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# Decisions of The Comptroller General of the United States

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## [B-115398]

**Energy—Clinch River Breeder Reactor Project—Termination Proposed**

Congress' failure to approve fiscal year 1984 monies for the Clinch River Breeder Reactor Project, either specifically in appropriations or in legislative history, allows the Energy Department to invoke the provision set forth in section 4(i) of the Project justification data and in its contracts calling for termination when there is "insufficiency of project funds to permit the effective conduct of the project." B-115398.33, June 23, 1977; B-164105, December 5, 1977; and B-164105, March 10, 1978, are distinguished.

**Matter of: Propriety of Energy Department's Terminating the Clinch River Breeder Reactor Project, December 1, 1983:**

A Department of Energy certifying officer asks whether available fiscal year 1983 appropriations intended for the Clinch River Breeder Reactor Project<sup>1</sup> (the Project) may be used for terminating the Project. For the reasons given below, we do not object to that use. The situation discussed in B-115398.33, June 23, 1977, B-164105, December 5, 1977, and B-164105, March 10, 1978, is distinguishable from the present case, as will be explained later.

*Background*

The Project began in 1969. In that year, pursuant to section 106 of Public Law 91-44, 83 Stat. 46, 47, the Atomic Energy Commission was authorized to study the ways in which a liquid metal fast breeder reactor demonstration project could be designed. The legislation required the Commission to submit criteria for the Project planning stage to the Joint Committee on Atomic Energy. The following year, the Congress expanded the Project to authorize the design, construction, and operation of a breeder reactor. Pub. L. No. 91-273, 84 Stat. 299, 300-01. The 1970 authorization required the Commission to submit criteria for the Project's construction phase to the Joint Committee for a 45 day lie-and-wait period.

In 1975, the authorizing language was amended again, though not in substance. Pub. L. No. 94-187, 89 Stat. 1063, 1069-70. The 1970 authorization, as amended in 1975, provides the current authority for the project.<sup>2</sup>

<sup>1</sup> Often referred to as the CRBRP.

<sup>2</sup> In pertinent part, the text reads:

"Sec. 106. LIQUID METAL FAST BREEDER REACTOR DEMONSTRATION PROGRAM—FOURTH ROUND.—(a) The Energy Research and Development Administration (ERDA) is hereby authorized to enter into cooperative arrangements with reactor manufacturers and others for participation in the research and development, design, construction, and operation of a Liquid Metal Fast Breeder Reactor powerplant, in accordance with criteria approved by the Joint Committee on Atomic Energy, without regard to the provisions of section 169 of the Atomic Energy Act of 1954, as amended. Appropriations are hereby authorized \* \* \* for the aforementioned cooperative arrangements as shown in the basis for arrangements as submitted in accordance with subsection (b) hereof \* \* \* ."

"(b) Before ERDA enters into any arrangement or amendment thereto under the authority of subsection (a) of this section, the basis for the arrangement or

Pursuant to the 1975 amendment, the Energy Research and Development Administration (ERDA) submitted criteria and justification data to the Joint Committee on Atomic Energy. The criteria called for the design, construction and operation of a liquid metal fast breeder reactor plant and set forth design requirements and plant objectives. The justification data contain much of the same information, and also provide an analysis of the relationship and responsibilities of the principal parties involved in the Project.

Section 4(i) of the justification data provides that one of the criteria justifying termination prior to the Project's completion is "insufficiency of project funds to permit the effective conduct of the project." (The principal Project Agreement contains substantially the same provision.) Both the criteria and justification data were approved by the Joint Committee. Modifications in the Proposed Arrangements for the Clinch River Breeder Reactor Demonstration Project: Hearings Before the Joint Comm. on Atomic Energy, 94th Cong., 2d Sess. 4, 522 (April 14 and 29, 1976). Although the justification data are not specifically mentioned in the authorizing legislation, as are the criteria, the colloquy between former Congressman Moss and Joint Committee Counsel William Parler during the cited hearings suggest that they had the same status:

Representative Moss. If there is a conflict between the contract [the Cooperative Arrangement] provisions and the criteria, which controls?

Mr. Parler. The criteria and the justification data which the Committee approved. Modifications in the Proposed Arrangements for the Clinch River Breeder Reactor Demonstration Project: Hearings before the Joint Comm. on Atomic Energy, 94th Cong., 2d Sess. 4 (April 14 and April 29, 1976).

The following year, Senator Henry Jackson, then Joint Committee Vice-Chairman, asked us about the propriety of the President's proposal (1) to defer some \$31.8 million in budget authority intended for the Project, and (2) to significantly curtail the Project. In furtherance of the proposal, ERDA submitted amended criteria and justification data to the Joint Committee, essentially calling for the Project's discontinuance.

In B-115398.33, June 23, 1977, we concluded that appropriated funds could not be spent on curtailing the Project. We found that the criteria already approved by the Joint Committee, including the stated objective of successfully completing, operating and demonstrating the usefulness of a breeder reactor powerplant, were as much a part of the authorizing legislation "as if they were explicitly stated in the statutory language itself." Proposed amendments to the criteria contemplated by the authorizing legislation were

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amendment thereto which ERDA proposes to execute \* \* \* shall be submitted to the Joint Committee on Atomic Energy, and a period of forty-five days shall elapse while Congress is in session. \* \* \* *Provided, further,* That such arrangement or amendment shall be entered into in accordance with the basis for the arrangement or amendment submitted as provided herein: \* \* \*

The Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, 577-78, directed the Department of Energy to assume the functions of the Energy Research and Development Administration.

only those which would have been consistent with completing the Project. Thus, we found that by both expending appropriations intended for the Project on, and attempting to have the Joint Committee<sup>3</sup> approve amended criteria and justification data calling for, the Project's curtailment, ERDA would have been in conflict with the authorizing legislation. Moreover, we stated that such expenditures would have violated a statutory requirement that appropriations be spent only on the objects for which they were made, 31 U.S.C. § 1301. In two subsequent decisions, we sustained this conclusion, particularly in the light of a Supplemental Appropriation Act for FY 1978 (Pub. L. 95-240, March 7, 1978, 92 Stat. 107), which specifically earmarked \$80,000,000 for the Project.

Between 1975 and 1983, first ERDA, and then its successor, the Department of Energy, continued the Project. The Project usually has been funded from lump-sum appropriations for operating expenses, e.g., Pub. L. No. 95-96, 91 Stat. 797, or operating expenses for energy supply, research and development activities, e.g., Pub. L. No. 97-88, 95 Stat. 1135, 1142: rarely has there been a specific appropriation for the Project. Through fiscal year 1983, the amounts intended for the Project have been indicated in committee reports accompanying the appropriation act which provided the lump-sum for operations. For example, in fiscal year 1977, the Committee report of both houses designated \$534,760,000 for the Project. H.R. Rep. No. 1223, 94th Cong., 2d Sess. 20 (1976); S. Rep. No. 960, 94th Cong., 2d Sess. 16 (1976). In fiscal 1984, however, no monies have been so designated.

The Department has now informed us that it intends to terminate the Project, and, that as of October 31, 1983, it had on hand some \$47 million, obligated but unexpended, and \$237,000 unobligated, no-year funds, designated for the Project but which it would like to use for termination instead.

### *Discussion*

The Department has presented a number of arguments supporting its position that it should be able to use the mentioned funds for termination activities. First, it maintains that our 1977 decision overlooked the fact that the legislation authorizing the Project was discretionary rather than mandatory. Thus, it suggests that the Energy Department is not legally required to carry out the Project and may terminate it. A Departmental memorandum also contends that Congress' support for the Project has changed substantially, and by not earmarking monies for the Project in fiscal 1984, Congress showed its intent not to continue the Project to completion. The same memorandum suggests that the termination provision in the Justification data and the contract permits the Department to

<sup>3</sup> The Joint Committee subsequently was abolished by Pub. L. No. 95-110, 91 Stat. 884.

end the Project if sufficient funds are not available to continue it effectively.

We agree with the Department of Energy that the legislation authorizing construction of a breeder reactor was not phrased in mandatory terms. Had the authorizing act provided that the agency "shall" or "must" carry out this Project, we would have interpreted the ensuing lump-sum appropriations as incorporating this requirement by reference. See B-159993, September 1, 1977. In the case of the breeder reactor program, section 106 of Pub. L. 91-273, as amended, authorized but did not compel the agency to undertake the Project in the first place.

There was no disagreement with this principle in B-115398.33, June 23, 1977. However, by the time the question of the authority to terminate came before us, the agency had already decided to enter into the program. It had developed detailed criteria and justification data, subsequently approved by the Joint Committee, and had entered into firm cooperative arrangements with three contractors consistent with these criteria and data. It was our view that the agency's proposals to continue the program only with respect to systems design activities did "not fulfill major objectives of the existing JCAE approved statutory criteria; nor the object of the authorization itself—to operate an LMFBR demonstration plant." In other words, having decided to undertake the Project, the agency was bound to proceed in accordance with the approved criteria and justification data.

This view was further strengthened by the provisions of the fiscal year 1978 supplemental appropriations act, which we considered in B-164105, December 5, 1977 and March 10, 1978. (The Act had not yet been signed into law when we wrote the December 5 decision but was subsequently enacted as Public Law 95-240 on March 7, 1978.) That Act as mentioned earlier, specifically earmarked \$80 million for the Project. The legislative history made it quite clear that the funds were intended to further the statutory objectives of the authorization act and could not legally be spent for any other purpose.

Congressional support for the Project has changed substantially since we rendered our earlier decisions. Concern about the Project's continuance has been reflected in committee reports for several years. Thus, the Conference and the Senate Reports accompanying the Energy and Water Development Appropriation Act, 1982, Pub. L. No. 97-88, 95 Stat. 1135, both suggested that funds intended for the Project could be expended on an alternate project as might be approved by authorizing legislation. H.R. Rep. No. 345, 97th Cong., 1st Sess. 24 (1981); S. Rep. No. 256, 97th Cong., 1st Sess. 94 (1981). The following year, the Conference report accompanying the Joint Resolution Continuing Appropriations for Fiscal Year 1983, Pub. L. No. 97-377, 96 Stat. 1830, called for the continuation of funding at fiscal year 1982 levels, but directed that the Energy Department

"not initiate construction of any permanent facility structures or place any additional major equipment orders during the period of this resolution." H.R. Rep. No. 980, 97th Cong., 2d Sess. 186 (1982). The report also directed that up to a million dollars be available to vigorously explore proposals, including a reconsideration of the original cost-sharing arrangement, that would reduce Federal budget requirements for the Project or Project alternate, and secure greater participation from the private sector. *Id.*

Thus far in fiscal 1984, no monies have been designated for the Project. The Conference report accompanying the Joint Resolution Continuing Appropriations for Fiscal Year 1984, Pub. L. No. 98-107, 97 Stat. 733, states:

The Conferees have deferred consideration, without prejudice, of additional funding for the CRBR project. Until Congress acts, the Department should maintain all options and not undertake any new activities relating to CRBR including an initiation of any construction. H.R. Rep. No. 397, 98th Cong., 1st Sess. 10 (1983).

The language in the House and Senate reports accompanying the fiscal year 1984 Energy and Water Development Appropriations bill, H.R. 3132, 98th Cong., 1st Sess., is similar. H.R. Rep. No. 217, 98th Cong., 1st Sess. 81; S. Rep. No. 153, 98th Cong., 1st Sess. 103-04 (1983).

There is some conflict in the Congressional floor debates about Congress' intention, as expressed in the cited reports. Thus, Congressman Whitten, Chairman of the House Appropriations Committee, appeared to agree with Congressman Ottinger's<sup>4</sup> suggestion that the language in the Conference report that applied to Clinch River was not intended to overcome the Secretary of Energy's position that if funds were not designated for the Project by October 1, 1983, the Project would effectively be in termination. 129 Cong. Rec. H7814-15 (daily ed. Sept. 30, 1983). On the other hand, in response to Senator Baker's<sup>5</sup> question about the Senate Appropriations Committee's intentions, Senator Hatfield, Chairman of that committee, said that "[b]y use of funds previously appropriated for CRBR but unobligated or private contributions, the project should be continued so as to maintain all options of the Congress in considering the DOE's August 1, 1983, CRBRP alternative financing plan during the period of this continuing resolution" and "the Department should take no action \* \* \* that would constrain or inhibit proceeding with the project with appropriated funds or alternative financing, should Congress act to continue funding for the project." 129 Cong. Rec. S13183-84 (daily ed. Sept. 29, 1983); 129 Cong. Rec. S13341-42 (daily ed. Sept. 30, 1983) (Colloquy between Senators Baker and Hatfield).

Soon after passage of the Joint Resolution Continuing Appropriations for Fiscal Year 1984, proponents of the Project attempted to

<sup>4</sup> Congressman Ottinger is Chairman of the House Subcommittee on Energy Conservation and Power, Committee on Energy and Commerce.

<sup>5</sup> Senator Baker has strongly advocated continuing the Project.

amend a 1984 Supplemental Appropriations bill, H.R. 3959, 98th Cong., 1st Sess, to provide \$1.5 billion to complete the Project. However, by a vote of 56-40, the Senate tabled the amendment. 129 Cong. Rec. S14613-44 (daily ed. Oct. 26, 1983).

The statements in the committee reports and floor debate discussed above show that Congress' support for the Project has diminished considerably from that demonstrated in 1977. By suggesting an alternate Project in fiscal year 1982, and directing limitations on construction and placement of major equipment orders in fiscal year 1983, the Congress showed its concern with how the Project was proceeding. Moreover, by not designating any funds for the Project in fiscal year 1984, and by directing that the Department not undertake new Project activities, the Congress demonstrated further erosion of its support for the Project. The tabling of the alternate financing plan during consideration of the fiscal year 1984 Supplemental Appropriations bill appears to be the final blow, although we acknowledge that it is not clear from the legislative histories of the Joint Resolution Continuing Appropriations for Fiscal Year 1984 and the 1984 Supplemental Appropriations bill whether the Congress intends the Energy Department to proceed with the Project on a limited basis, adopt an alternate, or begin termination. Nevertheless, we do not think the Department is unreasonable in concluding that further funding for the Project is not likely to be forthcoming. We think this provides the Department with a legal basis for terminating the Project.

As mentioned earlier, there is a specific termination provision in the justification data, and in the contractual documents as well, allowing for termination prior to the Project's completion in the event of "insufficiency of project funds to permit the effective conduct of the project." As monies usually have not been specifically appropriated for the Project, we read the quoted language as encompassing Congress' failure to include a specific appropriation for the Project in either an appropriation act, or legislative history indicating an intent that certain funds from a lump-sum appropriation are intended for the Project. The funding situation was very different at the time we issued our earlier decisions. The agency could not possibly have invoked the termination provisions, discussed above, since funds were clearly intended to remain available for the Project.

According, for the reasons given, we think the Department of Energy may use available 1983 appropriations to terminate the Clinch River Fast Breeder Reactor Project. Our decisions in B-115398.33, June 23, 1977, B-164105, December 5, 1977, and March 10, 1979, are distinguished.

[B-161457]

**Taxes—Federal—Interest and Penalties—Payment by Federal Agencies**

Section 6611 of the Internal Revenue Code does not require the payment of interest on over-payments of employer taxes by Federal Government agencies, since the funds are already in the hands of the Government. B-161457, May 9, 1978, is extended.

**Matter of: Applicability of Internal Revenue Code section 6611 to overpayments of employer taxes by Federal agencies, December 5, 1983:**

The Assistant Secretary (Administration) of the Department of the Treasury has requested our opinion on the applicability of Internal Revenue Code section 6611 interest payment provisions to overpayments of employment taxes by Federal Government agencies. Although the Federal employment taxes, which are set forth in Subtitle C of the Internal Revenue Code, include both employer and employee taxes, we understand Treasury's question to concern only the former. These include the Federal Insurance Contributions Act (FICA) tax on employers (26 U.S.C. §§ 3111-3112), the Railroad Retirement tax on employers (26 U.S.C. § 3221), and the Federal Unemployment tax (26 U.S.C. § 3301). We conclude that, with respect to these employer taxes, section 6611 does not require the payment of interest on overpayments by Federal agencies.

