an accident. In *Adair*, this Court analyzed whether second-hand smoke fit into the “toxic chemical” category, while the Correctional Officers are arguing that COVID-19 is a “virulent biological.” A “virulent biological” is an entirely different type of hazard from “toxic chemical” hazards, with its own, separate description of the hazard involved. Therefore, right off the bat, the “toxic chemical” analysis in *Adair* is an obvious mismatch to the “virulent biological” at issue here.

Moreover, there are significant, practical differences between exposure to COVID-19 and exposure to second-hand smoke that further render the analysis in *Adair* inapplicable here. For example, the presence of second-hand smoke can be seen or smelled and accounted for while the presence of COVID-19 is invisible and unknown, and transmission can occur unknowingly. Further, COVID-19 has a several-day incubation period in which a person is contagious, but asymptomatic,

and testing negative for the virus. *See Overview of Testing for SARS-CoV-2, the Virus that Causes COVID-19*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html> (last updated Aug. 25, 2022). A person may also never exhibit symptoms and still be contagious. *Id.* Additionally, one can never know where COVID-19 is lurking, in what person the virus may be present, in what room, and at what concentration. Indeed, while second-hand smoke did not fit into the “toxic chemical” category because there was no risk of leakage or spillage, no such requirement is necessary for virulent biologicals — invisible, often untraceable threats to personal health even without risk of leakage or spillage. Thus, the lower court incorrectly relied on and applied *Adair*, because the potential exposure to COVID-19 is, in and of itself, an accident under the hazardous duty definition.

Accordingly, the HDP Schedule supports the assertion that the Correctional Officers are entitled to HDP because they perform duties under circumstances in which an accident, the potential exposure to COVID-19 without adequate protective devices, could result in serious injury, illness, or death.

c. The Difference Between Incidental and Accidental Exposure Is the Performance of One’s Job Duties

An accidental exposure is one that occurs from the performance of the employees’ job duties, while an incidental exposure does not. Guidance issued by OPM when global society was shutting down in March 2020 specifically lays out what constitutes an incidental exposure and makes clear that those incidentally

exposed to COVID-19 are not eligible for hazard pay. *See* Attachment to OPM Memorandum #2020-05, at 11–12 (Mar. 7, 2020), *available at* <https://go.usa.gov/xdsTs>. The OPM Memorandum states that HDP cannot be paid to an employee “who may come into contact with the virus or another similar virus through incidental exposure to the public or other employees who are ill rather than being exposed to the virus during the performance of assigned duties.” *Id.*; *see also id.* (“An employee may not receive a hazard pay differential under the ‘virulent biologicals’ category if exposure to a qualifying virus was not triggered by the performance of assigned duties.”). By contrast, an accidental exposure is one that is “directly associated with the performance of assigned duties.” *Id.*¹⁷

¹⁷ This limit is similar to the “work with or in close proximity limit” discussed below. *See infra* Section IV. Just as an employee may not receive hazard pay unless their assigned duties cause them to come into contact with COVID-19, an employee will not be found to “work with or in close proximity to” COVID-19 unless their specific job duties require them to be in close proximity to others.

This distinction between incidental and accidental exposure is consistent among guidance for safety procedures regarding other hazards. For example, the Western Michigan University policy on bloodborne pathogens states that an exposure is a “reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious material that *may result from the performance of an employee’s duties.*” *Bloodborne Pathogen Exposure Control Plan*, Environmental Health and Safety, Western Michigan University, <https://wmich.edu/ehs/policies/bloodborne> (last updated Aug. 6, 2021) (emphasis added). The guide further states that exposure “does not include *incidental exposures* that may take place on the job, that are neither reasonably nor routinely expected, and that the worker is not required to incur in the *normal course of employment.*” *Id.* (emphasis added).

As an example, a correctional officer may be accidentally exposed to COVID-19 through the performance of assigned duties such as inmate pat downs or transfers. In contrast, an office worker may be incidentally exposed while eating lunch with a coworker. The office worker was not exposed to COVID-19 through the performance of their assigned duties.

The OPM Guidance not only provides a helpful distinction between incidental and accidental exposure, but it also provides support for the Correctional Officers' position that non-scientists can receive HDP or EDP. If the Government's "scientist" rule was correct, the OPM Memo would be wholly unnecessary, as it patently contemplates non-scientists receiving HDP due to exposure to coronavirus. *Id.* ("Agencies may pay a hazard pay differential to a General Schedule employee for exposure to 'virulent biologicals' only when the risk of exposure is directly associated with the performance of assigned duties."). Because of the exception for HDP eligibility for hazards already considered in the classification of the employee's job, *see* 5 U.S.C. § 5545(d), there would be no reason for OPM to specify that employees may receive HDP for exposure to COVID-19 if it only applied to workers in laboratory settings.

Accordingly, the accident that gives rise to HDP eligibility is the potential exposure to COVID-19 from the performance of one's official job duties without adequate safety protection. Because of the confined, overcrowded, poorly ventilated

prison setting and the Correctional Officers' official duties within that setting, which require them to be proximate to inmates who were infected, accidents were waiting to (and did) happen, and therefore, the Correctional Officers are entitled to HDP.

IV. If the Court Holds That the HDP Schedule and 5 C.F.R. Pt. 532, Subpt. E, Appx. A (EDP Schedule) Are Not Limited to Laboratory-Specific Duties, What Limits, If Any, Are There to the “Work With or in Close Proximity to” Language in the HDP and EDP Schedules?

To be eligible for HDP and EDP for duties involving either virulent biologicals or micro-organisms, the employee must “work with or in close proximity to” the hazard at issue. *See* 5 C.F.R. Pt. 550, Subpt. I, App. A; 5 C.F.R. Pt. 532, Subpt. E, App. A. Should the Court find that HDP and EDP are not limited to laboratory-specific duties, which the Correctional Officers strongly assert is the correct interpretation of the statutes and regulations, there would still be limits contained within the “work with or in close proximity to” language such that not every federal worker who may have been exposed to COVID-19 would be eligible for hazardous duty pay or environmental differential pay.

To find an employee worked “with or in close proximity to” a virulent biological or micro-organism, the employee must show that someone had a diagnosed case of COVID-19 in the area to which the employee was assigned or may be required to go as part of their job responsibilities, and that, due to the nature of their job, the employee may be required to come into contact with or close proximity to the infected individual. The key limitation here is *proximity* to

potentially infected individuals being a core part of the employee's job. With correctional officers, proximity to inmates is necessary for them to effectively perform their jobs; tasks such as pat downs and inmate transfers cannot be performed without being close to or physically touching the inmates, or their coworkers. *See* Addendum at 61–63 (a correctional officer's job requires "frequent direct contact with individuals in confinement," and they must "initiate[] and participate[] in searching [the] inmates, inmate housing units, [and] inmate work areas," and may be required to "exercise appropriate force to establish and/or maintain control over individuals").

This proximity requirement would substantially limit the scope of workers' eligibility for HDP or EDP due to COVID-19 exposure. Any employee working from home undoubtedly would be ineligible, and even employees who worked in person at the workplace would be ineligible if they only incidentally came into contact with members of the public who were infected or who were later shown to have been infected with COVID-19. For example, if an office worker was required to work in person, and at times interacted with the public, that worker would still not be eligible for HDP or EDP because the nature of their job does not *require* proximity to others like a correctional officer's job does. That office worker would be able to do their job without physical contact with a potentially infected person, while a correctional officer could not.

Furthermore, to meet the “work with or in close proximity to” requirement, it would not be enough to show merely that one person in the entire prison had COVID-19. Rather, the Correctional Officers must show that, due to the nature of the correctional officer’s job duties, the officer may come within close proximity to the infected individual, such as by demonstrating that someone had COVID-19 in the particular area of the prison that a Correctional Officer was required to work. For example, employees could show through discovery that they were assigned to Housing Unit A, and an inmate housed in Housing Unit A was infected, and due to the officers’ specific job duties, they could, at any point, be required to be in contact or in close proximity to that infected person. Whether someone is in “close proximity” to an infected person can be determined using the CDC guidance for when someone is a close contact. Thus, an employee would have to show that due to the nature of their job, they may have to be within six feet of an infected person. *See COVID-19 Appendices, Close Contact, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/php/contact-tracing/contact-tracing-plan/appendix.html> (last updated Aug. 11, 2022).*

These limits align with the established case law interpreting the “work with or in close proximity to” requirement. In *Abbott v. United States*, the Court of Federal Claims found that border patrol agents were entitled to hazardous duty pay because, due to their job responsibilities, they might have to enter, and regularly did enter, the

New or Tijuana Rivers, which were contaminated with virulent biologicals, to apprehend undocumented persons. No. 94-424 C, 2002 BL 26479, at *2 (Fed. Cl. Apr. 12, 2002). The court held that the HDP regulations “entitle[d] plaintiffs to hazardous duty pay for performing jobs that *potentially expose* them to virulent biologicals” and that the regulations do not require “*actual exposure* to virulent biologicals.” *Id.* (emphasis added); *see also id.* (finding that there is a difference between “requiring that an employee be *actually at risk*” and “requiring that the employee be *actually exposed*”) (emphasis in original).

Accordingly, employees are entitled to HDP or EDP even during instances where they do not directly handle or come into contact with hazardous materials, to the extent they can show that their duties and assignment placed them at risk of exposure to the hazard. The Correctional Officers should have the chance to show, during discovery, that they were assigned to areas in which COVID-infected persons were located and where they may have been required to come into contact with a COVID-infected person due to their job responsibilities.

V. Are Infected Persons or Surfaces “Primary Containers of Organisms Pathogenic for Man,” as Recited in the EDP Schedule for Distinguishing Between High- and Low-Degree Hazards?

a. *The Definition of High-Degree Hazard Does Not Require Working With “Primary Containers of Organisms Pathogenic for Man”*

In establishing what constitutes an “unusually severe hazard” warranting EDP,¹⁸ OPM promulgated a schedule of hazards. *See* 5 U.S.C. § 5343(c)(4); 5 C.F.R. Pt. 532, Subpt. E, App. A. The “micro-organism” category is divided into high-degree and low-degree hazards. A high degree hazard is defined as:

Working with or in close proximity to micro-organisms which involves potential personal injury such as death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease. These are work situations wherein the use of safety devices and equipment, medical prophylactic procedures such as vaccines and antiserums and other safety measures do not exist or have been developed but have not have practically eliminated the potential for such personal injury.

5 C.F.R. Pt. 532, Subpt. E, App. A. Notably, this definition does not mention “primary containers of organisms pathogenic for man.” *Id.* The high-degree hazard for micro-organisms then provides two, non-exhaustive examples, one of which contains the language at issue: “Direct contact with *primary containers of organisms*

¹⁸ Correctional Officers assigned to custody positions are General Schedule employees who are entitled to HDP. Other workers in the prison, such as cooks, who regularly work with a detail of inmate workers, would be entitled to EDP as Wage-Grade employees.

pathogenic for man such as culture flasks, culture test tubes, hypodermic syringes and similar instruments.” *Id.* (emphasis added).

The low-degree hazard definition is:

Working with or in close proximity to micro-organisms in situations for which the nature of the work *does not require the individual to be in direct contact with primary containers of organisms pathogenic for man*, such as culture flasks, culture test tubes, hypodermic syringes and similar instruments, and biopsy and autopsy material and wherein the use of safety devices and equipment and other safety measures have not practically eliminated the potential for personal injury.

Id. (emphasis added). While this definition does contain the phrase “primary containers of organisms pathogenic for man,” the Correctional Officers dispute the notion that working with such “containers” is a *requirement* to be eligible for high-degree hazard EDP. The plain language of the high-degree hazard definition requires only three elements. First, employees must allege that they worked with or in close proximity to COVID-19. *Id.* Second, they must allege that COVID-19 is a “micro-organism” and that safety precautions have not “practically eliminated the potential for personal injury.” *Id.* Third, the employee must allege that the work involves “potential personal injury such as death, or temporary, partial or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease.” *Id.* That is all that is required under the language of the EDP Schedule.

While it is true that one of the examples of a high-degree micro-organism hazard is “direct contact with primary containers of organisms pathogenic for man,”

see id., that language is in only one out of two, non-exhaustive examples of what could qualify as a high-degree hazard. Reading into the high-degree hazard definition a requirement that employees work with “primary containers of organisms pathogenic to man” would be contrary to the language of the regulation. *See Rosebud LMS Inc. v. Adobe Sys. Inc.*, 812 F.3d 1070, 1074 (Fed. Cir. 2016) (stating that a court should not read a requirement into a statute “where the statute itself does not recite the condition”); *Superior Fireplace Co. v. Majestic Products Co.*, 270 F.3d 1358, 1378 (Fed. Cir. 2001) (J. Dyk, Dissenting) (noting that it is not the court’s “task to read into the statute an implicit, extra-textual requirement”) (internal quotation marks and citations omitted); *see also Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984) (“Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.”).

b. *Infected Persons Are “Primary Containers of Organisms Pathogenic to Man”*

Even assuming *arguendo* that eligibility for high-degree hazard EDP requires an employee to work with “primary containers of organisms pathogenic for man,” the infected persons at issue here qualify as such. COVID-19 is carried by and spread primarily by people.¹⁹ Infected people act as a vessel for the virus, and when they

¹⁹ While the Complaint alleged that the Correctional Officers were exposed to COVID-19 through working with or in close proximity to infected surfaces, as well as people, the Correctional Officers acknowledge that the current science suggests that COVID-19 is unlikely to be transmitted via surfaces. *See SARS-CoV-2 and*

breathe, talk, or cough, droplets and particles containing the coronavirus are expelled, and can infect others. COVID-19 does not survive and thrive outside of humans; we are the *carriers* of the virus.²⁰ Thus, because infected humans are the primary method for transmitting COVID-19, as they contain and incubate the virus, they should be considered “primary containers of organisms pathogenic for man” for purposes of the EDP Schedule. *See* 5 C.F.R. Pt. 532, Subpt. E, App. A.

Lastly, even if the Court disagrees and finds that infected persons do not qualify as “primary containers of organisms pathogenic for man,” that does not preclude a finding that the Correctional Officers are entitled to EDP or HDP. The low-degree hazard definition in the EDP Schedule explicitly states that the work “does not require the individual to be in direct contact with primary containers of organisms pathogenic for man.” *Id.* Accordingly, the Correctional Officers would

Surface (Fomite) Transmission for Indoor Community Environments, CDC (Apr. 5, 2021) <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html> (finding that the infection risk through contaminated surfaces is low). Therefore, while it is still possible for surfaces to be the method of transmission for COVID-19, the primary risk for Correctional Officers comes from working with or in close proximity to infected or potentially infected people. *Id.* (“The principal mode by which people are infected with [COVID-19] is through exposure to respiratory droplets carrying infectious virus.”).