Subsection (a) of 26 U.S.C. § 6611 provides that interest shall be paid on any overpayment of internal revenue tax. On the other hand, Treasury notes that in our opinion B-161457, May 9, 1978, we held that the payment of interest and penalties for late filing or underpayment of employment taxes to the IRS by other Federal agencies was not authorized. In that decision, we explained that the rationale for applying the I.R.C. provisions which require the payment of interest and penalties against the private sector employer is not present when the employer is the United States since the funds are already in the hands of the United States. Treasury contends that "the I.R.C. § 6611 situation requiring IRS interest payments for federal overpayments is analogous to the federal agency underpayment interest/penalty circumstances described in B-161457 because, in both cases, all funds are already in the hands of the United States and, therefore, the rationale for applying interest/penalty provisions against the private sector is not present in either case." Treasury accordingly argues that the IRS should be prohibited from using its appropriated funds for the payment of section 6611 interest to other Federal agencies.

We agree with Treasury that our decision of May 9, 1978, should be extended to prohibit the use of appropriated funds by the IRS for the payment of interest on overpayments of employer taxes by other Federal agencies. As Treasury points out, our rationale for

barring the use of agency appropriations to pay interest to the IRS—i.e. that the funds are already in the hands of the United States—is equally applicable in this case. We accordingly conclude that section 6611 of the Internal Revenue Code does not require the payment of interest on overpayments of employer taxes by Federal Government agencies.

### [B-211778]

#### **Pay—Retired—Reservists—Erroneous Notification of Eligibility—What Constitutes**

At various times between 1940 and 1959 an individual served on full-time active duty, and participated satisfactorily in part-time Reserve programs, with both the Army and the Navy. However, he completed a total of only 7 of the 20 years' creditable service required to establish entitlement to Reserve retired pay at age 60. Years later in 1979 an Army personnel officer informally and erroneously advised the individual that he would be eligible for retired pay when he reached age 60. The individual is not entitled to retired pay on the basis of the erroneous advice, notwithstanding that by statute the Armed Forces are required to notify reservists when they have completed 20 years' creditable service and that such notification is irrevocable, since the informal erroneous advice plainly did not constitute an official statutory notice of completed service.

#### **Matter of: Robert E. Nahrstedt, December 5, 1983:**

The question presented in this case<sup>1</sup> is whether Mr. Robert E. Nahrstedt is entitled to military Reserve retired pay on the basis of erroneous advice he received from an Army personnel officer indicating that he had completed a sufficient number of years of creditable military service to qualify for retired pay. We conclude that Mr. Nahrstedt is not entitled to the retired pay in question.

#### **Background**

Mr. Nahrstedt was born on March 7, 1923. Records maintained by the Department of the Army reflect that he served for 6 months as an enlisted member of the Army National Guard from April to October 1940, and that he performed 21 days of active duty during August 1940. Subsequently, he enlisted in the Navy in March 1942 and served on active duty almost continuously during the following 3 years and 9 months until he was discharged in December 1945. Thereafter, he had no military status until January 1952, when he received an appointment as a commissioned officer in the Army National Guard. He then served on full-time active duty as a Guard officer until January 1954, a period of 2 years. Between 1954 and 1958 he did not actively participate in any Guard or Reserve

<sup>1</sup>This action is in response to a request from a special disbursing agent of the Army Finance and Accounting Center for an advance decision concerning the propriety of approving a voucher in favor of Mr. Nahrstedt in the amount of \$293.81, as Army Reserve retired pay due for the period March 7-31, 1983, if it may properly be concluded that he is entitled to retired pay under the applicable statutes. The request was forwarded here by the Office of the Comptroller of the Army after it was approved and assigned submission number DO-A-1418 by the Department of Defense Military Pay and Allowance Committee.

program, but he retained his commission and was placed in an inactive National Guard status. In January 1958, he transferred from the Army National Guard to the Army Reserve. During 1958 he performed 2 weeks of active duty for training and participated in eight inactive duty weekend drill periods as a Reserve officer, and he received credit for 1 year of satisfactory service as a reservist for retirement purposes. In the following year, 1959, he also performed 2 weeks of active duty, but he participated in only one weekend drill period and consequently was not credited with a year of satisfactory service. He then ceased participating in Reserve activities completely, but he retained his commission and his status as an officer of the Army Reserve. In 1961 he applied for transfer to the Retired Reserve in the commissioned grade he then held, captain (O-3), and he was so transferred the following year. On the basis of these records, Army officials later in 1980 combined all of Mr. Nahrstedt's creditable military and naval service, and arrived at the conclusion that he had completed only 7 years and 3 months of satisfactory service creditable for the purpose of establishing eligibility for Reserve retired pay.

By correspondence dated January 5, 1979, Mr. Nahrstedt had asked the Army Reserve Components Personnel and Administration Center, St. Louis, Missouri, about his eligibility for retired pay. Also, he apparently called the Center by telephone to discuss the matter. He subsequently received a handwritten postcard dated April 4, 1979, signed by an Army personnel officer stating that he would be eligible to receive retired pay beginning in March 1983 when he reached age 60. Army officials indicate that the Center uses handwritten postcards in responding to informal telephone inquiries. In May 1979 in response to further inquiries by Mr. Nahrstedt, the personnel officer also sent him a letter stating, "Enclosed you will find a transcript of master personnel record and chart used in computing retirement pay." However, that transcript was an incomplete computer printout that did not show Mr. Nahrstedt's periods of creditable service. It is not otherwise indicated that the personnel officer based his advice on an examination of the records or anything except information personally provided by Mr. Nahrstedt.

In May 1980 the Deputy Director for Retired Activities of the Army Reserve Components Personnel and Administration Center wrote to Mr. Nahrstedt to advise him that his underlying military and naval personnel records had been reviewed, and that:

To be eligible for retired pay at age 60 under Title 10, U.S. Code, Section 1331-1337, you must have completed a minimum of 20 qualifying years of service. Because you completed less than 20 qualifying years, you are not eligible for retired pay.

After some intervening correspondence, Mr. Nahrstedt wrote to the Center in October 1982, and while he apparently conceded that he had not completed the requisite 20 years' service, he said, "I still

feel that I should be granted benefits under Title 10 U.S. Code Section 1406 on whatever years and points that you have determined to exist at this time."

### Issue Presented

In requesting our decision in this matter. Army officials essentially question whether, on the basis of the erroneous advice Mr. Nahrstedt received in 1979 from the personnel officer about his eligibility for Reserve retired pay, he may now be allowed retired pay predicated on the provisions of 10 U.S.C. § 1406. The Army officials note that in *Matter of Cassidy*, 58 Comp. Gen. 390 (1979), we expressed the view that a retired reservist could base entitlement to retired pay under that statute on an erroneous notice verifying the completion of 20 years of creditable service, in the absence of any evidence that the reservist caused the service records to be altered or induced the erroneous notice to be sent.

### Applicable Statutes

As indicated, the laws governing eligibility for military retired pay based on non-regular service are contained in chapter 67 of title 10 of the United States Code; that is, 10 U.S.C. §§ 1331-1337. Under these provisions, a retired reservist generally becomes eligible for retired pay when he reaches age 60 if he has previously performed at least 20 years of creditable service. 10 U.S.C. § 1331(a). Creditable periods of service performed prior to July 1, 1949, include periods of active participation in the National Guard and periods of full-time active duty with any branch of the Armed Forces, 10 U.S.C. § 1332(a)(1). Creditable service since July 1, 1949, is each 1-year period in which a reservist has been credited with at least 50 "points," based on 1 point for each day of active duty; 1 point for each inactive duty drill (i.e., 4 points for a 4-drill weekend inactive duty training period); and 15 additional yearly membership points. 10 U.S.C. § 1332(a)(2).

In addition, 10 U.S.C. § 1406 provides that:

#### *§ 1406 Limitations on revocation of retired pay*

After a person has been granted retired pay under chapter 67 of this title, or has been notified in accordance with section 1331(d) of this title that he has completed the years of service required for eligibility for retired pay under chapter 67 of this title, the person's eligibility for retired pay may not be denied or revoked on the basis of any error, miscalculation, misinformation, or administrative determination of years of service performed as required by section 1331 (a)(2) of this title, unless it resulted directly from the fraud or misrepresentation of the person. \* \* \*

This provision was added by section 2 of the act of October 14, 1966, Public Law 89-652, 80 Stat. 902. Section 1 of Public Law 89-652 also added 10 U.S.C. § 1331(d) which requires that the Armed Forces provide for the written notification of each person who has completed the number of years of service required for eligibility for retired pay under chapter 67 of title 10 of the United States Code.

Such notice must be sent to the person concerned within 1 year after he has completed the required length of service.

The Navy Department in its report of June 6, 1966, on the need for H.R. 5297, which became Public Law 89-652, stated that the complicated method of computing creditable service for non-regular retirement under chapter 67 (10 U.S.C. §§ 1331-1337):

\* \* \* usually leaves the reservist in serious doubt as to whether he has in fact passed the 20-year milestone. The services, by a variety of administrative procedures, have attempted to keep the reservist informed of his progress and his completion of the years of service required. In some cases, however, reservists have received erroneous information or have miscalculated their years of service and in reliance thereon have reduced their Reserve participation only to find upon reaching retirement age that they have not in fact met the 20 years of service requirement. When the errors are not discovered until at or near retirement age the reservists no longer have time to renew their participation and acquire the necessary additional service. Page 3 of H. Rep. No. 1689, and page 2 of S. Rep. No. 1693, 89th Cong., 2d Sess.

A reservist may properly be transferred to the Retired Reserve upon his application after completing only 8 years of creditable service, and prior to the enactment of Public Law 89-652 some reservists apparently made that transfer prior to completing the full 20 years of satisfactory service needed to qualify for retired pay because of an erroneous but good faith belief that they had actually completed 20 years' service.<sup>2</sup> The primary purpose of Public Law 89-652 was to alleviate this problem and to place the burden on the Armed Forces to notify reservists when they had met the 20 years of service requirement to qualify for Reserve retired pay at age 60.

### Discussion

Our decision in *Matter of Cassidy*, 58 Comp. Gen. 390, cited above, involved an Air Force Reserve lieutenant colonel who faced involuntary separation from active Reserve status at the age of 54 in 1970 under a statutory restriction on service generally applicable to Air Force Reserve officers of his grade.<sup>3</sup> He disagreed with Air Force officials concerning the number of years of creditable service he actually had for retired pay purposes, but he was seeking reassignment to the Selective Service System so that he could extend his active Reserve status until age 60 under a special statutory exception applicable to that agency to ensure his completion of the 20 years' required service regardless of the outcome of that disagreement.<sup>4</sup> However, in 1969 he received an unsolicited official notice from the Air Reserve Personnel Center advising him that he had completed 20 years' creditable service for retired pay purposes, and in reliance on that notice he discontinued his efforts to trans-

<sup>2</sup> See 10 U.S.C. § 274; Department of Defense Directive 1200.4 (dated December 20, 1957, superseded) and *id.* 1200.15 (dated February 16, 1973, current). Compare *Montilla v. United States*, 198 Ct. Cl. 48 (1972).

<sup>3</sup> 10 U.S.C. § 8848.

<sup>4</sup> 10 U.S.C. § 1007. The Selective Service System ceased granting extensions under this statute in April 1970, but extensions granted prior to that time remained in effect until the concerned reservist reached age 60.

fer to the Selective Service System and remain in an active Reserve status. The notice was in error since he did not actually have 20 years of creditable service under the standards prescribed by 10 U.S.C. § 1332, but we held that in those particular circumstances 10 U.S.C. § 1406 made the official notice irrevocable and operated to make the officer eligible for retired pay computed on the basis of the actual amount of his creditable service.

The situation in the present case is entirely different. Mr. Nahrstedt did serve on full-time active duty with the Armed Forces for a total of 5 years and 9 months between 1942 and 1945, and between 1952 and 1954. In addition, he did participate actively and satisfactorily in part-time Army National Guard and Reserve programs for a total of 1 year and 6 months in 1940 and in 1958. However, it should have been fairly obvious to him in 1961 when he applied for a transfer to the Retired Reserve that he had not yet completed the full 20 years of creditable service he needed to qualify for Reserve retired pay at age 60. The handwritten postcard he received was simply an informal response to an informal inquiry, and it was plainly not a formal notice issued under the provisions of 10 U.S.C. §§ 1331(d) and 1406 to confirm a reservist's recent completion of 20 years' creditable service. Moreover, he did not, and could not, use or rely upon the postcard to decide whether he should discontinue active participation in a Reserve program. Hence, we conclude that the postcard did not confer eligibility for Reserve retired pay upon him under 10 U.S.C. § 1406, and that he is not entitled to retired pay under that or any other provision of law.

The question presented is answered accordingly.<sup>5</sup>

[B-211877]

### **Contracts—Protests—General Accounting Office Procedures— Timeliness of Protest—Solicitation Improprieties—Apparent Prior to Bid Opening/Closing Date for Proposals**

A protest that an agency's preference for awarding a single contract for agency-wide architect-engineer (A-E) services and that its use of evaluation criteria related to the size, current workload and location of competing firms discriminates against small, minority-owned firms is untimely where this information appeared in a Commerce Business Daily announcement of the proposed procurement, yet the protest was not filed until after the closing date specified in the announcement for receipt of qualifications statements (Standard Forms 254 and 255) from interested A-E firms.

### **Contracts—Small Business Concerns—Awards—Set-Asides— Administrative Determination**

General Accounting Office will not review the merits of a protest which, in effect, claims that the procuring agency's misrepresentation of its requirements to the Small Business Administration caused a procurement not to be set aside for small businesses. A decision as to whether a particular procurement should be set aside

<sup>5</sup> The submitted voucher, which may not be approved for payment, will be retained here.

for small businesses essentially is within the discretion of the contracting officer, since, with certain exceptions not relevant here, nothing in the Small Business Act or the procurement regulations makes it mandatory to set aside any particular procurement.

**Contracts—Architect, Engineering, etc. Services—  
Procurement Practices—Evaluation of Competitors—  
Application of Stated Criteria—Prior Architect-Engineering  
Contracts**

It is not improper for an architect-engineer (A-E) evaluation board to rely solely upon the information in the qualifications statements and performance data (Standard Forms 254 and 255) required to be submitted by A-E firms in determining with which firms discussions will be held.

**Contracts—Architect, Engineering, etc. Services—  
Procurement Practices—Evaluation of Competitors—  
Evaluation Board**

In view of the language of relevant regulations and the nature of the work to be performed under the contract, procuring agency did not abuse its discretion by convening an architect-engineer evaluation board, none of whose members was an architect or an engineer. In any event, the protester had no substantial chance for award in view of serious deficiencies in regards to its staff.

**Matter of: FACE Associates, Inc., December 5, 1983:**

FACE Associates, Inc. protests the Department of Labor's award of a contract to Leo A. Daly Co. for architect-engineer (A-E), project management, and facilities engineering management services at Job Corps centers. FACE contends that the Department of Labor failed to fulfill its obligation under the Small Business Act, as amended, 15 U.S.C. §§ 631-649 (1982), to encourage small business. The protester also contends that the evaluation of interested A-E firms was not in accord with applicable regulations. We dismiss the protest in part and deny the remainder.

The Brooks Act, 40 U.S.C. §§ 541-544 (1976), governs the procurement of A-E services. Generally, the selection procedures require a contracting agency to publicly announce requirements for A-E services. An A-E evaluation board, established by the agency head, then evaluates A-E statements of qualifications and performance data (Standard Forms (SFs) 254 and 255) already on file and statements submitted in response to the public announcement. Thereafter, the board must select no less than three of the most highly qualified firms (*i.e.*, the "short list") with which to hold discussions regarding anticipated concepts and the relative utility of alternative methods of approach for providing the services requested. Federal Procurement Regulations (FPR) §§ 1-4.1004-1 and 1-4.1004-2 (amend. 150, June 1975). After holding these discussions, the board, based on established and published criteria which are not to relate directly or indirectly to the fees to be paid, recommends to the selection official (the agency head or the official to whom the authority has been delegated) in order of preference no less than three

firms deemed most highly qualified. FPR § 1-4.1004-2(c). The selecting official must then review the recommendation and make the final selection in order of preference of the firms best qualified to perform the work. If the final selection of the best qualified firms is other than that recommended by the board, then the selecting official must provide complete written documentation of his decision. FPR § 1-4.1004-4. Negotiations are held with the A-E firm ranked first. Only if the agency is unable to agree with that firm as to a fair and reasonable price are negotiations terminated and the second-ranked firm invited to submit its proposed fee.