²⁰ Ashley Welch, *How Long is the Coronavirus Infectious When It’s in the Air*, Healthline (Jan. 21, 2022), <https://www.healthline.com/health-news/how-long-is-the-coronavirus-infectious-when-its-in-the-air> (research suggests that the coronavirus “does not survive for long outside of the human host’s body and loses its infectiousness rather quickly”).

still be entitled to the low-degree EDP should the Court find that they are precluded from high-degree EDP. Furthermore, there is no such language or requirement anywhere in the HDP statute or regulation, so a finding that people are not “primary containers of organisms pathogenic for man” should not affect a finding that the Correctional Officers are rightly entitled to HDP.

VI. If the Court Concludes That the Court of Federal Claims Properly Granted Dismissal, to What Extent Could the Underlying Complaint Be Amended to Establish a Plausible Claim for Relief That Satisfies the “Short And Plain Statement” Standard Of RCFC 8?

As an initial matter, the Correctional Officers strongly urge the Court to find that the original Complaint filed contains a “short and plain statement of the claim showing that the pleader is entitled to relief.” RCFC 8. However, should this Court conclude that the Court of Federal Claims properly granted dismissal, the extent to which the Complaint could or could not be amended to establish a plausible claim depends on the grounds of the affirmance.

If this Court agrees with the Court of Federal Claims that the HDP and EDP statutes should be interpreted extremely narrowly to only allow relief for those employees working with virulent biologicals or micro-organisms in laboratory or scientific settings, adopting a so-called “scientist rule,” then no, the Complaint could not be amended to state a claim under that rule and interpretation. The correctional officers at FCI Danbury plainly do not conduct biological experiments with COVID-19, nor do they work in any laboratory or scientific setting. Thus, under the

Government's proposed rule, their job responsibilities would never entitle them to HDP or EDP.

But, to reiterate, the Correctional Officers advocate that this Court reject the "scientist rule" as an untenable and flawed interpretation of the relevant statutes. Adopting the Government's approach would effectively eliminate the ability of employees to receive HDP and EDP; an outcome contrary to the purposes of the statutes when enacted by Congress. *See Princess Cruises, Inc. v. United States*, 201 F.3d 1352, 1362 (Fed. Cir. 2000) ("It is a long-held tenet of statutory interpretation that one section of a law should not be interpreted so as to render another section meaningless."); *see also Charles Adams*, 151 Fed. Cl. at 527 (noting this interpretation would produce "absurd results"). Indeed, it is difficult to imagine a scenario where an employee would be conducting biological experimentation with virulent biologicals or micro-organisms and would not have already had those risks considered in the classification of their job.

Conversely, if this Court does not adopt the "scientist rule," but instead finds that dismissal was appropriate for a lack of detail regarding the nature of the Correctional Officers' duties and potential exposures, then there are ways the Correctional Officers could amend the Complaint to further bolster their claims and provide additional facts regarding their assigned job duties and the circumstances of their repeated accidental exposure to COVID-19. For example, although the

Correctional Officers continue to assert that the allegations in their Complaint sufficiently satisfy the requirements of RCFC 8, the Correctional Officers nevertheless could amend to provide additional details about the specific job duties performed, the nature of those job duties with respect to proximity and contact with inmates, and the types of surfaces and equipment touched. An example of such additional details can be found in another complaint filed for HDP and EDP on behalf of correctional officers, which contains nearly identical claims, but additional detailed facts. *See Abdelrehim v. United States*, Case No. 21-2254 C, Dkt. 8, ¶¶ 30–40.²¹

²¹ While this case is being heard on a motion to dismiss, and thus, the record has not yet been developed, in light of the Court’s question, the Correctional Officers refer the Court to the referenced Amended Complaint in *Abdelrehim v. United States*.

Such additional details include that “Plaintiffs are charged with the principal activity and primary job duty of maintaining the safety and security of the Institution at all times, in significant part by coming into close physical proximity with inmates and other correctional officers,” *id.*, ¶ 30; the “posts and/or positions to which plaintiffs have been assigned within the Institution involve prolonged, close-quarters exposure to coworkers and/or inmates, often in indoor or enclosed settings,” *id.*, ¶ 32, “Plaintiffs regularly interact with inmates and come into close proximity or direct physical contact,” when performing “pat downs” or other searches, *id.*, ¶ 33, Plaintiffs must “physically touch equipment that is regularly handled by coworkers, including but not limited to metal chains, metal accountability chits, keys, handcuffs, radios, radio batteries, and cutdown tools,” *id.*, ¶ 36; Plaintiffs “must also physically touch objects and surfaces throughout the Institution that are regularly handled by coworkers, inmates, and visitors” including “keys, door handles, security gates . . . inmate effects and possessions, work tools, restroom surfaces . . . and other communal objects” *id.*, ¶ 37; Plaintiffs work “in close proximity to inmates and other coworkers potentially infected with COVID-19 when transporting prisoners by bus

CONCLUSION AND RELIEF SOUGHT

For all of these reasons, and for the reasons set forth in the Correctional Officers' opening and reply briefs on appeal, *see* Dkt. Nos. 11, 18, this Court should reverse the decision of the Court of Federal Claims, reinstate the Correctional Officers' Complaint, and remand with instructions to deny the Government's motion to dismiss in full.

Respectfully submitted,

Dated: August 26, 2022

/s/ Molly A. Elkin

Molly A. Elkin

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between institutions, when processing new arrivals . . . and when escorting new arrivals to points within [the Institution.]" *id.*, ¶ 38.

CERTIFICATE OF FILING

I hereby certify that on this 26th day of August 2022, a copy of the foregoing “En Banc Opening Brief for Plaintiffs-Appellants Cody Adams, et al.” was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court’s electronic filing system. Parties may access this filing through the Court’s system.

/s/ Molly A. Elkin

ADDENDUM

Pursuant to Fed. Cir. R. 28(a)(11) and Fed. R. App. 28(f), this Addendum contains the following items:

1. The Judgment and Opinion below, paginated as it appears in the Appendix.
See Fed. Cir. R. 28(c).
2. Position Description for Correctional Officers at FCI Danbury.

In the United States Court of Federal Claims

**No. 20-783 C
(Filed: February 5, 2021)**

CODY L. ADAMS, et al

Plaintiffs

v

JUDGMENT

THE UNITED STATES

Defendant

Pursuant to the court's Opinion And Order, filed February 5, 2021, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiffs' complaint is dismissed for failure to state a claim. No costs.

Lisa L. Reyes
Clerk of Court

By: s/ Anthony Curry
Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is \$505.00.

In the United States Court of Federal Claims

No. 20-783C

(Filed: February 5, 2021)

CODY L. ADAMS, et al.,

Plaintiffs,

V.

UNITED STATES,

Defendant.

Claim by prison guards and food workers for hazardous duty pay or environmental differential pay; 5 U.S.C. §§ 5545(d), 5343(c)(4); work with, and in close proximity to, persons infected with COVID-19 virus

Theodore R. Coploff, McGillivray Steele Elkin LLP, Washington, D.C., for plaintiffs.

Eric E. Laufgraben, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for defendant. With him on the briefs were Jeffrey Bossert Clark, Acting Assistant Attorney General, Robert E. Kirschman, Jr., Director, Allison Kidd-Miller, Assistant Director, and Liridona Sinani, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., as well as Marie C. Clarke, Douglas S. Goldring, and Kathleen Haley Harne, Office of General Counsel, Federal Bureau of Prisons, United States Department of Justice, Washington, D.C.

OPINION AND ORDER

LETTOW, Senior Judge.

Plaintiffs, current and former employees of the Federal Bureau of Prisons, Federal Correctional Institution in Danbury, Connecticut (“FCI Danbury”) have sued the United States, seeking a declaratory judgment, hazardous duty pay, environmental differential pay, overtime pay, interest, and attorneys’ fees and costs. *See* Compl. at 16-22, ECF No. 1. The current and former employees assert that they are entitled under federal law to additional pay due to their “work with or in close proximity to objects, surfaces, and/or individuals infected with” the novel coronavirus.¹ Compl. ¶¶ 25, 30. Defendant has moved to dismiss the complaint pursuant to

¹ The novel coronavirus, or SARS-CoV-2, causes the disease known as COVID-19. See Vivien Williams, *How the Virus that Causes COVID-19 Differs from Other Coronaviruses*, MAYO CLINIC NEWS NETWORK (Mar. 30, 2020), <https://newsnetwork.mayoclinic.org/discussion/how-the-virus-that-causes-covid-19-differs-from-other-coronaviruses/>. While the terms for the

Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (“RCFC”). *See* Def.’s Mot. to Dismiss or, in the Alternative, for a More Definite Statement (“Def.’s Mot.”), ECF No. 9. After briefing, *see* Pls.’ Resp. to Def.’s Mot. (“Pls.’ Resp.”), ECF No. 10; Def.’s Reply to Pls.’ Resp. (“Def.’s Reply”), ECF No. 13, the court held a hearing on December 22, 2020. The motion is ready for disposition.

The court concludes that, in light of binding precedent, plaintiffs’ alleged exposure to the novel coronavirus does not entitle them to compensation pursuant to 5 U.S.C. §§ 5545(d) or 5343(c)(4). Given that plaintiffs’ claim for overtime pay under the Fair Labor Standards Act (“FLSA”) is derivative of their claims for hazardous duty pay and environmental differential pay, this claim must also be dismissed. Because plaintiffs have failed to state a claim upon which relief may be granted, the government’s motion to dismiss is GRANTED and plaintiffs’ complaint is DISMISSED.

BACKGROUND²

The novel coronavirus was first identified in 2019 “as the cause of a disease outbreak that originated in China.” *Coronavirus Disease 2019 (COVID-19)*, MAYO CLINIC (Dec. 22, 2020), <https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963>. COVID-19, a contagious respiratory illness caused by the virus, can result in symptoms ranging from mild to severe. *See Symptoms of Coronavirus*, CENTERS FOR DISEASE CONTROL & PREVENTION (Dec. 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>. On March 11, 2020, the World Health Organization declared the coronavirus outbreak a pandemic.³ The United States continues to struggle with preventing the spread of the virus as states report new infections and deaths every day. *See generally Coronavirus Resource Center*, JOHNS HOPKINS UNIVERSITY & MEDICINE, <https://coronavirus.jhu.edu/map.html> (last visited Feb. 4, 2021).

The virus “can [be] spread by a person being exposed to small droplets or aerosols that stay in the air for several minutes or hours.” *Coronavirus Disease 2019 (COVID-19)*, MAYO CLINIC (Dec. 22, 2020), <https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963>. Infection can also result when “a person touches a surface or object with the virus on it and then touches his or her mouth, nose or eyes, although this isn’t considered to be a main way it spreads.” *Id.* These characteristics enable the virus to spread rapidly in

virus and the disease are often conflated, the novel coronavirus itself is the “virulent biological[]” or “hazardous micro-organism[]” relevant to plaintiffs’ claims. Compl. ¶ 28.

² The recitations that follow do not constitute findings of fact, but rather are recitals attendant to the pending motions and reflect matters drawn from the complaint, the parties’ briefs and records, and documents appended to the complaint and briefs.

³ *See* WHO Director-General’s opening remarks at the media briefing on COVID-19, WORLD HEALTH ORGANIZATION (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

confined spaces, leaving prison populations and staff susceptible to infection. As of February 2021, 2,164 federal inmates and 1,745 staff members of the Bureau of Prisons currently “have confirmed positive test results for COVID-19 nationwide,” while more previously have had the virus or tested positive for the disease, and have recovered. *COVID-19 Update*, FEDERAL BUREAU OF PRISONS (Feb. 4, 2021), <https://www.bop.gov/coronavirus/>. The deaths of 216 federal inmates and 3 staff members have been attributed to the disease. *Id.*

FCI Danbury, which houses over 650 inmates, is a low security federal correctional institution. Compl. ¶¶ 7, 11. The plaintiffs employed at FCI Danbury include a correctional officer, a cook supervisor, and other “current or former correctional worker[s] employed by the United States Department of Justice, Bureau of Prisons, at FCI Danbury.” Compl. ¶¶ 3-7. According to the complaint, over 100 employees and inmates of FCI Danbury have tested positive for COVID-19. Compl. ¶ 17. Plaintiffs filed suit in this court on June 26, 2020, seeking “a declaratory judgment, damages and other relief” pursuant to federal statutes. Compl. ¶ 1. These current and former employees are either general schedule salaried employees eligible for hazardous duty pay pursuant to 5 U.S.C. § 5545(d), or waged employees eligible for environmental differential pay pursuant to 5 U.S.C. § 5343(c)(4). *See* Compl. ¶¶ 33, 43; *see also Adams v. United States*, ___ Fed. Cl. ___, ___, 2020 WL 7334354, at *2 (Dec. 14, 2020) (hereinafter “*Charles Adams*”) (“[H]azardous duty pay is available to general schedule salaried employees, while environmental differential pay is available to waged employees.”). Plaintiffs allege that they are entitled to differential pay due to their “work in or in close proximity to objects, surfaces, and/or individuals infected with” the novel coronavirus. Compl. ¶¶ 36-38, 48-51.

STANDARDS FOR DECISION

Under RCFC 12(b)(6), a complaint will survive a motion to dismiss if it “contain[s] sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). The factual matters alleged “must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Twombly*, 550 U.S. at 555-56 (citations omitted).

When reviewing the complaint, “the court must accept as true the complaint’s undisputed factual allegations and should construe them in a light most favorable to the plaintiff.” *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009) (citing *Papasan v. Allain*, 478 U.S. 265, 283 (1986)) (additional citation omitted). Conclusory statements of law and fact, however, “are not entitled to the assumption of truth” and “must be supported by factual allegations.” *Iqbal*, 556 U.S. at 679. “[N]aked assertion[s]’ devoid of ‘further factual enhancement’” are insufficient to state a claim. *Id.* at 678 (quoting *Twombly*, 550 U.S. at 557); *accord Bradley v. Chiron Corp.*, 136 F.3d 1317, 1322 (Fed. Cir. 1998) (“Conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim.”).