The Job Corps, part of the Department of Labor's Employment and Training Administration, announced its intention to contract for the A-E services in the Commerce Business Daily (CBD) of January 19, 1983, and invited interested firms to submit SFs 254 and 255 by March 1. The announcement described the work to be performed as of a continuous nature for the period July 1983 to September 1984 and estimated that approximately 50 man-years of effort would be required. The announcement further informed interested firms that:

\* \* \* It is the intention of the Employment and Training Administration/Job Corps to select one contractor. However, after evaluation of proposals, it may be necessary to select a second qualified firm to accomplish the total work effort. It is contemplated that the successful firm[s] will be: a single firm capable of providing all services in house, a full service joint venture of not more than two firms or two independent firms utilizing subcontractors to provide full service. \* \* \*

The evaluation criteria set forth in the notice included size of organization and current workload and location of staff and branch offices.

Based upon an evaluation of the SFs 254 and 255 submitted by 40 interested A-E firms, the A-E evaluation board selected the seven firms receiving the most evaluation points for discussions. By letters of April 1 and 4, FACE protested to the agency its exclusion from this "short list."

The evaluation board held discussions with the seven firms and subsequently recommended that fee negotiations be conducted with Leo A. Daly Co., the firm which had received the most evaluation points in the initial evaluation and which the board had determined to be the best qualified. After learning on May 6 that the Department of Labor had denied its earlier protest to the agency, FACE filed a protest with our Office on May 20. At the beginning of July, while this latter protest was still pending, the agency made award to Daly.

FACE alleged in its protest filed with the Department of Labor and in its initial submission to our Office that the preference for a single contractor and the evaluation criteria concerning contractor size and location set forth in the CBD notice created a strong bias favoring selection of a large enterprise and accordingly breached the agency's obligations under the Small Business Act to provide the maximum practicable opportunity for small businesses to par-

ticipate in Federal procurement. FACE also objects to the agency's failure to set aside this procurement for small business concerns.

The Job Corps contends that these aspects of FACE's protest are untimely. FACE contends that its protest is timely because it was filed within 10 days of when FACE first became aware of an alleged circumvention of procedures mandated by the Small Business Act to ensure that small businesses receive a fair share of Federal procurements. In particular, FACE alleges that at an April 1, 1983 meeting attended by representatives of FACE, the Department of Labor and SBA's Office of Small and Disadvantaged Business Utilization, the SBA representative indicated that SBA had questioned the preference for a single contractor but had been convinced by the Department of Labor that a change in the agency's needs had resulted in the change from the previous contract under which the agency had selected multiple firms, including FACE, to perform the work in question. FACE alleges that the Department of Labor misrepresented its needs to SBA, arguing that a comparison of the statement of work from FACE's then current contract with the statement of work for the proposed contract reveals that they are nearly identical. FACE also cites the statement in the agency's administrative report that "Our requirement \* \* \* for architectural, engineering (A/E) and construction management services for the Job Corps program have *not* substantially changed."

We understand FACE to be contending that this alleged misrepresentation violated the Department of Labor's obligations under the FPR to provide SBA representatives, upon request, an opportunity to review the proposed procurement and access to available information as may be required for SBA's review. FPR §§ 1-1.705-3 and 1-1.705-4. However, FACE has failed to prove that the Department of Labor misrepresented its needs to SBA. While the nature of the work to be performed by the contractor may not have substantially changed under the proposed contract, the record before us taken as a whole indicates that the procuring officials believed that the needs of the Government in regards to agency supervision had changed. As FACE itself indicates, the representative of the Department of Labor at the meeting in question indicated that increased management was necessary for the proposed contract. The contracting officer in the administrative report on this protest states that the agency made a careful decision to reduce the number of A-E contractors in order to improve management control, simplify oversight, and adjust to retrenchment within the agency.

Moreover, our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1983), require that protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of proposals must be filed prior to the bid opening or the closing date. The preference for a single contractor, the evaluation criteria, and the fact that the procurement was not set

aside all were apparent from the CBD announcement. FACE participated in the procurement knowing of these "ground rules" but did not object to them until it learned that it had not been selected for the "short list." This is too late. If FACE thought any of the terms under which the procurement was being conducted was improper it was incumbent upon FACE to protest prior to the March 1 closing date for receipt of qualifications statements. Since FACE did not, these grounds of protest are untimely. See *R.E. Skinner & Associates*, B-196084, *et al.*, February 20, 1980, 80-1 CPD 145. Further, even if the protest was timely as to this ground, we note that a decision as to whether a particular procurement should be set aside for small businesses essentially is one within the discretion of the contracting agency, since, with certain exceptions not relevant here, nothing in the Small Business Act or the procurement regulations makes it mandatory to set aside any particular procurement. See *W.B. Jolley*, B-209933, June 6, 1983, 83-1 CPD 609.

FACE next alleges that in its initial evaluation, the evaluation board arbitrarily and capriciously failed to consult those familiar with FACE's performance under prior contracts with the Department of Labor for information on the quality of that performance and relied instead upon SFs 254 and 255, thereby depriving the board of the ability to fully and fairly apply the mandatory evaluation criteria. The agency denies that it was improper to rely upon SFs 254 and 255 and contends that it gave due consideration to the experience of A-E firms, including FACE, interested in the procurement.

FACE's argument is without merit. 40 U.S.C. § 542 provides that contracts for A-E services will be negotiated upon the basis of demonstrated competence and qualification for the type of professional services required. The implementing regulations generally provide that in evaluating A-E firms, the evaluation board will consider the specialized experience of the firm and the past record of performance on contracts with Government agencies and private industry, as well as any criteria set forth in the public notice on a particular contract. FPR § 1-4.1004-3. The CBD notice here informed the interested firms that the factors for evaluation included the experience of the firms.

As for the specific sources of information to be utilized, 40 U.S.C. § 543 provides that the agency shall encourage firms to submit annually a statement of qualifications and performance data and that, for each proposed project, the agency shall evaluate the current statements on file with the agency together with those submitted by other firms regarding the proposed project. The implementing regulations provide that SFs 254 and 255 already on file and those submitted in response to the public announcement shall be used to collect data on A-E firms, including information on their past experience, but adds that "Information from other sources (such as other clients \* \* \* and assessments by the procuring

agency itself on prior projects awarded to a firm) may also be included in the files" which the evaluation board must review. FPR § 1-4.1004-2.

The statutory provisions encouraging the submission of annual statements of qualifications and performance data reflect a legislative intent to avoid requiring a burdensome, particularized, ad hoc investigation into qualifications and experience for each individual procurement. See S. Rep. No. 1219, 92d Cong., 2d Sess. 8 (1982); H.R. Rep. No. 1188, 92d Cong., 2d Sess. 9-10 (1972). Accordingly, the FPR permits but does not ordinarily require an evaluation board to seek out information beyond that in the qualifications statements. The regulation provides only that information from other sources "may," as opposed to "shall," be included in the files, even though the drafters of that provision must surely have foreseen that incumbent contractors with relevant experience would compete for subsequent contracts.

While there may be circumstances where it would be an abuse of discretion for an evaluation board to rely solely upon SFs 254 and 255, we do not believe that such circumstances are present here. The record does not support FACE's complaint that the board was deprived of the ability to properly evaluate FACE's experience. The SF 254 is the questionnaire concerning a firm's qualifications and experience which those interested in competing for this work are instructed to submit annually and which is kept on file at using agencies. The SF 255 is a supplement to the SF 254 and whose "purpose is to provide additional information regarding the qualifications of interested firms to undertake a specific Federal A-E project." Both forms require interested firms to describe their prior experience and special qualifications.

In particular, section 10 of SF 255 requests interested firms to show why they are especially qualified to undertake the work in question; provides for the submission of supporting information including "any awards or recognition received \* \* \* for similar work;" and permits respondents to say anything they wish in support of their qualifications. This would appear to have afforded FACE the opportunity to cite favorable evaluations of FACE's prior work for the Department of Labor. We note that FACE in fact took advantage of the opportunity offered by section 10 of SF 255 to submit a 23 page statement documenting its special qualifications. Reliance upon SFs 254 and 255 in these circumstances is consistent with our prior decisions in which we have held that evaluators are not required to refer to information or materials outside a proposal in a negotiated procurement which should have been described or included in the proposal. See *Advanced ElectroMagnetics, Inc.*, B-208271, April 5, 1983, 83-1 CPD 360.

The protester next contends that its exclusion from the "short list" was improper because the evaluation board which failed to select it was improperly constituted.

FPR § 1-4.1004-1(a) provides, in pertinent part, that:

(a) Each agency head shall establish one or more permanent or ad hoc architect-engineer evaluation boards to be composed of an appropriate number of members who, collectively, have experience in architecture, engineering, construction, and related procurement matters. Members shall be appointed from among highly qualified professional employees (intra-agency and interagency) and private practitioners (if provided for by agency procedure) engaged in the practice of architecture, engineering or related professions \* \* \*.

The evaluation board consisted of a chairman and three other members, although apparently only the latter three made actual numerical evaluations of the A-E firms. All four of the board members were long-term Government employees. From the biographies provided by the agency, it would appear that none of the members was an architect or an engineer and that only one of the members, the chairman, was a contract specialist experienced in the procurement of architect, engineer, or construction services. Of the remaining members, one was a regional Job Corps director described as knowledgeable as to the needs of the Job Corps and with experience in contract administration, another as a manpower analyst with knowledge of procurement policies and procedures, and the third as a program analyst and auditor familiar with ETA and Job Corps contract compliance and contractor responsibility issues and problems.

FACE alleges that only architects and engineers can properly evaluate the qualifications of A-E firms and that the "plain language" of section 1-4.1004-1(a)

requires that all the members of the architect-engineer evaluation board be architects, engineers, or members of related professions [which] is a profession related to the design or construction supervision function of architects or engineers.\* \* \*.

In response, the agency denies that the composition of the board was inconsistent with the requirements imposed by regulation and maintains that the board was composed of highly qualified professional employees selected on the basis of their knowledge of and experience with the Job Corps, the A-E requirements of the Job Corps, A-E procurement regulations, and demonstrated ability to perform evaluations objectively. In addition, the agency indicates that the procurement was for A-E management services only, as opposed to A-E design services, and argues that accordingly, the board was not required to review technical drawings or make judgments requiring an architect or engineer. The agency also notes that, in any case, the selecting official was a registered professional engineer.

We do not read section 1-4.1004-1(a) as mandating that all members of the evaluation board must be architects or engineers. Rather, the regulation instructs agencies to establish evaluation boards that are composed of an appropriate mix of relevant disciplines. In this case, given the nature of the work to be performed, i.e., primarily management services rather than design services, we do not believe that the Department of Labor abused its discretion

in constituting the board. Moreover, it is clear to us from our review of the entire record that the protester did not have a substantial chance for award regardless of the composition of the evaluation panel. The agency announced its intention in the CBD notice to award the contract, if possible, to a single contractor capable of providing in-house, over a period of 15 months, the 50 man-years of effort estimated to be necessary for performance. FACE indicated in its SFs 254 and 255 that it had an in-house staff of 25, of which only 17 were designated architects or engineers.

An analysis of the evaluation board's initial technical evaluation of FACE suggests that FACE's chance for award was seriously and adversely affected by perceived problems with its staff. A-E firms were assigned evaluation points in six categories, one of which was "Staff." In each category, the firms were assigned separate point scores by each member of the board, other than the chairman. These raw scores in all the categories were totaled and divided by 3 to yield an overall average total, with a maximum of 100 points possible. FACE received a lower raw staff score than any of the seven firms selected for the short list. Its raw staff score was approximately 6.4 raw points, or more than 2 overall points lower than the average raw staff score of the firms on the short list. This overall point difference is especially significant since FACE scored only 1 overall point below the bottom firms on the short list. At least one of the evaluators specifically attributed the low raw staff score given FACE to the inadequate number of its staff.

Although FACE now contends that, had discussions been held with it, it could have proposed an increase in staff or taken other measures to satisfy the agency's needs, the CBD announcement gave FACE clear notice of the Government's needs. FACE, having failed to take advantage of the opportunity to propose such measures when it submitted its SF 255 in response to the announcement, will not now be heard to complain that it was denied an opportunity to propose measures satisfying the Government's needs. In any case, FACE's overall point score was 8 points below that of Daly, thus suggesting the relative unlikelihood of any award to FACE.

The protest is denied.

[B-212560]

### **Officers and Employees—Transfers—Miscellaneous Expenses— Real Estate Deposit Forfeiture**

Employee transferred to new duty station and contracted to purchase residence there. When agency delayed establishment of new office at this duty station, employee, due to uncertainty of the situation, chose to forfeit deposit on residence. Since agency delay appears to be the proximate cause of forfeiture, the deposit may be claimed as a miscellaneous relocation expense. The claim is not so unusual or extraordinary as to warrant consideration as a meritorious claim.

**Matter of: Marvin K. Eilts—Claim for Forfeited Real Estate Deposit, December 5, 1983:**

The issue in this decision is whether an employee may be reimbursed for a real estate deposit he forfeited when the Government delayed opening the new office to which he was being transferred. We hold that the forfeited deposit may be claimed as a miscellaneous expense under the statute and regulations governing the payment of relocation expenses. However, to the extent the miscellaneous expense allowance does not fully reimburse the employee, we will not recommend relief as a meritorious claim.

This decision is in response to a request from Mr. Vern F. Highley, Administrator, Agricultural Marketing Service (AMS), Department of Agriculture, concerning the claim of Mr. Marvin K. Eilts, an AMS employee, for reimbursement of a forfeited real estate deposit.

In July 1982, AMS proposed moving a field headquarters office from Kansas City, Missouri, to Dallas, Texas, and Mr. Eilts, who was stationed in Denver, Colorado, was selected to be the supervisor of the proposed Dallas office. In connection with his transfer, Mr. Eilts signed a service agreement on July 28, 1982, and he traveled to Dallas on a househunting trip on August 9, 1982. During this trip he signed a contract to purchase a residence in the Dallas area, and he made a \$2,000 earnest money deposit on this contract. Mr. Eilts subsequently agreed to release the contingency on selling his residence in Denver and agreed to settlement on the new residence on or before October 17, 1982.

Although Mr. Eilts reported for duty in Dallas on September 9, 1982, the closing of the Kansas City office and the establishment of the Dallas office was delayed beyond the proposed effective date of October 1, 1982. Because of this delay and the uncertainty as to whether the Dallas office would be established, Mr. Eilts chose not to settle on this residence. Therefore, under the terms of the contract, he forfeited the \$2,000 earnest money deposit. The Dallas office was later opened on December 26, 1982, and AMS has requested, in the absence of other authority to pay this claim, that we consider this claim under the Meritorious Claims Act, 31 U.S.C. § 3702(d), as codified by 97-258, 96 Stat. 877, September 13, 1982 (formerly 31 U.S.C. § 236).

Our decisions have held that such a forfeited deposit may not be claimed as a real estate expense under 5 U.S.C. § 5724a(a)(4) (1982) and the applicable Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR). See *Ralph A. Neeper*, B-195920, June 30, 1980, citing 55 Comp. Gen. 628 (1976); and *David D. Lombardo*, B-190764, April 14, 1978.

However, we have held that this expense may be claimed as a miscellaneous expense under 5 U.S.C. § 5724a(b) and FTR Chapter 2, Part 3. See *Neeper*, and *Lombardo*, cited above. In our prior deci-

sions, the forfeiture normally occurred where the employee made a real estate or lease deposit at his duty station and then was transferred to a new duty station. Thus, the transfer of the employee was considered to be the proximate cause of the forfeiture. See *Lombardo*, cited above, and B-177595, March 2, 1973. We have permitted reimbursement even where the employee applied for the position which necessitated his transfer. See *Neeper*, cited above, and *Richard E. Witmer*, B-196002, March 18, 1980.