ANALYSIS

I. *Hazardous Duty Pay Pursuant to 5 U.S.C. § 5545(d)*

General schedule salaried federal employees qualify for hazardous duty pay when they are assigned and perform a “duty involving unusual physical hardship or hazard,” unless their employment classification “takes into account the degree of physical hardship or hazard involved in the performance of [their] duties.” 5 U.S.C. § 5545(d). In this respect, the “physical hardship or hazard” must be one that is “not *usually* involved in carrying out the duties of [the] position.” *Id.* (emphasis added). Congress tasked the Office of Personnel Management (“OPM”) with establishing schedules of pay differentials for hazardous duty pay, *see id.*, as well as prescribing regulations necessary for the administration of the statute, 5 U.S.C. § 5548(d). OPM has defined “[d]uty involving physical hardship” as “duty that may not in itself be hazardous, but causes extreme physical discomfort or distress and is not adequately alleviated by protective or mechanical devices, such as . . . exposure to fumes, dust, or noise that causes nausea, skin, eye, ear, or nose irritation.” 5 C.F.R. § 550.902. OPM further defined “[h]azardous duty” as “duty performed under circumstances in which an accident could result in serious injury or death, such as duty performed on a high structure where protective facilities are not used” *Id.*

Under its Schedule of Pay Differentials Authorized for Hazardous Duty Pay, OPM set forth numerous categories of duties involving physical hardship or hazard. 5 C.F.R. Part 550, Subpart I, Appx. A. Among these categories is “work with or in close proximity to . . . [v]irulent biologicals.” *Id.* Plaintiffs rely on this category in asserting their claim for hazardous duty pay. *See* Compl. ¶¶ 32-38. OPM elaborates that the term “[v]irulent biologicals” refers to “[m]aterials 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.” 5 C.F.R. Part 550, Subpart I, Appx. A. The Federal Personnel Manual provides examples of when an employee works “with or in close proximity to . . . [v]irulent biologicals,” including “[o]perating or maintaining equipment in biological experimentation or production[, c]leaning and sterilization of vessels and equipment contaminated with virulent microorganisms,” and “[c]aring for or handling disease-contaminated experimental animals in biological experimentation and production in medical laboratories, the primary mission of which is research and development not associated directly with patient care.” Federal Personnel Manual Supp. 990-2, § 550-E-4, 1973 WL 151518 (Feb. 28, 1973).⁴

In sum, plaintiffs who are current or former general schedule salaried employees of FCI Danbury must establish three elements in order to state a claim for hazardous duty pay: (1) the employee was assigned to and performed work “with or in close proximity to” the novel coronavirus, 5 C.F.R. Part 550, Subpart I, Appx. A; (2) the virus itself is a “[v]irulent biological[],” *id.*; and (3) the employees’ job classifications do not take exposure to the virus into

⁴ While OPM retired the Federal Personnel Manual on December 31, 1993, the publication “continues to be a valuable resource for construing regulations that were promulgated or were in effect” prior to the date of retirement. *Schmidt v. Department of Interior*, 153 F.3d 1348, 1353 n.4 (Fed. Cir. 1998) (citing *Markland v. Office of Pers. Mgmt.*, 140 F.3d 1031, 1034 (Fed. Cir. 1998)).

account, *i.e.*, the employees' exposure to the virus is an "*unusual* physical hardship or hazard," 5 U.S.C. § 5545(d) (emphasis added); *see also* 5 C.F.R. § 550.904(a).⁵

In its motion to dismiss, the government avers that plaintiffs have failed to sufficiently allege that they worked "with or in close proximity to" the novel coronavirus itself, only that they have performed "work with or in close proximity to objects, surfaces, and/or individuals infected with" the virus. Def.'s Mot. at 15 (quoting Compl. ¶¶ 25, 30) (emphasis removed). Plaintiffs counter that the language used in their complaint does not distinguish their claims from the regulation in any meaningful way. Pls.' Resp. at 11.

The Federal Circuit addressed the scope of both 5 U.S.C. § 5545(d) and 5 C.F.R. § 550.902 in *Adair v. United States*, 497 F.3d 1244 (Fed. Cir. 2007). In *Adair*, prison guards employed by the Federal Correctional Institution in Jesup, Georgia sought "enhanced back pay for their exposure to inmates' smoking . . ." *Adair*, 497 F.3d at 1249. The Federal Circuit affirmed the Court of Federal Claims' dismissal of plaintiffs' complaint under RCFC 12(b)(6), emphasizing that 5 U.S.C. § 5545(d) "[c]learly . . . does not cover all physical hardships or hazards, but only those that are 'unusual.'" *Id.* at 1253 (footnote omitted). In concluding that exposure to secondhand smoke was not an "unusual" hardship under the plain meaning of the statute, the court contrasted the prison guards' claim to examples of "unusual physical hardships or hazards" provided by the Chairman of the U.S. Civil Service Commission:

We would visualize assignments such as those requiring *irregular or intermittent participation* in hurricane weather flights, participation in test flights of aircraft during their developmental period or after modification, participation in trial runs of newly built submarines or in submerged voyages of an exploratory nature such as those under the Polar ice fields, and performance of work at extreme heights under adverse conditions, as among those meeting the criteria of unusual physical hardships or hazard. . . . The examples cited above . . . take into consideration, for example, such matters as the need to deliberately operate equipment such as newly developed or modified aircraft beyond its known design capabilities or safe operating limits, and exposure to elements or conditions over which little or no control can be exercised.

Id. at 1254 (quoting *Hazardous Duty Pay: House Report No. 31*, 89th Cong. (1st Sess. 1965)) (emphasis added). While the cited examples were assignments requiring "irregular or intermittent participation," *id.*, secondhand smoke at the prison "was commonly encountered indoors and outdoors," *id.* at 1253. The court also noted that "Congress . . . could not have intended to have included [secondhand smoke] as an unusual risk or hazardous work situation because at the time the statute was enacted, Congress was unaware of the dangers of" exposure to secondhand smoke. *Id.* at 1254.

⁵ "As the statute does not define 'unusual,' [courts should] apply its ordinary meaning. It is clear from a plain reading of the statute that [the term] 'unusual physical hardship or hazard' include[s] those 'not usually involved in carrying out the duties' of an employee's position." *Adair v. United States*, 497 F.3d 1244, 1253 n.2 (Fed. Cir. 2007) (quoting 5 U.S.C. § 5545(d)).

In the present case, plaintiffs encounter an analogous obstacle in their workplace. While secondhand smoke and the novel coronavirus pose distinct risks to human health, neither qualifies as an “unusual” hardship under the plain meaning of 5 U.S.C. § 5545(d). The employees’ potential exposure to the novel coronavirus is not the result of an “irregular or intermittent” assignment, *Adair*, 497 F.3d at 1254 (citation omitted), but appears to stem from their regular duties at FCI Danbury. Plaintiffs do not allege they have performed new duties since the beginning of the pandemic, but that “[a]s a result of plaintiffs’ performance of their official duties . . . [they] have been exposed” to the novel coronavirus. Compl. ¶ 28. Just as the prison guards in *Adair* were exposed to secondhand smoke when their duties of employment “involved the caretaking and monitoring of inmates,” plaintiffs here were and have been allegedly exposed to the novel coronavirus in executing their official duties at FCI Danbury. *See Adair*, 497 F.3d at 1253. “Congress, moreover, could not have intended to have included” exposure to the novel coronavirus “as an unusual risk or hazardous work situation because at the time the statute was enacted, Congress was unaware of the dangers of” the virus. *Id.* at 1254. In light of binding precedent, therefore, exposure to the virus at FCI Danbury cannot be characterized as an “unusual” hardship under 5 U.S.C. § 5545(d).