In the present case it was not the employee's transfer which caused the forfeiture but rather the Government's delay in establishing the Dallas office which prompted Mr. Eilts to cancel his house purchase and forfeit the deposit. Mr. Eilts has advised us informally that he discussed the situation with AMS officials prior to forfeiture of the deposit, but no particular advice was given to him. We presume that if the proposed Dallas office was never opened, the agency would have found another position for him in Dallas or would have transferred him to another location. However, due to the uncertainty regarding the proposed Dallas office, Mr. Eilts chose not to proceed with purchasing this residence. Since the delay in opening this office appears to be the proximate cause of the forfeiture, we have no objections to Mr. Eilts claiming this forfeited deposit as a miscellaneous expense in view of our prior decisions.

We have learned informally that Mr. Eilts claimed \$200 in undocumented miscellaneous expenses. He may now claim the remainder of the miscellaneous expense allowance provided in FTR para. 2-3.3, but not in excess of the maximum amount allowable by statute. See *Neeper*, cited above.

Finally, the agency requests our consideration of this claim as a meritorious claim. Under the provisions of 31 U.S.C. § 3702(d) (formerly 31 U.S.C. § 236), the Comptroller General shall report to Congress a claim that may not be paid under current statute but which the Comptroller General believes Congress should consider for legal or equitable reasons. Generally, we have considered this remedy in extraordinary circumstances involving cases of unusual circumstances which were unlikely to constitute a recurring problem. See *Dr. Martin Blinder*, B-210831, August 2, 1983. We do not consider this to be an unusual or a nonrecurring problem as evidenced by the number of decisions of our Office involving forfeited real estate or lease deposits, and we find no elements of unusual legal liability or equity which would justify our reporting this claim to the Congress under the Meritorious Claims Act.

Accordingly, we hold that Mr. Eilts may be reimbursed for the forfeited deposit as a miscellaneous expense subject to the limitations of that expense allowance.

[B-212562]

**Medical Treatment—Officers and Employees—Employee v. Government Interest**

An employee, who was required to undergo a fitness-for-duty examination and who, prior to the examination, underwent medical tests in the course of diagnosis and treatment, may not be reimbursed for the cost of these tests even though they were relied upon by the physician administering the fitness-for-duty examination. Costs of treatment are personal to the employee. Use of the tests by the physician performing the fitness-for-duty examination as part of the medical history furnished by the employee did not result in any cost to the employee beyond that already incurred for treatment.

**Matter of: Chester A. Lanehart, December 6, 1983:**

The issue in this decision is whether an employee may be reimbursed for the cost of medical tests conducted immediately prior to a fitness-for-duty examination where the examining physician relied on the results of the tests in determining the employee's fitness for duty. Because the tests were obtained for and related to treatment of the employee's illness (which also resulted in the fitness-for-duty examination) their expense is personal to the employee and may not be reimbursed simply because the test results were relied upon by the physician who conducted the fitness-for-duty examination.

This action results from the request of the National Federation of Federal Employees for a decision on the claim of Mr. Chester A. Lanehart filed on July 29, 1983, under the procedures of 4 C.F.R. Part 22 (1983). A copy of the request was served on the Department of the Air Force, Mr. Lanehart's employer, as required by 4 C.F.R. § 22.4. No objection has been received from the Air Force, and no grievance has been filed. Accordingly, this matter is considered to be a joint request of the labor organization and the agency. 4 C.F.R. § 22.7(b).

Mr. Lanehart is employed as a fireman at Andrews Air Force Base, Washington, D.C. On February 11, 1983, he experienced difficulty in breathing and was treated and released at an emergency facility. The results of a subsequent pulmonary function test lead to his being placed on restricted duty, and on March 22, 1983, he was ordered to undergo a fitness-for-duty examination. A board certified pulmonary specialist named by the employee was selected to conduct the examination, and the examination was scheduled by the agency for April 20, 1983.

Mr. Lanehart visited his family doctor and other specialists prior to the fitness-for-duty examination. On April 6, 1983, he underwent an operation to correct a severe nasal obstruction. Incident to that surgery he received an EKG, a chest X-ray, and laboratory tests. Subsequently, he received a second pulmonary function test and an EKG stress test. When Mr. Lanehart reported for his fitness-for-duty examination, he offered the results of those tests to the examining physician who copied them and specifically referred to the

X-ray, EKG, and pulmonary function tests in his report to the agency.

Although the major portion of that expense was paid by his insurance agency, Mr. Lanehart submitted a claim for the \$1,136 amount originally billed for the tests. This claim was denied by the Air Force on June 16, 1983, on the basis that the "tests were not requested and accomplished for the benefit of the government." In addition, the Air Force questioned the extent to which Mr. Lanehart had incurred out-of-pocket expenses for the amounts claimed.

A Federal agency has authority to direct an employee to submit a fitness-for-duty examination when questions arise concerning his physical capacity to continue working in his assigned position. *Yates v. United States*, 220 Ct. Cl. 669, 670 (1979). See also Federal Personnel Manual Chapter 339 and Supplement 752-1. We have consistently held that an agency may use appropriated funds to pay for physical examinations of its employees when those examinations are primarily for the benefit of the Government rather than for the benefit of the employees concerned. 49 Comp. Gen. 794 (1970); 41 Comp. Gen. 531 (1962). As noted by the union we have also held that employees may be reimbursed reasonable travel expenses in connection with such examinations if those expenses are determined to be necessary and for the Government's benefit. *Matter of Travel Expenses*, 62 Comp. Gen. 294 (1983).

Under the Federal Personnel Manual Chapter 339, subchapter 1-3(c), an employee who is required to undergo a fitness-for-duty examination as a condition of continued employment may choose to be examined either by a Federal medical officer or by a private physician of his own choice who has been found to be acceptable to the agency concerned. Consistent with our holding, the regulation states that when the agency requires such a fitness-for-duty examination, there must be no cost to the employee, regardless of whether the examination is performed by a Federal medical officer or by an employee-designated physician. B-155489, December 10, 1964. While we have held that this regulation requires an agency to pay certain costs directly related to the examination, such as transportation and per diem, we have distinguished between expenses associated with the examination itself and those related to treatment and have disallowed the latter. 49 Comp. Gen. 794 (1970). The disallowance of expenses of treatment is consistent with the general rule that medical care and treatment are personal to the employee and payment therefor may not be made from appropriated funds unless provided for in a contract of employment or by statute or valid regulation. 53 Comp. Gen. 230 (1973); *Matter of Environmental Protection Agency*, 57 Comp. Gen. 62 (1977).

In this case, Mr. Lanehart sought diagnosis and treatment prior to the fitness-for-duty examination. The tests were conducted for those purposes and in the absence of an agency-directed examination, there would be no question but that he is personally responsi-

ble for the portion of their expense not paid or reimbursed by his insurance agency. Those expenses are personal. Mr. Lanehart's determination to offer those test results to the physician who conducted the fitness-for-duty examination as part of his medical history does not change their character. Although the examining physician was able to rely on the test results and possibly spared the agency the cost of performing similar tests, his reliance on those tests did not result in costs to the employee above and beyond those he had already incurred in connection with the treatment of his physical condition. Unlike the cost of travel held to be reimbursable in *Matter of Travel Expenses*, cited above, the tests were performed incident to treatment of the employee and were not required solely as part of the fitness-for-duty examination.

For the reasons stated above, the employee's claim may not be paid.

[B-213490]

**National Railroad Passenger Corporation—Applicability of Freedom of Information, Privacy and Sunshine Acts**

It is the policy of the General Accounting Office to refrain from commenting on matters in litigation unless the court expresses an interest in our opinion. Therefore, because question is currently before the U.S. Court of Appeals for the District of Columbia Circuit, it would be inappropriate for GAO to comment on whether National Railroad Passenger Corporation (AMTRAK) is subject to the Government in the Sunshine Act, 5 U.S.C. 552b. However, subsequent to GAO decision at 57 Comp. Gen. 733 (1978), the Omnibus Budget Reconciliation Act of 1981 amended the Rail Passenger Service Act, reducing from a majority to a minority the number of directors on Amtrak's board that are appointed by the President with the advice and consent of the Senate. Because 5 U.S.C. 552(b) defines agencies covered by the act to include collegial bodies, a majority of whom are Presidential appointees, this amendment has an obvious bearing on the question of whether Amtrak is subject to the Government in the Sunshine Act.

**To the Honorable William V. Roth, Jr., United States Senate,  
December 6, 1983:**

This responds to your October 5, 1983, letter to our Office requesting our opinion on a matter brought to your attention by Mr. Alfred E. Ehm of San Antonio, Texas. Mr. Ehm is concerned with the efforts of the National Railroad Passenger Corporation (Amtrak) to exempt itself from the provisions of the Government in the Sunshine Act (Sunshine Act), 5 U.S.C. § 552b, on legal grounds. He has taken an appeal from the decision of the District Court for the District of Columbia in Civil Action No. 83-1316, *Alfred E. Ehm v. National Railroad Passenger Corporation (Ehm v. Amtrak)* in which the court found that Amtrak is not subject to the Sunshine Act. Mr. Ehm believes that the District Court decision in *Ehm v. Amtrak* contravenes our decision of 57 Comp. Gen. 773 (1978) and clearly expressed congressional intent that Amtrak be subject to the Sunshine Act.

It is our policy to refrain from commenting on matters in litigation unless so requested by the court. *See, e.g.*, 58 Comp. Gen. 282, 286 (1979). Hence it would not be appropriate for us to express any opinion concerning the issues in the case of *Ehm v. Amtrak*, or the appeal, No. 83-1852 (D.C. Cir., docketed Aug. 12, 1983).

It is important to note, however, that subsequent to our decision at 57 Comp. Gen. 773 (1978), section 1174 of the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, 95 Stat. 357, 689, amended the Rail Passenger Service Act, 45 U.S.C. § 543, reducing the number of directors on Amtrak's board appointed by the President with the advice and consent of the Senate to less than a majority. The Sunshine Act at 5 U.S.C. § 552b(a)(1) states:

(a) For purposes of this section—

(1) the term "agency" means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate and any subdivision thereof authorized to act on behalf of the agency;

The 1981 amendment has an obvious bearing on the question of whether AMTRAK is subject to the Sunshine Act. We hope that this information will assist you.

[B-208097]

### **Compensation—Removals, Suspension, etc.—Deductions from Backpay—Unemployment Compensation**

The Commissioner of Customs asks whether unemployment compensation paid by a State to a Federal civilian employee during a period of wrongful separation may be deducted from a subsequent backpay award under 5 U.S.C. 5596. Under the law providing Unemployment Compensation for Federal Employees (5 U.S.C. 8501, *et seq.*) and Department of Labor regulations (20 C.F.R. Part 609), overpayments of unemployment compensation are to be determined and recovered under the applicable State's law. Since unemployment compensation received from a State by a Federal employee during a period of wrongful separation may be required to be refunded to the State, no deduction should be made from the backpay award.

### **Matter of: Glen Gurwit—Backpay—State Unemployment Compensation, December 7, 1983:**

Mr. Alfred R. DeAngelus, the Acting Commissioner of Customs, requests a decision as to whether unemployment compensation paid by a State to a Federal Government employee during a period in which he was removed from Government employment may be deducted from a subsequent backpay award to which the employee has been found to be entitled following an appeal of the removal. Under the current regulations, we conclude that, since unemployment compensation received from a State by an employee during a period of unjustified or unwarranted separation from the Federal service may be required to be refunded to the State, no deduction should be made by the Federal agency from the backpay to which the employee is otherwise entitled.

## BACKGROUND

In December 1980, Mr. Glen Gurwit was removed from the U.S. Customs Service of disciplinary reasons. Mr. Gurwit filed a grievance in connection with his removal and the issue of whether his removal was for the efficiency of the Service was submitted to arbitration pursuant to the National Agreement between the U.S. Customs Service and the National Treasury Employees Union. In November 1981, the arbitrator issued an award ordering that Mr. Gurwit be reinstated with backpay. There was no appeal from the arbitrator's award, and the only question that remains is the amount of the award under the Back Pay Act of 1966, 5 U.S.C. § 5596.

During the time that Mr. Gurwit was separated from the Customs Service, he received unemployment compensation benefits from the State of Vermont. It is the Service's position that in computing a backpay award, State unemployment compensation received by an employee during the period of the wrongful removal should be regarded as earnings of the employee entitling a Federal agency to deduct that amount from the backpay award. The agency would be responsible for determining the amount of the duplicate unemployment compensation payments and deduct them from the total amount of the backpay award. The Customs Service believes that this position is consistent with the letter and spirit of the back Pay Act of 1966, 5 U.S.C. § 5596, and would result in significant savings to the Federal Government in the future.

## INTERIM BENEFITS AND BACKPAY AWARDS GENERALLY

Generally, the Back Pay Act, 5 U.S.C. § 5596 (1976), provides that a Federal employee found to have undergone an unjustified or unwarranted personnel action is entitled upon correction of the action to recover the amount he would have earned during that period as if the personnel action had not occurred, less any amounts earned by him through other employment. The Act further provides that for all purposes the employee is deemed to have performed services for the agency during that period. Section 5596 entitles an employee to the pay he normally would have earned during the period of the improper action as if he had performed services for the agency during that period. The statute requires the agency to make the employee whole, *Ciambelli v. United States*, 203 Ct. Cl. 680, 687 (1974), but recovery is limited to compensation lost, *Seebach v. United States*, 182 Ct. Cl. 342, 353 (1968).

Under 5 U.S.C. § 5596(c), the Office of Personnel Management shall prescribe regulations to carry out the Back Pay Act. The implementing backpay regulations, 5 C.F.R. § 550.805 (1983), provide that the employing agency shall recompute the employee's pay for the period of the corrective action as if the improper personnel action had not occurred, but no employee shall be granted more

pay than he would have been entitled to receive if the improper personnel action had not occurred. Further guidance is contained in Federal Personnel Manual Supplement 990-2, Book 550, Subchapter S8.

Any deduction from backpay must be based on the nature of the outside benefits in each situation. See for example, 57 Comp. Gen. 464 (1978), requiring the offset of the amount received as severance pay from the computation of a backpay award; and see B-195213, July 7, 1980, requiring that the amount received for disability compensation be deducted from the computation of the backpay award. Here, in the *Gurwit* case, we must address the status of unemployment compensation benefits paid by a State to the employee.

### UNEMPLOYMENT COMPENSATION FOR FEDERAL EMPLOYEES

Since January 1, 1955, Federal civilian employees have had unemployment insurance protection under Chapter 85, Title 5, of the United States Code. In addition, Public Law 96-499, the Omnibus Reconciliation Act of December 5, 1980, requires each Federal agency to pay the costs of all State unemployment benefits to eligible former employees. The Department of Labor, through its Employment and Training Administration's Unemployment Insurance Service, is responsible for (1) developing administrative procedures and forms for State and Federal agencies to use and (2) advising State offices and Federal agencies of their responsibilities under the law. The Secretary of Labor has entered into agreements with all 50 States, the District of Columbia, Puerto Rico, and the Virgin Islands. Under these agreements, States are required to pay unemployment compensation to former Federal employees in the same amount and under the same terms and conditions of the paying States' laws that apply to unemployed private industry claimants. Generally, the paying State will be the one in which the claimant's last official duty station was located.

In making such payments to Federal employees, the State agency receives a 100 percent contribution from a fund administered by the Department of Labor. 5 U.S.C. § 8505 (1976). The Department of Labor certifies payments from this fund to the State agency on a quarterly basis, based on estimates of the amount which should be necessary for the upcoming quarter and adjusting that amount according to any underpayment or overpayment made in the previous quarter. Monies are deposited into the fund by each employing Federal agency in an amount equal to the payments of unemployment compensation benefits made to employees of that agency, such deposits also being determined quarterly on the basis of estimates for the upcoming quarter. See 5 U.S.C. § 8509 (Supp. IV 1980).

All States require that, to receive payments, a claimant must be unemployed from lack of work and be able and available for work. State unemployment compensation laws and policies vary regarding eligibility requirements, payment amounts, and duration of payments. For a comprehensive review of unemployment compensation under Vermont State law, see Vermont Statutes Annotated, title 21, Chapter 17 (1978).

Under 5 U.S.C. § 8502(b) (1976), a State agency, acting as the agent of the United States, shall pay unemployment compensation benefits to a qualifying claimant in the same amount, on the same terms, and subject to the same conditions as the compensation which would be payable to the claimant if the Federal service and Federal wages had been included as employment and wages under that State's law. Under 5 U.S.C. § 8502(d), a determination by a State agency with respect to entitlement to compensation under an agreement is subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in that manner and to that extent.

Under 5 U.S.C. § 8508, the Secretary of Labor may prescribe regulations necessary to carry out the law providing Unemployment Compensation for Federal Employees (5 U.S.C. §§ 8501 *et seq.*). That provision of law also charges the Secretary, insofar as practicable, to consult with representatives of State unemployment compensation agencies before prescribing rules which may affect the performance by the State agencies of functions under agreements under the law. The Secretary of Labor's regulations implementing the law are contained in Part 609 of Title 20, Code of Federal Regulations (1982). Under 20 C.F.R. § 609.21 (1982), determinations of whether there have been overpayments, and whether they shall be recovered or waived, and the methods of recovery, are in all respects committed to the State agencies for action in accordance with that State's unemployment compensation law. Moreover, appeal and review of State agency determinations are also committed to resolution under State laws. See 20 C.F.R. § 609.25 (1982).

## UNEMPLOYMENT COMPENSATION AND BACKPAY AWARDS

As emphasized above, individual States are required to pay unemployment compensation benefits to former Federal civilian employees in the same amount and under the same terms and conditions of the paying State's laws as apply to unemployed private industry claimants. In addition, overpayments of unemployment compensation shall be determined and recovered or waived in accordance with the provisions of the applicable State unemployment compensation law.

Recognizing these State initiatives, decisions of this Office have consistently held that, where applicable State law may require refund of unemployment compensation, a Federal agency should

not deduct unemployment compensation received during the corresponding period from a backpay award. In 35 Comp. Gen. 241 (1955), unemployment compensation was received from the State of Oklahoma by a postal service employee. Since the employee might have been required to refund the unemployment compensation to the Oklahoma Employment Security Commission, we determined that no deduction from the backpay should be made. This holding was extended to cover a former member of the military service in 50 Comp. Gen. 180 (1970). And, in B-189198, August 25, 1977, we advised the Community Service Administration by letter that unemployment compensation received from the District of Columbia should not be deducted from a backpay award to an employee. The letter relied upon Federal Personnel Manual Supplement 990-2, Book 550, subchapter S8-5f and S8-5i (now subchapter S8-6(4)), which provides as follows:

(4) Unemployment compensation. Unemployment compensation received from a State by an employee during a period of unjustified or unwarranted separation from the Federal service may be required to be refunded by the State and therefore, no deduction should be made from the back pay to which the employee is otherwise entitled on restoration.

### OPINIONS OF REGULATORS

In furtherance of our deliberations, we requested the views of both the Office of Personnel Management and the Department of Labor on the withholding of unemployment compensation from a Federal backpay award. The Department of Labor's Administrator, Office of Employment Security, concluded that backpay constitutes wages, but unemployment compensation does not constitute wages and is not the equivalent of wages under Federal court decisions. He concluded, therefore, that under current Federal law a Federal agency may not lawfully deduct from an award of backpay an amount equal to the unemployment compensation paid.

Taking a contrary position, the General Counsel, Office of Personnel Management, responded that under backpay regulations at section 550.803 of Title 5, Code of Federal Regulations, the term "pay, allowances, and differentials" is defined as "\* \* \* monetary and employment benefits to which an employee is entitled by statute or regulation by virtue of the performance of a Federal function." Based on this definition, the General Counsel concluded that unemployment compensation payments are employment benefits directly resulting from the loss of Federal employment. As such, unemployment compensation payments should be withheld from backpay awards to assure recoupment of erroneous payments to Federal employees who are subsequently reinstated with backpay.

### OPINION

Department of Labor regulations on unemployment compensation for former Federal civilian employees, discussed above, do not

specifically address the assessment of contingent liability to make a refund in instances where an employee receives unemployment benefits during a period for which restoration and backpay are subsequently awarded. Nor do Office of Personnel Management regulations governing backpay provide any specific guidance on the treatment of unemployment compensation paid by States. However, as stated above, the Federal Personnel Manual clearly states that unemployment compensation is not to be deducted from backpay, citing 35 Comp. Gen. 241.

What remains from the responses received from the duly authorized regulators of unemployment compensation (DOL) and Federal backpay (OPM) is a dichotomy in the approach to the issue of whether State unemployment compensation payments should be offset by a Federal agency from a backpay award. We recognize OPM's concern that there may be instances in which a State does not effect recovery of the unemployment compensation and as a result the employee stands to be unjustly enriched. This would be the result where the State does not receive notice of the Federal agency's backpay award, where State law specifically excludes unemployment compensation from the definition of wages or earnings to be offset, where a State's statutory limitations period bars recovery of the compensation, or where the particular State might otherwise encounter administrative difficulty in identifying and collecting back the compensation. We would point out, on the other hand, that the unemployment compensation statute and the Department of Labor regulations grant to the States the right to determine when and how to recover overpayments of unemployment compensation paid to Federal employees. Hence, we do not believe that these potential difficulties in a given case provide a legal basis for us to overturn our prior decisions against deducting unemployment compensation from backpay.

Rather, in view of the existing conflict between the agencies charged with regulating the unemployment and backpay laws, we believe that the impetus for any change in the existing law should result from initiatives coordinated through the Department of Labor and the Office of Personnel Management. Thus, in the absence of statutory amendment, revised regulations, or reformation of existing Federal-State agreements on the issue, the procedures available for recoupment of unemployment benefits in the circumstances of Mr. Gurwit's case require deference to individual State initiatives. Therefore, until such change occurs, we will continue to follow our holdings that, since unemployment compensation received from a State by an employee during a period of unjustified or unwarranted separation from the Federal service may be required to be refunded by the State, no deduction should be made by the Federal agency from the backpay to which an employee is otherwise entitled on restoration.

Whether and in what manner Mr. Gurwit must repay to the State of Vermont all or any portion of the amount of unemployment compensation he received during the period covered by the Federal backpay award must be resolved under that State's laws by those, such as the Commissioner of Employment Security and the Attorney General, entrusted with their enforcement. Accordingly, the Customs Service may not make any deduction from the backpay award on account of unemployment compensation paid by the State of Vermont to Mr. Gurwit.

[B-209414]

**Compensation—Periodic Step-Increases—Waiting Period  
Commencement—Repromotion—During Period of Pay  
Retention**

A General Schedule employee was reduced in grade when he exercised his right under 10 U.S.C. 1586 (1976 & Supp. IV 1980) to return to a position in the United States following overseas duty. In accordance with 10 U.S.C. 1586, as implemented by Department of Defense Instruction 1404.8 (April 10, 1968), the employee was afforded pay retention under 5 U.S.C. 5363 (Supp. IV 1980). The employee's subsequent repromotion to his former grade and step commenced a new waiting period for within-grade increases, since the constructive increase in pay which occurs upon repromotion during a period of pay retention is an "equivalent increase" under 5 U.S.C. 5335(a) (1976 & Supp. IV 1980); 5 CFR 531.403 (1982). 62 Comp. Gen. 151 is reversed based on new information furnished.

**Matter of: Eric E. Bahl—General Schedule Within-Grade  
Increase—Pay Retention—Repromotion to Prior Position  
After Demotion—Reconsideration, December 7, 1983:**

The issue in this case is whether the repromotion of an employee to his former position, occurring while the employee is receiving a retained rate of pay under 5 U.S.C. § 5363 (Supp. IV 1980), constitutes an "equivalent increase" under 5 U.S.C. § 5335(a) (1976 & Supp. IV 1980), and 5 CFR § 531.403 (1982), so as to require the commencement of a new waiting period for periodic step increases. We hold that the repromotion of an employee under these circumstances constitutes an "equivalent increase" within the meaning of the applicable law and regulations, even though the employee's actual salary remains the same throughout the period of demotion and repromotion.

Michael E. George, Acting Personnel Officer, Department of the Army, Kansas City District, Corps of Engineers, request that we reconsider our decision in *Eric E. Bahl*, B-209414, January 31, 1983, 62 Comp. Gen. 151. That decision was handled as a labor-relations matter under our procedures in 4 CFR Part 22 (1982). Pursuant to those procedures, the National Federation of Federal Employees, Local 29 (NFFE), representing Mr. Bahl, served the Army with a copy of its request for a decision. The Army did not file responsive comments with our Office, and, therefore, we rendered a decision based on information supplied to us by NFFE. The Army now ad-

vises us that NFFE incorrectly reported the facts surrounding Mr. Bahl's claim. For the reasons that follow, we reverse our prior determination.

Information furnished to us by NFFE, upon which our prior decision was based, set forth the relevant facts as follows. In June 1975, Mr. Bahl, a General Schedule employee, was transferred to the Army Real Estate Agency in Europe and simultaneously was promoted to step 1 of grade GS-11. Due to subsequent pay adjustments and within-grade increases, Mr. Bahl had attained step 4 of grade GS-11 in June 1978. Had Mr. Bahl remained in that position and grade, his next two within-grade increases would have occurred in June 1980 and June 1982. However, on July 1, 1980, Mr. Bahl was demoted to grade GS-9 when he was transferred back to Kansas City. Concurrently, he received a within-grade increase to step 5 of his former grade. At that time, he was afforded grade retention under the provisions of 5 U.S.C. § 5362, and, hence, for pay administration purposes, his grade remained the same (grade GS-11, step 5). In November 1980, Mr. Bahl was repromoted to his former position at grade GS-11, step 5.

The NFFE further reported that the Army denied Mr. Bahl's request for a retroactive within-grade increase effective on or about July 1, 1982, stating that it was not due until November 1982, and citing our decision in 42 Comp. Gen. 702 (1963). That decision, in conjunction with others discussed more fully below, expresses the general rule that repromotion during a period of pay retention constitutes an "equivalent increase" within the contemplation of 5 U.S.C. § 5335(a), requiring the commencement of a new waiting period for within-grade increases.

Relying on the facts presented by NFFE, we held that Mr. Bahl was entitled to be retroactively awarded a within-grade increase under the provisions of 5 U.S.C. § 5335(a), based on the schedule in effect prior to his demotion. Specifically, we distinguished *pay* retention under 5 U.S.C. § 5363 from *grade* retention under 5 U.S.C. § 5362, determining that, under the latter provision, the retained grade of an employee is to be treated as the grade of his position for all purposes, including eligibility for within-grade advancement, during the 2-year period of grade retention. Consequently, we decided that Mr. Bahl's repromotion to his former position, occurring during a period of grade retention, did not constitute an "equivalent increase" under 5 U.S.C. § 5335(a) and its implementing regulations, and did not require commencement of a new waiting period for within-grade increases.

The Army now advises us that Mr. Bahl was ineligible for grade retention under 5 U.S.C. § 5362 because he was not demoted as the result of a reduction-in-force (RIF) or reclassification process. He was, however, afforded pay retention under 5 U.S.C. § 5363, because he was reduced in grade as a consequence of exercising his right under 10 U.S.C. § 1586 (1976 & Supp. IV 1980) to return to a

position in the United States following the completion of overseas duty. Specifically, section 1586 guarantees an employee that he will be placed, upon his return from overseas duty, in the same position he vacated to accept the foreign assignment. Thus, even though Mr. Bahl had been promoted from grade GS-9 to grade GS-11 concurrent with his overseas transfer, subsequently attaining step 5 of grade GS-11, he was reemployed in the United States in the grade GS-9 position he had vacated to accept the overseas assignment. He was, however, paid at the rate for grade GS-11, step 5, in accordance with Department of Defense Instruction 1404.8 (April 10, 1968), which implements 10 U.S.C. § 1586 and provides in relevant part that:

An employee whose exercise of reemployment rights would result in a reduction from his current grade shall be given assistance through return placement programs for at least a six-month period in locating a position at his present grade before being required to exercise his return rights. *Employees returning to a lower grade will be entitled to pay savings benefits if otherwise eligible.* [Italic supplied.]

The NFFE has responded to the Army's request for reconsideration, renewing its contention that Mr. Bahl was entitled to grade retention under 5 U.S.C. § 5362, as implemented by 5 C.F.R. § 536.103 (1982). Specifically, the union states that, while Mr. Bahl may not have been demoted through RIF or reclassification procedures, he had served for at least 52 consecutive weeks in a higher graded position prior to the reduction in grade, and, therefore, was eligible for grade retention under 5 C.F.R. § 536.103(c)(3). Section 536.103(c)(3) states that:

(3) In situations other than those covered by paragraphs (c)(1) and (c)(2) of this section, an employee is eligible for grade retention if he or she, immediately prior to being placed in the lower grade, has served in a position in any pay schedule for 52 consecutive weeks or more provided that the service was in an agency as defined in 5 U.S.C. § 5102 at a grade(s) higher than the position in which the employee was placed.

Applying the requirements of 5 U.S.C. § 5362 and its implementing regulations, we are unable to find that Mr. Bahl was entitled to grade retention. Section 5362 authorizes grade retention only for those individuals who are reduced in grade as a result of a RIF or reclassification process. 5 U.S.C. §§ 5362 (a) and (b). See also, H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. 159, 160 (1978). In this regard, the implementing regulations in 5 C.F.R. § 536.103(a) state that:

(a) Grade retention shall apply to an employee who moves to a position in a covered pay schedule which is lower graded than the position held immediately prior to the demotion in the following circumstances:

- (1) As a result of reduction-in-force procedures; or
- (2) As a result of a reclassification process.

Subsection 536.103(b) provides that an employee who is not entitled to grade retention under the above-cited provisions may, at the employing agency's option, be granted grade retention if he has been reduced in grade as the result of a reorganization or reclassification decision announced by management in writing.

The provisions of 5 C.F.R. § 536.103(c), cited by NFFE, do not delineate additional circumstances under which an employee may be afforded grade retention, but, instead, prescribe eligibility requirements applicable to an employee who is reduced in grade as a result of the processes specifically identified in subsections 536.103(a) and (b). See Federal Personnel Manual, Chapter 536, Subchapter 2 (October 1, 1981). Since Mr. Bahl was not reduced in grade as the result of a RIF or reclassification process, he is not entitled to grade retention under 5 U.S.C. § 5362, as implemented by 5 C.F.R. § 536.103, and the eligibility requirements stated in 5 C.F.R. § 536.103(c) do not pertain to him.

Additionally, NFFE states that 10 U.S.C. § 1586 was enacted in 1960 to provide minimum protection for an employee returning to a position in the United States following overseas duty, and, therefore, should not be construed as diminishing the grade and pay retention benefits authorized by 5 U.S.C. §§ 5362 and 5363, added by the Civil Service Reform Act of 1978 (CSRA), Public Law 95-454, 92 Stat. 1218. The union further contends that the grade and pay retention provisions of the CSRA supersede 10 U.S.C. § 1586, since the former provisions are "more specific" than the latter. We see no useful purpose to be served by addressing these contentions, since we have determined that Mr. Bahl was not entitled to grade retention under 5 U.S.C. § 5362, and the Army states that the employee was afforded pay retention under 5 U.S.C. § 5363. Accordingly, the issue for our determination is whether the repromotion of an employee placed on pay retention under 5 U.S.C. § 5363 is an "equivalent increase" under 5 U.S.C. § 5335(a), as implemented by 5 C.F.R. § 531.403, so as to require the commencement of a new waiting period for periodic step increases.

Section 5335(a) of Title 5, United States Code, provides that an employee is eligible for periodic step increases in pay upon completion of 104 calendar weeks of service in pay rates 4, 5, and 6, as long as the employee did not receive an "equivalent increase" in pay from any cause during that period. An "equivalent increase" is defined in 5 C.F.R. § 531.403 as follows:

"Equivalent increase" means an increase or increases in an employee's rate of basic pay equal to or greater than the difference between the rate of pay for the General Schedule grade and step occupied by the employee and the rate of pay for the next higher step of that grade.