Congress “left open the possibility,” however, that exposure to the virus “could be covered by the statute by delegating to OPM the authority to establish ‘pay differentials for duty involving unusual physical hardship or hazard.’” *Adair*, 497 F.3d at 1254 (quoting 5 U.S.C. § 5545(d)) (emphasis removed). To date exposure to the novel coronavirus at FCI Danbury does not qualify as either a “duty involving physical hardship” or a “hazardous duty” as defined by OPM. While plaintiffs allege that they “have performed work in or in close proximity to objects, surfaces, and/or individuals infected with” the novel coronavirus “without sufficient protective devices,” Compl. ¶ 36, an allegation of insufficient protective equipment does not establish that the hazard posed by the virus “is not adequately alleviated by protective or mechanical devices,” *Adair*, 497 F.3d at 1255 (noting that secondhand smoke “can be adequately alleviated by protective or mechanic[al] devices, such as ventilation systems); *see* 5 C.F.R. § 550.902.⁶ Furthermore, plaintiffs’ work cannot be categorized as a “hazardous duty,” as potential exposure

⁶ OPM’s guidance regarding hazardous duty pay based on potential exposure to the novel coronavirus further calls into question plaintiffs’ claim under 5 U.S.C. § 5545(d):

The hazard pay differential cannot be paid to an employee who may come in contact with the virus or another similar virus through incidental exposure to the public or other employees who are ill rather than being exposed to the virus during the performance of assigned duties (e.g., as in the case of a poultry handler or health care worker). Also, the virus must be determined to be likely to cause serious disease or fatality for which protective devices do not afford complete protection.

OPM Memorandum No. 2020-05, Attach. A at 12 (Mar. 7, 2020), *available at* <https://go.usa.gov/xG2KS>. While plaintiffs allege that over 100 employees and inmates of FCI Danbury have tested positive for COVID-19, Compl. ¶ 17, the widespread nature of the pandemic raises the probability that plaintiffs have come into contact with the virus via “incidental exposure” as described by OPM.

to the virus is dissimilar to an “accident . . . such as duty performed on a high structure where protective facilities are not used” 5 C.F.R. § 550.902. Plaintiffs’ claim for hazardous duty pay, therefore, lacks textual support from the relevant statute, the corresponding regulation, and binding precedent.⁷

II. *Environmental Differential Pay Pursuant to 5 U.S.C. § 5343(c)(4)*

While general schedule salaried employees are eligible for hazardous duty pay in certain scenarios, waged employees qualify for environmental differential pay “for duty involving unusually severe working conditions or unusually severe hazards” 5 U.S.C. § 5343(c)(4). OPM promulgated 5 C.F.R. § 532.511 in response to the statute, authorizing “environmental differential pay when [an employee is] exposed to a working condition or hazard that falls within one of the categories approved by the Office of Personnel Management.” 5 C.F.R. § 532.511(a)(1). The categories upon which plaintiffs rely are “work[] with or in close proximity to micro-organisms” which present a “high degree hazard,” and “work[] with or in close proximity to micro-organisms” which present a “low degree hazard.” 5 C.F.R. Part 532, Subpart E, Appx. A. OPM elaborated on the “high degree hazard” category in Appendix A, stating that it covers “work situations wherein the use of safety devices and equipment, medical prophylactic procedures such as vaccines . . . and other safety measures do not exist or have been developed but have not practically eliminated the potential for . . . personal injury.” *Id.* If waged employees seek environmental differential pay under this category, their work must “involve[] potential personal injury such as death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease.” *Id.* The examples cited by OPM for “work[] with or in close proximity to micro-organisms” posing a “high degree hazard” include “[d]irect contact with primary containers of organisms pathogenic for man such as culture flasks, culture test tubes, hypodermic syringes and similar instruments,” and “cultivating virulent organisms on artificial media.” *Id.* The category of “work[] with or in close proximity to micro-organisms” which pose a “low degree hazard” encompasses “situations for which the nature of the work does not require the individual to be in direct contact with primary containers of organisms pathogenic for man” *Id.*

Plaintiffs seeking environmental differential pay, therefore, must show that (1) they “work[ed] with or in close proximity to” the novel coronavirus; (2) the virus is a “micro-organism” and safety precautions “have not practically eliminated” the risk of infection and

⁷ The court acknowledges the recent decision in *Charles Adams*, in which correctional workers at the Bureau of Prisons Federal Medical Center in Lexington, Kentucky sued the United States for hazardous duty pay, environmental differential pay, and overtime pay. *See Charles Adams*, ___ Fed. Cl. ___, 2020 WL 7334354. Plaintiffs assert that *Charles Adams* presented and resolved “near-identical factual and legal issues” to the case currently before the court. *See* Pls.’ Notice of Suppl. Authority at 4, ECF No. 16. To the extent that the facts and legal issues in the present case parallel those presented in *Charles Adams*, the court respectfully disagrees with the decision in that case to hold that the plaintiffs there had “stated a claim for relief that rises above the speculative level.” *Charles Adams*, ___ Fed. Cl. ___, 2020 WL 7334354, at *6. The Federal Circuit’s interpretation of the relevant terms in 5 U.S.C. § 5545(d), 5 C.F.R. § 550.902, and OPM’s schedule of pay differentials precludes this court from concluding that plaintiffs have stated a claim for hazardous duty pay.

“personal injury;” and, if seeking pay under the “high degree hazard category, (3) plaintiffs’ duties “involve[] potential personal injury such as death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease.” 5 C.F.R. Part 532, Subpart E, Appx. A.

Again, *Adair* compels the court to conclude that plaintiffs have failed to state a claim. Just as exposure to the novel coronavirus is not “unusual” under § 5545(d), such exposure cannot be characterized as “unusually severe” under § 5343(c)(4). Plaintiffs in *Adair* argued that exposure to cigarette smoke entitled them to environmental differential pay under two categories: “Poisons (toxic chemicals)—high degree hazard . . . and . . . Poisons (toxic chemicals)—low egress hazard.” *Adair*, 497 F.3d at 1256-57. In holding that the plaintiffs in *Adair* had failed to state a claim under § 5343, the Federal Circuit emphasized the importance of the examples of “high or low degree hazards provided in the regulations Although the examples are not exhaustive, they all describe scenarios where the job assignment requires directly or indirectly working *with* toxic chemicals or containers that hold toxic chemicals as part of a job assignment” *Id.* at 1257-58 (emphasis in original). Notably, the Federal Circuit pointed out that “[t]he examples do not cover situations in which the employees work with inmates who *incidentally* smoke, for there is no work ‘*with*’ [second-hand smoke] in this context.” *Id.* at 1258 (emphasis added).

In the present case, plaintiffs have not worked “with” the novel coronavirus, but “with or in close proximity to objects, surfaces, and/or individuals infected with” the virus. Compl. ¶ 48. In other words, plaintiffs allegedly have worked with objects and surfaces infected with the virus, as well as “with inmates who incidentally” have COVID-19. *Adair*, 497 F.3d at 1258. OPM’s examples of “work[] with or in close proximity to micro-organisms” are instructive. As correctional officers, cook supervisors, and other employees at FCI Danbury, plaintiffs’ duties are not analogous to those which require “[d]irect contact with primary containers of organisms pathogenic for man such as culture flasks, culture test tubes, hypodermic syringes and similar instruments,” or “cultivating virulent organisms on artificial media.” 5 C.F.R. Part 532, Subpart E, Appx. A.

Plaintiffs point to *Abbott v. United States*, 47 Fed. Cl. 582 (2000), in arguing that *Adair* does not foreclose their claims. Pls.’ Resp. at 4; Hr’g Tr. 34:17 to 36:5 (Dec. 22, 2020). In *Abbott*, the court concluded that plaintiffs had stated a well-pleaded claim insofar as they allegedly worked near contaminated rivers containing “virulent biologicals.” *Abbott*, 47 Fed. Cl. at 584. To be sure, *Adair* addressed categories involving “toxic chemicals,” *Adair*, 497 F.3d at 1256-57, while plaintiffs allege exposure to “virulent biologicals,” as in *Abbott*, 47 Fed. Cl. at 584, and “micro-organisms,” Compl. ¶ 28. Even putting aside the fact that *Adair* was decided after *Abbott*, the phrase “with or in close proximity to” is used in OPM’s schedules for differential pay when working with “virulent biologicals,” “micro-organisms,” and “toxic chemicals.” See 5 C.F.R. Part 550, Subpart I, Appx. A; 5 C.F.R. Part 532, Subpart E, Appx. A. *Adair* addressed a different category under the schedule for environmental differentials, but this detail does not render the Federal Circuit’s decision irrelevant. “[T]he substantial relation[s] between” the categories and schedules promulgated by OPM “present[] a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.” *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (quoting *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986)) (additional

citations and quotation marks omitted). Therefore, the Federal Circuit's interpretation of the phrase "with or in close proximity to" in the context of environmental differential pay is binding on this court.⁸

III. Overtime Pay Under the Fair Labor Standards Act

Plaintiffs also claim that they "have been unlawfully deprived of overtime compensation" under FLSA. Compl. ¶ 58. The government violated FLSA, plaintiffs allege, "by failing to include hazardous duty pay and environmental differential payments . . . in the regular rate of pay at which FLSA overtime is paid." Compl. ¶ 57. The government counters that plaintiffs' failure to state a claim under either 5 U.S.C. § 5545(d) or § 5343(c)(4) precludes recovery additional overtime pay. Def.'s Mot. at 23.

The court concurs with the government, because plaintiffs' claim for overtime pay under FLSA is derivative of their claims for hazardous duty pay and environmental differential pay. FLSA provides that an employee who works over 40 hours in a workweek is entitled to "compensation for his employment in excess of the [40] hours . . . at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). The "regular rate" which employees of FCI Danbury were paid would be higher if they could claim entitlement to hazardous duty pay or environmental differential pay. Plaintiffs' failure to state a claim for these payments, however, bars their claim under FLSA as well.

CONCLUSION

For the reasons stated, the government's motion to dismiss is GRANTED. Plaintiffs' complaint shall be DISMISSED for failure to state a claim. The clerk shall enter judgment accordingly.

No costs.

It is so **ORDERED**.

s/ Charles F. Lettow

Charles F. Lettow
Senior Judge

⁸ The court in *Charles Adams* held that plaintiffs had sufficiently pled their claim for environmental differential pay to survive the motion to dismiss. 2020 WL 7334354, at *6. Here also, however, the Federal Circuit's interpretation of the term "with or in close proximity to," as well as its emphasis on the examples provided in OPM's schedule of environmental differentials, compel the court to dismiss plaintiff's environmental differential claim. Compare Compl. ¶ 48, with *Adair*, 497 F.3d at 1258 (concluding from the examples provided in 5 C.F.R. Part 532, Subpart E, Appx. A that plaintiffs did not work "with" secondhand smoke).

U.S. DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF PRISONS

A. Reason for Classification Action								
X	Standardized Position					MRN: SPA021		
	New Position							
	Replace/Inactivate MRN:							
B. Classification								
Official Title:					Pay	Occupational	Function	
CORRECTIONAL OFFICER					Plan	Series	Code	Grade
					GS	0007		07
Working Title:					Local Classifier:		Date:	
SENIOR OFFICER					Regional Classifier:		Date:	
					PPM Classifier: /s/		Date: 05/22/01	
C. Organizational Structure								
1 st	Department of Justice				4 th			
2 nd	Federal Bureau of Prisons				5 th			
3 rd					6 th			
Duty Station (If Different): Various								
D. Supervisor's Certification								
I certify that this is an accurate statement of the major duties and responsibilities of the position and its organizational relationships and that the position is necessary to carry out Government functions for which I am responsible. This certification is made with the knowledge that this information is to be used for statutory purposes relating to appointment and payment of public funds and that false or misleading statements may constitute violations of such statute or their implementing regulations.								
Signature: /s/					Date:			
Name/Title: Michael B. Cooksey, Assistant Director, Correctional Programs Division								
E. Classification Certification								
I certify that this position has been classified as required by Title 5, U.S. Code, in conformance with standards published by the OPM or, if no published standard applies directly, consistently with the most applicable published standards.								
Signature: /s/					Date: 05/22/01			
Name/Title: Jeff Barnes, Chief, Pay and Position Management								
F. Remarks					INCUMBENT:			
Standards Referenced: Correctional Officer Series, GS-0007, TS-4, 4/71. FLSA: Non-Exempt								
Position Review History	Initials	Date	Initials	Date	Initials	Date	Initials	Date
Employee (Optional)								
Supervisor								
Classifier								

MASTER RECORD/INDIVIDUAL POSITION DATA									
A. KEY DATA									
1. FUNCTION:		2. DEPT-CD/AGCY-BUR-CD:	DJ FP						
3. SON:		4. MR-NO:	SPA021	5. GRADE:		6. IP-NO:			
B. MASTER RECORD									
1. PAY-PLAN:				2. OCC-SER:	0007				
3. OCC-FUNC-CD:				4. OFF-TLE-PF/CD/SF:		0001			
5. OFF-TITLE:	CORRECTNL OFFCR								
6. HQ-FLD-CD:	2			7. SUP-CD:	8				
8. CLASS-STD-CD:				9. INTERDIS-CD:					
10. DT-CLASS:	05 24 01			11. EARLY-RET-CD:	1				
12. INACT/ACT:	A			13. DT-ABOL:					
14. DT-INACT/REACT:				15. AGCY-USE:					
16. INTERDIS-SER:									
17. INTERDIS-PF/CD/SF:									
18. PATCO-CD:	(SYSTEM GENERATED)			19. PROF-CATEGORY:					
C. INDIVIDUAL POSITION									
1. FLSA-CD/PAY-TBL:	N		2. FIN-DS/PROC-INTG:						
3. POS-SCHED:				4. POS-SENS/ADP/DRUG-TS:		N	Y		
5. COMP-LEV:	0000			6. WK-TITLE-CD:	4585				
7. WK-TITLE:	SR OFFCR								
8. ORG-STR-CD:	FP 30								
9. VAC-REV-CD:				10. TARGET-GD:	07				
11. LANG-REQ:				12. PROJ-DTY-IND:					
13. DUTY-STATION:				14. BUS-CD/COPR-ST:	1018	Blank			
15. DT-LST-AUDIT:	05 24 01			16. PAS-IND/LEO-IND:	Blank	A			
17. DATE-EST:				18. GD-BASIS-IND:					
19. DT-REQ-REC:				20. NTE-DT:					
21. POS-ST-BUD:	Y			22. MT-REV/CL-ACT-CD:					
23. DT-EMP-ASGN:	(SYSTEM GENERATED)			24. DT-ABOL:					
25. INACT/ACT:				26. DT-INACT/REACT:					
27. ACCTG-STAT:	3100			28. INT-ASGN-SER:					
29. AGCY-USE:				30. OBLIG-SSN:	(SYSTEM GENERATED)				
31. DT-VACATED:	(SYSTEM GENERATED)			32. INCUMBENT-SSN:	(SYSTEM GENERATED)				
REMARKS:									

POSITION DESCRIPTION

Correctional Officer (Senior Officer) GS-0007-07

INTRODUCTION

Incumbent is a member of the Correctional Services Department at a Bureau of Prisons (BOP) federal correctional facility. Serves as a Senior Officer and performs the full range of duties and responsibilities for detention, correctional supervision, protection, control and accountability of inmates. This is a progressively responsible position in which the incumbent performs specific duties of the various correctional posts to which assigned.