In cases arising under the salary retention statutes in effect before the CSRA, we held that, after a demotion with retained pay and a later repromotion to the employee's former grade and step, the employee must begin a new waiting period upon repromotion without counting service at the grade and step before the demotion as part of the new waiting period. *Richard C. Dunn*, B-193394, March 23, 1979; *Duane E. Tucker*, B-193336, March 23, 1979. We explained that, upon repromotion, the constructive increase in pay from the applicable rate determined under 5 U.S.C. § 5334(b) for

the lower grade held during demotion constitutes an "equivalent increase" within the meaning of 5 U.S.C. § 5335(a). See 43 Comp. Gen. 701 (1964); 43 Comp. Gen. 507 (1964); 42 Comp. Gen. 702 (1963).

The rule stated in the above-cited decisions applies to an individual who is repromoted while receiving a retained rate of pay under 5 U.S.C. § 5363, for several reasons. First, the provisions of 5 U.S.C. § 5334(b) (Supp. IV 1980), upon which our prior decisions were based, continue to require the use of constructive within-grade increases in determining the rate to be paid an employee who is promoted while receiving a retained rate of compensation.

Second, 5 U.S.C. § 5363 parallels the prior statutes authorizing salary retention in that it provides only for pay, and not grade retention. Thus, although an employee afforded pay retention under 5 U.S.C. § 5363 receives basic pay based on the rate for the grade and step he had attained prior to demotion, the lower grade held during demotion is relevant for other purposes of pay and pay administration. In contrast, under the grade retention provisions of 5 U.S.C. § 5363, the grade the employee attained prior to his demotion is to be treated as his grade for all purposes, including eligibility for within-grade advancement, during the 2-year period of grade retention.

Finally, we advised the Office of Personnel Management of the foregoing considerations when that agency recently proposed revisions in the within-grade increase regulations set forth in 5 C.F.R. Part 531. Subsection 531.407(c)(7) of the proposed regulations provided that an increase in an employee's rate of basic pay should not be considered an "equivalent increase" when it results from the promotion of an individual receiving pay retention under 5 U.S.C. § 5363, as implemented by 5 C.F.R. Part 536, unless it results in an increase in pay of at least one within-grade increase for the grade to which the individual is promoted. 45 Fed. Reg. 50,338 (July 29, 1980). This rule was deleted from the final regulations because it conflicted with our prior decisions, discussed above. 46 Fed. 2,317 (January 9, 1981).

Thus, applying the relevant statutes and regulations in light of our prior decisions, Mr. Bahl's repromotion to grade GS-11, step 5, while he was receiving pay for that grade and step as a retained rate resulted in a constructive pay increase under 5 U.S.C. § 5334(b). This increase represented an "equivalent increase" within the meaning of 5 U.S.C. § 5335(a), as implemented by 5 C.F.R. § 531.403, and a new waiting period for within-grade increases commenced upon the employee's repromotion in November 1980. Mr. Bahl, therefore, would not have been eligible for within-grade advancement to grade GS-11, step 6, until November 1982, after he had completed 104 weeks of service in step 5. On this basis, we reverse our earlier determination that Mr. Bahl was entitled to a within-grade increase on or about July 1, 1982, based on the schedule in effect prior to his demotion.

The NFFE additionally asserts that "it is possible" that the Army incorrectly computed a pay raise granted to Mr. Bahl on October 1, 1980, and has requested that the employee be awarded backpay in an unspecified amount. We are unable to render a determination on this matter since NFFE's allegation is speculative and has not been adequately substantiated. See 4 C.F.R. §§ 22.8, 31.7 (1982).

For the reasons stated above, we reverse our prior decision.

[B-212447]

**President's Executive Exchange Program—President's  
Commission on Executive Exchange—Expenses—  
Appropriations—Availability**

President's Commission on Executive Exchange may use its private sector participation fees maintained in OPM revolving fund described in 5 U.S.C. 1304(e)(1) for the costs of a word processor and postage machine as those expenditures are directly in furtherance of the statutory purposes, *i.e.*, the costs of education, set forth in Public Law 97-412.

**President's Executive Exchange Program—President's  
Commission on Executive Exchange—Expenses—  
Appropriations—Availability**

Expenses for the reupholstered furniture and insurance for works of art are general administrative costs that must be paid out of OPM salary and expense account rather than from private sector participation fees.

**Insurance—Government—Self-Insurer—Exception**

As the insurance is for privately owned works of art temporarily entrusted to Government on condition that they be insured, Government's self-insurance rule does not apply. Government would achieve no economy by applying rule and would lose the benefit of using the property to be insured.

**Matter of: Expenses of President's Commission on Executive  
Exchange, December 7, 1983:**

The President's Commission on Executive Exchange asks whether monies in the Commission's private sector account, an account maintained in an Office of Personnel Management (OPM) revolving fund, can be used for (1) a word processor; (2) a postage machine; (3) reupholstering furniture in the Commission's reception room; and (4) commercial insurance for works of art that are to be hung on the Commission's Conference room walls. Consistent with our views below, we have no objection to the expenditures; however, we believe the reupholstery and insurance should be paid out of OPM's salary and expense appropriation.

**BACKGROUND**

The President's Commission on Executive Exchange (originally named the President's Commission on Personnel Interchange) was established in 1969 by executive order. Exec. Order No. 11451, 34

Fed. Reg. 921 (1969). Its current functions are set forth in Executive Order No. 12136, 44 Fed Reg. 28771 (1979). Under this order the Commission is directed to develop a program in which executives from the Government's executive agencies and the private sector are exchanged and placed in positions in the other sector. The order also directs the Commission to develop an education program designed to assist the exchanged executives to place their work experiences within the broader context of Government and the private sector.

Currently, the Commission is funded both from private and public monies. Funding for Commission staff salaries and administrative expenses comes from OPM's annual appropriation for "salaries and expenses." Public Law 97-412, 96 Stat. 2047, codified at 5 U.S.C. § 1304(e)(ii), authorizes the Commission to impose participation fees for private sector participation in its executive exchange program and place the fees in a special account in an OPM revolving fund. The Commission may use funds from this account for the following purposes:

\* \* \* for costs of education and related travel of exchanged executives; for printing \* \* \* and, in such amounts as may be specified in appropriations Acts, for entertainment expenses.

The materials submitted by the Commission show that the word processor will be used in direct support of the Assistant Director of Education, and the postage machine during bulk mailings of brochures and educational materials in conjunction with the education program schedule. The reception room in which the reupholstered furniture will be kept is to be used by speakers who are invited to the Commission headquarters to participate in the Commission's education program, by the executives who are nominated for the program, and by nominees who have been invited to the townhouse for interviews for possible participation in the program. About 75 percent of the reception room use is directly related to the education program since this is the major reason for people visiting the Commission's offices.

The art works will decorate the Commission's conference room walls. This room, as well, is mostly, although not exclusively, used for the education program. The Corcoran Gallery, a private art gallery, is offering the Commission the works of art on condition that the Commission insures them. The Commission has informed us that the loan is temporary and that the works of art will be returned when Ms. June Walker, the Commission's Executive Director, leaves the Commission. We understand that Ms. Walker arranged the loan and feels responsible for returning the works of art.

In view of OPM's relationship with the Commission, we requested OPM's views on the questions presented. OPM concluded that the word processor and postage machine could be purchased from

the private sector participation fees since they are to be used in direct support of the Commission's programs. OPM suggested the same conclusion for the reupholstery and insurance. OPM also thought the Commission could use appropriated funds from OPM's salaries and expenses appropriation for the described purchases, as well as the participation fees, on the basis that they are legitimate administrative expenses.

### LEGAL DISCUSSION

This request raises two questions: (1) whether the proposed purchases are for the purposes for which the special account in OPM's revolving fund was established, and (2) whether the proposed purchase of insurance is a proper exception to the rule that the Government, as a self-insurer, does not buy commercial insurance.

Except as otherwise provided by law, appropriations may be used only for the objects for which they have been made. 31 U.S.C. § 1301(a) (formerly 31 U.S.C. § 628). It is a well-settled corollary to this law that where an appropriation is made for a particular object, by implication it confers authority to incur expenses that are necessary or proper or incident to proper execution of the object. B-211531, July 18, 1983; 6 Comp. Gen. 619, 621 (1927). As it is difficult to state precisely what is and is not a necessary expense, the role of agency discretion is important. Although administrative determinations pertaining to necessary expense questions are not binding on the Comptroller General, normally GAO will not substitute its own judgment for that of an agency. 18 Comp. Gen. 285, 292 (1938). We have held that revolving funds are appropriations, B-193573, December 19, 1979, and, accordingly, that the legal principles governing appropriations also apply to revolving funds. B-203087, July 7, 1981; see 35 Comp. Gen. 436, 438 (1956). It follows that the principles described above would apply to the OPM revolving fund in which the private sector participation fees are maintained.

Applying these principles to the proposed purchase, we find that as the word processor and postage machine are to be used for the Commission's educational program, expenditure of the participation fees for their purchase would be directly in furtherance of the purpose set forth in Public Law 97-412, that is, for costs of education. Accordingly, the private sector account may be used for these expenses.

As regards reupholstering the furniture, although the Commission points out that the reupholstered furniture is to be kept in the reception room used by participants and prospective participants in the Commission's education exchange program, we believe this cost must be considered to be a general administrative expense. The reception room is also used for non-education program purposes. Costs of maintaining such areas are usually assigned to overhead

or general administrative costs and we do not believe they can properly be paid out of an account with the limitation imposed on the Commission's private sector account. For similar reasons we do not believe the insurance of works of art used to decorate a general purpose board room can be paid for out of the private sector account; rather they should be paid, if otherwise proper, out of the salary and expense account.

We next consider the question of insuring loaned works of art. As a threshold matter, agencies are authorized to acquire, by purchase, loan, or otherwise, decorative items, paintings, or similar objects when the purchase is consistent with work-related objectives and the agency mission, and is not primarily for the personal convenience or personal satisfaction of a Government officer or employee. 60 Comp. Gen. 580, 582 (1981). We think that the information furnished by the Commission provides adequate justification for acceptance of the borrowed art work.

The rule on self-insurance referred to earlier is a rule of policy rather than statute. We have generally stated that it does not make economic sense to expend appropriated funds for the purchase of insurance to cover loss or damage to Government-owned property or for the liability of Government employees for damage to someone else's property. The extent of the Government's resources is generally sufficient to absorb such a loss or liability should the contingency actually occur. See B-158766, February 3, 1977; 19 Comp. Gen. 798, 800 (1940). Nevertheless, we have made exceptions in the case of privately owned property temporarily entrusted to the Government where the owner requires insurance coverage as part of the transaction. 42 Comp. Gen. 392, 393 (1963). In such situations the Government would achieve no economy by applying the rule against purchasing insurance and would lose the benefits of using the property to be insured. In this instance, the Corcoran Gallery of Art, a private entity, is requiring, as a condition of the loan of several of its works of art, that the Commission purchase insurance. The self-insurance rule need not be applied to that purchase as long as the costs of the insurance are paid from the salaries and expenses appropriation.

In summary, the word processor and postage machine may be paid for out of the special account in OPM's revolving fund; however, the reupholstery of the chairs and the cost of insurance for the loaned art should be paid out of the OPM salaries and expense account.

[B-210481]

**General Accounting Office—Jurisdiction—Grants-In-Aid—  
Protests Not Concerning Award Propriety—No Authority To  
Consider**

General Accounting Office will not consider a bidder's complaint that a municipality, seeking to construct a swimming pool partially funded by a Federal grant, was improperly making a claim under the bidder's bid bond where the municipality conducted three rounds of bidding, the last of which was under specifications differing from the others, and then made a claim against the bid bond of the low bidder, under the first solicitation, who had refused to execute a contract at a price it maintained was mistaken and which the city would not permit the bidder to correct. Such a complaint does not sufficiently concern the propriety of the award of a contract as to come within the purview of GAO's review of grant complaints.

**Matter of: Steele and Associates, Inc., December 9, 1983:**

Steele and Associates, Inc. has filed a complaint with our office against the decision by the city of Garland, Texas, to hold Steele liable on the bid bond it submitted when bidding for a contract to construct a "Surf and Swim" wave-action pool and associated facilities for the city. The project was funded, in part, by a \$705,000 grant from the Department of the Interior under the Land and Water Conservation Act of 1965, as amended, 16 U.S.C. §§ 4601-4 to 4601-11 (1982). We dismiss the complaint.

In response to its initial January 1982 solicitation, the city received eight bids. Since Steele's base bid of \$1,914,100 appeared low, the city notified Steele on March 22 that a \$1,914,100 contract had been approved by the City Council. Steele thereupon informed the city by letter dated March 24 that its total bid should have been \$2,028,200 (still \$61,800 less than the second-low bid of \$2,090,000) and that it had mistakenly assumed that the city wanted landscaping and landscape irrigation for the project to be priced separately. Accordingly, Steele requested correction of its base bid to include its prices for these items.

By letter of April 7, the city rejected Steele's request and instead declared Steele in default for failure to execute the contract; the city then resolicited. When bids were opened in May, Steele's bid, this time for \$2,028,200, again appeared low. However, residents of the neighborhood where the pool was to be located, concerned about the congestion it would create and questioning the need for such a pool since a similar, commercially owned wave-action pool was to be built nearby, objected to its construction. In response to these objections, the City Council canceled the solicitation without making an award. After voters later approved the project in a referendum, the city solicited bids for a third time, although with different specifications than in the initial solicitation. Steele submitted a bid for \$2,078,200, but award was made instead to Hannah Construction Company, Inc., on its low bid of \$2,012,000.

The city then demanded payment from Steele of \$38,700, the apparent additional cost of the award to Hannah,<sup>1</sup> and attempted to collect on the bid bond in the absence of payment from Steele. Steele subsequently filed this complaint with our Office, arguing that it would be unconscionable for the city to hold it liable on the bid bond.

We consider grant complaints pursuant to our public notice entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406, September 12, 1975, wherein we stated that we would undertake reviews concerning the propriety of contract awards made by grantees. In its complaint, however, Steele is not seeking the award of this contract but relief from a claim against its bid bond made by the city after the contracting process had been completed. We consider this matter as one not sufficiently concerning the award of a contract as to be within the purview of our grant notice.

Accordingly, the complaint is dismissed.

[B-203553]

### **Rehabilitation Act of 1973—Handicapped Employees—Special Equipment, etc.—Appropriation Availability**

In appropriate circumstances, the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 *et seq.*, authorizes the expenditure of appropriated funds for special equipment that will enable a qualified handicapped employee to perform his or her official duties. These circumstances were not present in our previous decision, Matter of Internal Revenue Service, 61 Comp. Gen. 634 (1982), and the result therein is hereby affirmed.

### **Rehabilitation Act of 1973—Handicapped Employees—What Constitutes a Handicap**

A reference in 61 Comp. Gen. 634 to an employee's allergic reaction to tobacco smoke as a handicap was not intended to refer to the term as defined in the Rehabilitation Act or its implementing regulations. 61 Comp. Gen. 634 is clarified.

### **Matter of: Equal Employment Opportunity Commission—Special Equipment for Handicapped Employees, December 14, 1983:**

The Chairman of the Equal Employment Opportunity Commission (EEOC) has requested clarification of our decision at 61 Comp. Gen. 634 (B-203553, September 24, 1982). In that decision, we held that appropriated funds could not be used to purchase an air purifier for the office of an Internal Revenue Service employee who suffered from an allergy to tobacco smoke. The Chairman indicates that certain Federal agencies have interpreted the decision as prohibiting them from expending Government funds to comply with the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701 *et seq.*

<sup>1</sup> It is not clear from the record how the city calculated this amount, which is less than the difference between the two firms' bids.

He requests that we revise our decision to clarify that in appropriate circumstances the Rehabilitation Act authorizes the expenditure of appropriated funds for special equipment and furnishings to enable a handicapped employee to perform his or her official duties. We affirm the result in 61 Comp. Gen. 634 (1982) but clarify its basis to point out that the employee involved was not a "qualified handicapped individual" as defined in the Rehabilitation Act or its implementing regulations.

In 61 Comp. Gen. 634, 635, we stated that:

[I]n the absence of specific statutory authority, the cost of special equipment and furnishings to enable an employee to perform his or her official duties constitutes a personal expense of the employee and is not payable from appropriated funds.