MAJOR DUTIES AND RESPONSIBILITIES

Provides supervision, care and correctional treatment of inmates and guidance to lower-graded Correctional Officers. Incumbent is concerned with maintenance of institution security contributing to the health and welfare of the inmates and the promotion of good public relations.

As an employee in a federal correctional facility, the incumbent is subject to arduous, adverse and stressful working conditions and environments.

Enforces rules and regulations governing facility security, inmate accountability and inmate conduct to ensure judicial sanctions are carried out and inmates remain in custody.

From time to time, may be authorized to carry firearms and to use physical force, including deadly force, to maintain control of inmates.

Is subject to being in such hostile or life-threatening situations as riots, assaults and escape attempts. Exercises sound judgment in making instantaneous decisions affecting life, well-being, civil liberties and property which cannot be reviewed prior to implementation and which may subject the decision-maker to legal liabilities, including personal sanctions.

Must successfully complete specialized training in firearms proficiency, self defense, management of medical emergencies, safety management and interpersonal communication skills.

Must adhere to high standards of personal conduct both on and off the job and is subject to sanctions for misconduct.

During institution emergencies or other periods of heavy workload or limited staff, may be required to work long and irregular hours, unusual shifts, Sundays, holidays and unexpected overtime.

Information as to operations and procedures is provided by post orders, BOP program statements, local supplements, custodial manual, internal correspondence and staff meetings. Incumbent must be flexible and have a broad knowledge base to use own initiative in the resolution of problem situations.

NATURE OF ASSIGNMENT

Supervises and instructs inmates regarding proper sanitation, personal hygiene and work habits. On a rotating basis, performs the duties and responsibilities of the majority of duty posts with relative independence. On occasion is assigned to train and provide assistance to lower-graded Correctional Officers.

Must maintain the control and discipline of inmates in such areas as the auditorium, housing units, segregation, recreation areas, dining room, etc.

Escorts inmates to various cities or states for court appearances, bedside visits, funerals, etc. On occasion, may be assigned to transport federal prisoners on a BOP bus.

Incumbent has the authority to enforce criminal statutes and/or judicial sanctions, including investigative, arrest and/or detention authority on institution property. When necessary, incumbent also has the authority to carry firearms and exercise appropriate force to establish and/or maintain control over individuals. When conditions warrant, the employee may enter into hostile or life threatening situations and may be required to make decisions affecting the life, well-being, civil liberties, and/or property of others. The actions of the incumbent could result in personal sanctions and legal liability.

Incumbent must successfully complete specialized training in firearms proficiency, self defense, management of medical emergencies, safety management and interpersonal communication skills.

Supervises and instructs inmates in the proper use and care of tools and equipment. Maintains strict control over hazardous tools,

locks, keys, and other items that could be used to effect an escape or cause injury to staff and/or inmates.

Possesses a thorough knowledge of BOP regulations to enforce security measures and protect life and property. Work within a prison environment requires a special ability for alertness requiring keen mental and physical effort. Must be aware of group or individual tensions, alert to unpredictable behavior, and generally sensitive to signs of trouble which could result in injury and reports any abnormal behavior or attitudes to the correctional supervisors or other higher authorities.

Initiates and participates in the searching of inmates, inmate housing units or inmate work areas to prevent the introduction of contraband.

Skill in the identification of narcotics and narcotic paraphernalia.

Knowledge and ability to apply counseling and guidance skills and techniques in order to effectively influence the attitudes, behavior and work habits of inmates.

Prepares written reports such as incident reports, minor work orders, memos of involvement in specific incidents, and accident or injury reports.

Supervises inmate movement and maintaining control of assigned areas of responsibility within the institution.

Maintains a working knowledge of radio and other electronic equipment used.

Supervises inmates in living quarters and instructing them in proper housekeeping and sanitation.

Remains constantly alert and reporting observations regarding inmate identification, attitudes, behavior and association to higher authorities to prevent possible incidents.

Works in a variety of positions with varying complexity. Must be knowledgeable enough to work for a brief period of time in more responsible positions such as Front and Rear entrances, Control Center, Visiting Room, and Special Housing Units. Required to respond promptly to any emergency situation such as escape, fog patrol, riots, major disturbances, etc. Is expected to keep abreast of institution and BOP procedures and be familiar with the physical layout of the facility.

LEVEL OF RESPONSIBILITY

Works under the immediate supervision of a Lieutenant from whom he/she receives oral and written instructions. May also receive direction and guidance from Senior Officer Specialists and other Correctional Officers. Guidance may also be received from the Captain, Associate Warden(s), and other supervisors. Receives specific training in preparation for increased responsibilities. Work is reviewed by means of evaluation of written reports, oral reports, and infrequent observation of certain details by supervisors.

May be required to provide orientation and supervision to lower-graded Correctional Officers and assist them in the performance of their duties.

Possesses initiative, sound judgement, a positive approach and the ability to make on-the-spot decisions.

May be required to help conduct training sessions as a means to effectively instruct other officers in the proper performance of duties.

Has comprehensive working knowledge of the principles and techniques of penology to effectively advise and counsel inmates regarding domestic, institutional, emotional, and adjustment problems. Due to experience in working a variety of posts, incumbent recognizes unusual or abnormal situations and acts according to policies, procedures and directives. Must be able to work with all types of inmates, including those with emotional disorders and disruptive patterns, in an effective, firm and fair manner.

The work performed is within a federal prison and the incumbent is subject to possible hostage and assault situations. The duties of this position require frequent direct contact with individuals in confinement who are suspected or convicted of offenses against the criminal laws of the United States. Daily stress and exposure to potentially dangerous situations such as physical attack are an inherent part of this position; consequently, it has been designated as a law enforcement position. Accordingly, the incumbent is covered under the special retirement provisions for law enforcement officers contained in Chapters 83 and 84 of Title 5, United States Code.

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT****CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS****Case Number:** 21-1662**Short Case Caption:** Cody Adams, et al. v. United States**Instructions:** When computing a word, line, or page count, you may exclude any items listed as exempted under Fed. R. App. P. 5(c), Fed. R. App. P. 21(d), Fed. R. App. P. 27(d)(2), Fed. R. App. P. 32(f), or Fed. Cir. R. 32(b)(2).

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because it meets one of the following:

- ☒ the filing has been prepared using a proportionally-spaced typeface and includes 11,163 words.
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Date: 08/26/2022Signature: /s/ Molly A. ElkinName: Molly A. Elkin