In that case, neither the voucher that was questioned nor any agency submission justified the purchase of the air purifier as being authorized under the Rehabilitation Act of 1973. It was not argued that the employee was handicapped, as that term is defined in 29 U.S.C. § 706(7)(B) or 29 C.F.R. § 1613.702. Although the employee apparently suffered from allergic reactions to tobacco smoke in his work area, the agency made no determination that he:

(1) Has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has record of such an impairment, or (3) is regarded as having such an impairment. 29 C.F.R. § 1613.702(a).

We thus had no reason to consider whether the Rehabilitation Act provided specific statutory authority for the purchase of equipment necessary for a qualified handicapped employee to perform his or her official duties. (We have already relieved the accountable officer of liability on other grounds. B-203553, February 22, 1983.)

We recognize that we characterized the employee's allergy as a handicap at one point in our decision. 61 Comp. Gen. at 636. We were, however, using the term in its broad sense (i.e. a physical disadvantage), rather than in its narrower statutorily defined sense (i.e. "a physical or mental impairment which substantially limits one or more of [a] person's major life activities").

The EEOC says that in order to comply with sections 501 and 505 of the Rehabilitation Act of 1973, as amended, (29 U.S.C. § 791 (1976); 29 U.S.C. § 794a (Supp. IV, 1980)) and the regulations promulgated pursuant thereto, 29 C.F.R. § 1613.704, a Federal agency may be required, in appropriate circumstances, to expend public funds to acquire or modify equipment, to provide readers or interpreters, or to make facilities readily accessible. We agree completely. An agency may, when acting under the authority of the Rehabilitation Act of 1973, expend appropriated funds to accommodate the physical or mental limitations of a qualified handicapped employee or applicant, as defined in the Act or implementing regulations, unless such accommodation would impose an undue hardship on the operation of its program. Our decision at 61 Comp. Gen. 634 (1982) was never intended to suggest otherwise in appropriate circumstances.

**[B-213225]****Bids—Invitation for Bids—Specifications—Minimum Needs Requirement—Administrative Determination—Reasonableness**

Procuring agency generally must give bidders sufficient details in solicitation to enable them to compete intelligently and on relatively equal basis; specifications must be unambiguous and describe agency's minimum needs accurately. However, when precise estimates of work to be performed cannot be made, solicitation is sufficient if it places bidders on notice and permits them to use business judgment in setting prices to cover risk of being asked to provide greater amount or different type of services than indicated.

**Bids—Invitation for Bids—Specifications—Adequacy**

Where 11 firms submit bids in response to allegedly vague solicitation and four bidders specifically state that they had no difficulty in preparing fixed-price bids, General Accounting Office cannot conclude that specifications inhibited competition or prevented bidders from preparing bids properly.

**Contractors—Responsibility—Determination—Review by GAO—Affirmative Finding Accepted**

Allegation that unrealistically low bid is due to failure to understand what may be required under contract involves bidder responsibility and, if agency makes affirmative determination, GAO will not generally review it.

**Contracts—Requirements—Estimated Amounts Basis—Best Information Available**

Where agency solicits bids for a requirements contract on the basis of estimated quantity, estimate in solicitation should be based on the best information available and present a reasonably accurate representation of the agency's anticipated needs. Protest that providing estimated total square footage of major floor finishing required, instead of estimate of square footage of each of three different types of floor finishing to be performed is defective, is denied where protester has not established that the more general estimate is not based on best information available.

**Contracts—Labor Stipulations—Davis-Bacon Act—Applicability—Construction Contracts**

Where one item under bid schedule, which requires separate bid price, is undisputedly construction work, agency properly included in solicitation Davis-Bacon Act wage provisions which are applicable to construction work.

**Matter of: Hero, Inc., December 14, 1983: .**

Hero, Inc. (Hero) protests any award under invitation for bids (IFB) No. F49642-83-B-1018, for comprehensive maintenance and repair of family housing issued by the Department of the Air Force (Air Force). Hero contends that the IFB is defective because it fails to state estimated quantities for two solicited items in contravention of applicable regulation and because the IFB improperly contains a Davis-Bacon Act wage determination. Hero requests cancellation of the IFB.

We find the protest without merit.

Since January 1, 1981, Hero has performed under an Air Force contract for the maintenance and repair of family housing units at Andrews Air Force Base. On August 22, 1983, the Air Force issued

the IFB under protest. A site visit and prebid conference was held on September 1, 1983.

On September 13, 1983, Hero sought injunctive relief from the United States Claims Court. Hero argued that the IFB was defective for the same reasons discussed in this decision and now before the district court. The United States Claims Court dismissed Hero's complaint because at the time it was not a bidder under the IFB at issue and, in any event, even as a bidder, the firm would not be entitled to equitable relief. On September 30, 1983, Hero filed a protest with our Office and on October 14, 1983, filed for injunctive relief with the United States District Court for the District of Columbia under Civil Action No. 863-3032. The court concluded it had jurisdiction, issued a preliminary injunction and requested our opinion on Hero's protest.

The first ground of protest concerns item 1 of the IFB which requires the contractor to furnish all labor, transportation, equipment, and supervision necessary for the maintenance of 2,084 specified family housing units. The IFB solicits a firm, fixed price for this item. Hero argues that this item is a fixed-price, requirements contract with an indefinite scope of work and that the Air Force is required to state under Defense Acquisition Regulation (DAR) § 3-409.2 (1976 ed.) estimated quantities for major items of work under the item. For example, item 1 requires repair or replacement of fencing, walls, floor and bathrooms, each of which would cost a different amount to accomplish. According to Hero, the best available information consistent with the DAR provision is the estimated quantities or historical information for these major items of work. Hero asserts that the Air Force should provide estimates of the number and type of items needing repair or replacement and, without this information, bidders will not bid on a common basis.

The Air Force argues that the information it provided under the IFB permits informed bidding under item 1. The Air Force states that the IFB contains the estimated number of service calls listed by general maintenance, appliance repair, and air conditioning/heating repair. Also, the IFB contains the average number of vacant housing units by month, type of housing units to be serviced, including housing unit number, type of construction, gross square feet, date constructed, type of equipment in housing and floor plans, and unique features and problems. Finally, the IFB contains standards for types of tasks defining the quality of maintenance and repair work to be performed under this line item. The Air Force asserts that this information is sufficient for bidders to intelligently estimate the size and composition of the staff needed to meet item 1. Moreover, only Hero, the incumbent, has objected to this item, and the Air Force advises that it deliberately determined not to convert item 1 into a requirements contract because that approach would create a costly and unnecessary contract administration burden.

We find Hero's argument that the item is a requirements-type contract because of the indefinite scope of work and, therefore, DAR § 3-409.2(a) requires the Air Force to inform bidders of the estimated quantities for the major task areas to be without merit.

As a general rule, a procuring agency must give bidders sufficient detail in the IFB to enable them to compete intelligently and on a relatively equal basis. *Telephonics Corporation*, B-194110, January 9, 1980, 80-1 CPD 25. Specifications must be free from ambiguity, *M. J. Rudolph Corporation*, B-196159, January 31, 1980, 80-1 CPD 84, and must describe the minimum needs of the procuring activity accurately. *Gibson & Cushman Dredging Corporation*, B-194902, February 12, 1980, 80-1 CPD 122. There is no legal requirement that competition be based on plans and specifications which state the work in detail so as to completely eliminate the possibility that the successful contractor will encounter conditions or be required to perform work other than that specified. We have stated that such perfection, while desirable, is manifestly impracticable in some procurements, 41 Comp. Gen. 484 at 488 (1962), and that the mere presence of a risk factor does not make a solicitation improper. *Applied Devices Corporation*, B-199371, February 4, 1981, 81-1 CPD 65.

Under these standards, we find the information provided for item 1 to be adequate to prepare a bid. While, as Hero states, it might have been helpful to bidders if the Air Force had provided the service orders in more detailed task categories, there is no requirement that the agency do so. Furthermore, the information Hero wants is not the only factor which may determine current needs. For example, if bidders were informed that 40 percent of service calls last year involved plumbing type maintenance, there is no assurance that this pattern would necessarily repeat itself this year; rather, there could be an inverse relationship because a high incidence of plumbing repair in the previous year might result in diminution of existing problems and, therefore, less repair or replacement the following year. Similarly, if external wall and roof repairs were not a substantial percentage of work last year, weather conditions this year could result in more roof and wall repairs. Thus, the historical data Hero seeks would not necessarily provide a more accurate basis for bidders to prepare their bids.

In light of this, we find the Air Force decision only to provide the prior year's total of service calls and information concerning the building structures not legally objectionable.

For the reasons discussed immediately above, even if we assumed that item 1 was a requirements contract, the protester has not shown that the information provided by the Air Force did not constitute the best available information as required under the DAR § 3-409.2(a).

We note that in *Klein-Sieb Advertising and Public Relations, Inc.* (Klein-Sieb), B-200399, September 28, 1981, 81-2 CPD 251, we ad-

dressed issues similar to the ones raised here. Klein-Seib, the incumbent under that procurement, was concerned that firms which had not performed the contract would be unaware of the great differences in the amount and type of work which the agency required under previous contracts and that bids would be unrealistically low. Klein-Seib argued, as does Hero, that the agency possessed detailed figures based on the prior contract experience which the agency had a duty to disclose to all bidders. Without such disclosure, the incumbent argued, it would be prejudiced by offering what it believed, on the basis of past experience, was a reasonable price for the services it would be expected to provide.

In *Klein-Seib*, we found it significant that other offerors had submitted offers without protest, and several had specifically commented to this Office that they found the statement of work adequate for preparation of proposals on a fixed-price basis. Similarly, here four bidders have indicated specifically to this Office no problems with the IFB, and 11 bids have been received.

We also note that the prior IFB under which Hero was awarded the current contract contained the same schedule format, that is, a fixed price for maintenance services. Although the scope of work has been expanded under the instant IFB, the solicitation approach has been viable in the past and apparently resulted in adequate competition and award.

The second protest allegation concerns item 4, which is a requirements item that solicits a price per square foot for providing major floor refinishing. The bid schedule states estimated quantities in totals of 45,000 square feet for occupied units and 65,000 for unoccupied units and also indicates that in the previous year 91 units, totaling 87,252 square feet, were serviced. Hero does not challenge the accuracy of this information, but contends that this information does not comply with DAR § 3-409.2 that a requirements item state the best available estimated quantities. The protester argues that the best available estimate requires a breakdown by the three types of floors involved in this requirement—wood floors, resilient floors, and linoleum floors. Hero states that, as the incumbent contractor, it has furnished the Air Force with the previous year's breakdown as to the type of floor refinished, and such information should be disclosed to the bidders.

The Air Force points out that the DAR provision requires the best available estimated quantities, which, in its view, it has provided, and that additional specificity regarding these estimates cannot be supported by information available to the Air Force, and the information is not required to permit bidders to compete on a common basis.

We deny this protest issue.

DAR § 3-409.2(a) provides that when an agency solicits bids for a requirements contract on the basis of estimated quantities, the estimate "should be as realistic as possible." We therefore have held

that the estimate stated in the IFB must be based on the best information available and present a reasonably accurate representation of the agency's anticipated actual needs. *Space Service International Corporation*, B-207888.4, .5, .6, .7, December 13, 1982, 82-2 CPD 525. There is no requirement that the estimate be absolutely correct. Since the protester bears the burden of proof, we normally will not sustain a challenge to an agency's estimate unless it is shown that the estimate misrepresents anticipated actual requirements, is not based on the best information available, or resulted from bad faith or fraud. *Space Service, supra*.

Thus, the issue here is whether the estimate is based on the best information available. In our view, the protester has not established that the estimate is not based on the best information available to the Air Force.

The Air Force decided to solicit on the basis of an estimate of the total quantity of floor finishing per square foot and advised bidders of the total estimated need regardless of floor type for fiscal year 1984 and further provided the previous year's total. Hero does not challenge the accuracy of the total estimate, but argues that further detail is warranted. While Hero argues that as incumbent contractor it provided a breakdown of the type and quantity of floor finishing performed the previous year, the Air Force states that this historical data was not the best estimate of future needs. The Air Force indicates that the prior year's information does not provide a reliable indication of this year's needs and that the Air Force's estimated total provides a more accurate projection of its requirement. In this regard, the protester has not provided any evidence that last year's experience is a reliable indication of this year's requirement with respect to the types of floors that will require floor finishing. Under these circumstances, we find that the agency did not abuse its discretion in using an estimate rather than historical data in order to determine its requirements.

With regard to both items 1 and 4, Hero's implied allegation that any bidder who submitted an unrealistically low price does not understand what is required under the contract concerns the bidder's ability to perform and, thus, is a matter of responsibility. Before awarding a contract to any firm, the Air Force must find that it is a responsible concern. DAR § 1-902 (1976 ed.). Our Office does not review affirmative determinations of responsibility except in circumstances not present here. See *Klein-Sieb Advertising and Public Relations, Inc., supra*.

Hero's other objection to the IFB is that the contract, if awarded, will contain two wage rate determinations. Under the IFB, the Service Contract Act, 41 U.S.C. § 351, *et seq.* (1976), is applicable to item 1 and the Davis-Bacon Act, 40 U.S.C. § 276a (1976), will cover item 4.

Hero asserts that the use of two different wage determinations under the contract will obligate the contractor to pay a minimum

wage of at least \$9.66 per hour for carpenters performing work under item 1, while the minimum wage for carpenters working under item 4 will be only \$6.32 per hour. Hero argues "that the inclusion of these varying wage rates for the same class of employee working on the same project creates . . . confusion as to the price to be bid," and that "[i]t would be virtually impossible to hire an employee at two different wage rates depending on what the employee is doing at a particular time on a particular day."

Hero does not deny that some of the work under the IFB could be classified as construction work and subject to the Davis-Bacon Act. Hero asserts, however, that under DAR § 12-106.2, the Davis-Bacon Act wage determination is unnecessary and should have been excluded from this IFB.

DAR § 12-106.2 states that a contract for construction work is exempt from the need to include appropriate Davis-Bacon Act clauses in the IFB, when it is to be performed in support of nonconstruction work and, in the circumstances of the particular case, the construction work is so merged with the nonconstruction work or so fragmented in terms of the locations or time spans in which it is to be performed that it cannot be segregated as a separate contractual requirement for construction.

Our Office has concluded that the responsibility for determining whether Davis-Bacon Act provisions should be included in a particular contract, as in the case of other appropriate contract provisions, rests primarily with the contracting agencies which must award, administer and enforce the contract. Consequently, our Office will not disturb a good-faith determination by a contracting officer that a contract should be either for construction or supply. *Abbott Power Corporation*, B-190067, December 6, 1977, 77-2 CPD 434; 44 Comp. Gen. 498 (1965).

The Air Force states that item 4, covering floor finishing, is work requirements classified as construction work by the Department of Labor (DOL), and that DOL confirmed this during the course of the preparation of the IFB. Hero does not deny that some of the IFB could be classified as construction work, but argues that it cannot be clearly separated as a practical matter from the other work.

In our view, the Air Force has not acted improperly in applying the Davis-Bacon Act provisions to item 4. The work is separately identified as major floor finishing as a separately bid item with its own specification. As such, the Air Force properly followed the DAR in including the Davis-Bacon provisions. Bidders responding to item 4 are on notice that they must pay salaries in accordance with the Davis-Bacon Act wage determination and must bid accordingly.

Furthermore, we reject Hero's contention that paying for minor floor finishing work under a Service Contract Act wage rate under item 1 and at a different wage rate under item 4 for major floor refinishing creates confusion as to how to bid. We note that Hero

asserts by affidavit that it is impossible to hire construction workers at different wage rates and thus bidders will have to pay at the higher of the two wage rates. Assuming the protester is correct in this regard, bidders should know that they will be obligated to pay workers at the higher rate and, therefore, bidders should be able to calculate wage requirements under the IFB.

As noted above, it is our view that the protest is without merit.

[B-212226]

### **Pay—Retired—Reduction—Civilian Employment**

The Board of Governors of the Federal Reserve System is authorized to appoint its employees and fix their compensation without regard to the civil service laws, and those employees are paid from sources other than appropriated funds. Nevertheless, the Board performs a governmental function and is an establishment of the Federal Government. Hence, a retired Army officer who obtained civilian employment with the Board was subject to reductions in his military retired pay under the dual compensation restrictions which are currently prescribed by statute and which apply to all military retirees who hold civilian positions in the Government.

### **Debt Collections—Waiver—Military Personnel—Pay, etc.—Retired**

An Army officer is liable to refund overpayments of military retired pay he received when that pay was not properly reduced under the dual compensation laws on account of his civilian Government employment. However, he is eligible to apply for a waiver of his indebtedness under the statute which authorizes the Comptroller General to waive the collection of overpayments of military pay and allowances.

### **Matter of: Lieutenant Colonel Robert E. Frazier, USA (Retired), December 16, 1983:**

The issue presented in this case is whether Lieutenant Colonel Robert E. Frazier, USA (Retired), is subject to reductions in his military retired pay under the dual compensation restrictions prescribed by 5 U.S.C. § 5532 on account of his civilian employment with the Board of Governors of the Federal Reserve System. We conclude that his military retired pay is subject to those restrictions prescribed by statute.<sup>1</sup>

### **Background**

Colonel Frazier was retired as an officer of the Regular Army on September 1, 1980. Since that date he has held civilian employment with the Board of Governors of the Federal Reserve System. The Board notified the Army Finance and Accounting Center of his civilian Government employment in April 1981. The Finance Center

<sup>1</sup> This action is in response to a request submitted by a special disbursing agent of the Army Finance and Accounting Center for an advance decision concerning the propriety of approving a voucher in favor of Colonel Frazier in the amount of \$776.05, representing additional retired pay payable to him for the period April 1-30, 1983, in the event it may properly be concluded that he is not subject to the dual compensation restrictions of 5 U.S.C. § 5532. The request was forwarded here by the Office of the Comptroller of the Army after being assigned control number DO-A-1422 by the Department of Defense Military Pay and Allowance Committee.

in turn notified Colonel Frazier that beginning June 1, 1981, his military retired pay would be reduced under the dual compensation restrictions imposed by 5 U.S.C. § 5532. The Finance Center also advised Colonel Frazier that because those restrictions had not previously been enforced, he had received overpayments of retired pay from the Department of the Army from September 1980 through May 1981, and the Finance Center asked him to refund those overpayments.

Colonel Frazier then wrote to the Finance Center disagreeing and asking that the matter be reconsidered. He argued essentially that he did not believe his employment with the Federal Reserve Board should be covered by those dual compensation restrictions since he was not a civil service employee and was not paid from appropriated funds. Army officials reviewed his arguments and eventually acceded in 1982. His retired pay was then reinstated in full, and the amounts previously withheld were refunded.

In March 1983 the concerned officials of the Army Finance and Accounting Center learned that retired Navy officers employed in a civilian capacity by the Federal Reserve Board were considered by the Department of the Navy to be subject to reductions in their retired pay under the dual compensation restrictions of 5 U.S.C. § 5532. The Army officials then reinstated the reductions in Colonel Frazier's military retired pay commencing on April 1, 1983. In requesting our decision in the matter, Army officials question whether the reinstatement of these reductions in Colonel Frazier's retired pay account on that date was proper and, if so, whether the collection of the overpayments of retired pay received by Colonel Frazier between September 1, 1980, and March 31, 1983, must be collected.

After Army officials requested our decision on that question, Colonel Frazier retained private counsel to represent his interests, and his attorney has presented additional arguments in support of the proposition that the civilian employment of retired military personnel by the Federal Reserve Board should not be restricted by the dual compensation limitations of 5 U.S.C. § 5532. Essentially, the attorney notes that the Board's employees are not subject to the civil service laws and are not paid from appropriated funds, and he suggests that the Board itself is an entity wholly independent of both the executive and legislative branches of the Government. He advances three arguments in furtherance of his client's position that the Board and its employees are exempt from the provisions of 5 U.S.C. § 5532. First, he contends that the Congressional debates leading to the enactment of that statute reflect that it was designed as a limitation on expenditures of Government monies or appropriated funds,<sup>2</sup> and he suggests that it should therefore have

<sup>2</sup> With specific reference to 110 CONG. REC. 3010, 3018, 16184, and 16188 (1964) (statements of Cong. Johansen, Cong. Gross, Sen. Williams, and Sen. Metcalf).

no application to the Board's employees since they are not paid from Government funds. Second, the attorney suggests that 5 U.S.C. § 5532 is part of the system of laws which governs civil service employment, and as such does not apply to Board employees because the Board is exempt from the civil service laws. Third, the attorney contends that 5 U.S.C. § 5532 is a general statute which if made applicable to the Federal Reserve Board would result in a nullification or revocation of specific provisions of the Federal Reserve Act relating to Board employment, and that this result would be impermissible under the rule of statutory construction that a statute dealing with a specific subject is not nullified or submerged by a later enacted statute covering a more generalized spectrum.

### Board of Governors of the Federal Reserve System

The Federal Reserve System is an instrumentality of the Federal Government which was created by the Act of December 23, 1913, ch. 6, 38 Stat. 251, commonly referred to as the Federal Reserve Act. That Act, as amended, is currently codified in chapter 3 of title 12 of the United States Code, that is, 12 U.S.C. §§ 221-522.

The Federal Reserve System has a Board of Governors composed of seven members who are appointed by the President, by and with the advice and the consent of the Senate. 12 U.S.C. § 241. Concerning the appointment of the Board's employees and the payment of their compensation, 12 U.S.C. § 244 provides that:

\* \* \* The Board shall determine and prescribe the manner in which its obligations shall be incurred and its disbursements and expenses allowed and paid, and may leave on deposit in the Federal Reserve banks the proceeds of assessments levied upon them to defray its estimated expenses and the salaries of its members and employees, whose employment, compensation, leave, and expenses shall be governed solely by the provisions of this chapter and rules and regulations of the Board not inconsistent therewith; and funds derived from such assessments shall not be construed to be Government funds or appropriated moneys. \* \* \*

This provision exempts the appointment and compensation of the Board's employees from the civil service laws which apply to most Government agencies.<sup>3</sup> Also, the Board's employees are not paid from "Government funds or appropriated moneys."

### Limitations on Military Retired Pay Imposed by Statute on Account of Civilian Government Employment

Prior to 1964 a number of different legislative enactments imposed restrictions on the amount of military retired or retainer pay which could be paid to personnel of the uniformed services who obtained civilian employment with the Federal Government. One of these statutes applied to all Regular officers of the armed forces retired for length of service, who obtained any civilian employment with the Government, and we held that retired Regular officers

<sup>3</sup> See *Matter of Federal Reserve Board*, 58 Comp. Gen. 687 (1979); and *Matter of VA Department of Medicine and Surgery*, B-196611, December 19, 1979.

who sought employment in a civilian capacity with the Federal Reserve Board were subject to that particular statute.<sup>4</sup> On the other hand, other dual compensation restrictions imposed by statute prior to 1964 applied only as restrictions on the expenditure of appropriated funds, and we held that persons employed by the Federal Reserve System were not subject to those particular restrictions since Federal Reserve employees were not paid from appropriated funds.<sup>5</sup> All of these pre-1964 enactments have long since been repealed, but they are mentioned here because the decisions of our Office and the Court of Claims which were concerned with the application of those repealed laws appear to have led to uncertainty among Army officials concerning the proper application of the dual compensation laws which are currently in effect.

The current statutory dual compensation restrictions applicable to retired military and naval personnel are codified in sections 5531 and 5532 of title 5 of the United States Code. Section 5531, as derived from the Dual Compensation Act of 1964,<sup>6</sup> provides that these restrictions are applicable to retired personnel who hold:

\* \* \* a civilian office or position (including a temporary, part-time, or intermittent position), appointive or elective, in the legislative, executive, or judicial branch of the Government of the United States (including a Government corporation and a non-appropriated fund instrumentality under the jurisdiction of the armed forces)  
\* \* \*

Subsections 5532 (a) and (b) of title 5 prescribe a formula for the reduction of military retired pay of retired Regular officers who are employed by the Government. These provisions were added by the Dual Compensation Act of 1964 and were designed to put a ceiling on the amount of compensation retired Regular officers could receive from the Government.<sup>7</sup> Subsection 5532(c) was added by the Civil Service Reform Act of 1978 to insure that all retired military and naval personnel—Regular or Reserve, officer or enlisted—who were appointed to civilian positions in the Federal service would be subject to an absolute maximum rate of combined civilian salary and military retired pay equal to the rate payable for Level V of the Executive Schedule.<sup>8</sup>

<sup>4</sup> See B-145896, June 28, 1961, concerning the application of the act of July 31, 1894, as amended, 5 U.S.C. 62 (1958 ed., repealed), commonly referred to as the Dual Office Act of 1894.

<sup>5</sup> See, for example, A-76647, July 21, 1936; and also 19 Comp. Gen. 363, 365 (1939), concerning the application of the act of May 10, 1916, 39 Stat. 120, as amended by the act of August 29, 1916, 39 Stat. 582, which placed restrictions on the holding of two or more civilian positions at the same time. Compare also *Grandall v. United States*, 161 Ct. Cl. 714 (1963), in which the Court of Claims considered the application of section 212 of the Economy Act of 1932, as amended, 5 U.S.C. 59a (1958 ed., repealed), to a retired officer of the Army (without component) who was employed by a nonappropriated fund activity.

<sup>6</sup> Public Law 88-448, approved August 19, 1964, 78 Stat. 484.

<sup>7</sup> See *Puglisi v. United States*, 215 Ct. Cl. 86, 95 (1977); and *Matter of Graves*, 61 Comp. Gen. 604, 605 (1982).

<sup>8</sup> Subsection 308(a) of Public Law 95-454, approved October 13, 1978, 92 Stat. 1149. See *Matter of Graves*, cited above, at 61 Comp. Gen. pages 605-606.

### Application of 5 U.S.C. §§ 5531 and 5532 to Federal Reserve Board Employees

As indicated, the statutory charter of the Federal Reserve Board authorizes the Board to appoint its employees and fix their compensation without regard to the civil service laws, and the employees' compensation is not paid from appropriated funds. However, it cannot be disputed that the Board performs a governmental function and is an establishment of the Federal Government.

Regarding the argument that these provisions were enacted to save appropriated funds (the taxpayers' money), we point out that the Dual Compensation Act of 1964 was enacted to consolidate various existing laws dealing with the employment of military retirees in civilian positions to make the limitations clearer and to make it easier for civilian agencies to attract skilled military retirees.<sup>9</sup> Nevertheless the Congress did impose a limitation on the dual payments received by these individuals. Further, the definition of "civilian office or position" specifically includes positions with "a Government corporation and a nonappropriated fund instrumentality under the jurisdiction of the armed forces." Obviously, the purpose of these provisions was more than merely to save dollars. In addition, the fact that nonappropriated fund activities under the armed forces are mentioned and the Board is not under the jurisdiction of the armed forces, will not support a conclusion that Congress intended to exclude the Board from its provisions since the parenthetical phrase in which the wording appears is to be viewed as explanatory and not restrictive. The term "nonappropriated fund instrumentality" is an arcane expression used almost exclusively within defense agencies and the military and naval departments, and we therefore find no basis for an inference that Congress intended the Board to be excluded from coverage as a "nonappropriated fund instrumentality not under the jurisdiction of the armed forces." It is further noted that at the time the 1964 act was passed the Court of Claims had recently excluded employees of nonappropriated fund activities of the armed forces from coverage under section 212 of the Economy Act of 1932.<sup>10</sup> It appears that Congress wished to overcome that court decision by making it clear that the dual employment provisions were not to be applied only to individuals paid from appropriated funds.

Moreover, we are unable to find any expression of Congressional intent in the legislative history of the Dual Compensation Act of 1964 that 5 U.S.C. § 5532 be construed as having application only to employment for which compensation is paid from appropriated funds. On the contrary, the legislative documents reflect that the statute:

<sup>9</sup> See S. Rep. No. 935, 88th Cong., 2d Sess. reprinted in 1964 U.S. CODE CONG. & AD. NEWS 2834.

<sup>10</sup> *Grandall v. United States* (footnote 5, above).

\* \* \* is intended to cover employment in *any* civilian office or position in the Government of the United States or in the municipal government of the District of Columbia whether appointive, elective, under a personal service contract, or otherwise. [Italic supplied.]<sup>11</sup>

In the Congressional debates referred to by Colonel Frazier's attorney, some statements were made regarding "taxpayer funds," but in the context of those debates it appears that these were simply expressions of concern about the costs of some of the provisions of the proposed legislation, and those remarks do not support the proposition he has advanced.<sup>12</sup>

Regarding the other arguments raised by Colonel Frazier's attorney, we point out that 5 U.S.C. § 5532 prescribes limitations on the receipt of military retired pay by persons who hold any Government position, irrespective of whether the position is within the appointive civil service. In addition, the statute does not place any restrictions on the Federal Reserve Board in hiring or compensating Board employees, and we therefore do not find that the reduction of Colonel Frazier's retired pay under the statute would result in a nullification or revocation of 12 U.S.C. § 244 or any other provision of the Federal Reserve Act. Consequently, we are unable to agree with the arguments made that 5 U.S.C. § 5532 applies only to positions within the classified civil service, or that the statute improperly infringes on specific provisions of the Federal Reserve Act or interferes with the Board's independence. We note that this conclusion is consistent with the way in which the Board treats reemployed annuitants in that the pay of such individuals is reduced by virtue of their entitlement to civil service or Board retirement benefits.

For the foregoing reasons, we conclude that military retirees who obtain civilian employment with the Federal Reserve Board are covered by 5 U.S.C. § 5531, and that they are subject to the reductions in military retired pay prescribed by 5 U.S.C. § 5532 on account of their civilian Government employment. Therefore, we further conclude that Colonel Frazier received erroneous overpayments of military retired pay from September 1, 1980, through March 31, 1983, as the result of the Army Finance Center's failure to make those prescribed reductions during that period.

#### Collection of Overpayments

Colonel Frazier is in debt to the Government because of the erroneous overpayments of retired pay he received from the Army between September 1980 and April 1983, and he is liable to make restitution in the full amount unless he applies for and is granted a waiver of his indebtedness under the provisions of 10 U.S.C. § 2774.<sup>13</sup> That statute authorizes the Comptroller General to waive

<sup>11</sup> See S. Rep. No. 935, 88th Cong., 2d Sess., cited above (footnote 9), at 1964 U.S. CODE CONG. & AD. NEWS page 2837.

<sup>12</sup> See 110 CONG. REC. 3006-3021, 16184-16190 (1964).

<sup>13</sup> See *Price v. United States*, 224 Ct. Cl. 58 (1980).

the collection of erroneous overpayments of military pay and allowances in certain circumstances if collection action would be "against equity and good conscience and not in the best interests of the United States," provided that there is no indication of fault on the part of the concerned service member.<sup>14</sup>

The question presented is answered accordingly.<sup>15</sup>

### [B-199079]

#### **Appropriations—Fiscal Year—Availability Beyond— Contracts—Multi-Year**

Proposed Office of Federal Supply and Service, General Services Administration program of multiyear contracting in connection with Multiple Award Schedule, does not violate 31 U.S.C. 1341(a)(1)(B) or 41 U.S.C. 11, because MAS agreements do not give rise to binding commitments obligating the Government to expend funds unless and until agencies issue purchase order and agencies will not make the administrative determinations necessary for placing order until after appropriations have been made for purchases. 48 Comp. Gen. 497 and 42 Comp. Gen. 272 are distinguished.

#### **Appropriations—Availability—Contracts—Future Needs**

Proposed Office of Federal Supply and Service (FSS), General Services Administration program of multiyear contracting in connection with Multiple Award Schedule (MAS), does not violate 31 U.S.C. 1502 since under FSS program, binding commitment obligating Government to expend funds is not made until the time of ordering MAS item and current appropriation, not appropriation of year MAS agreement entered into, is charged. 60 Comp. Gen. 219. Ruling A-60589, July 25, 1935, is superseded by Federal Property and Administrative Services Act of 1949.

#### **Contracts—Federal Supply Schedule—Multi-Year Procurement—Effect on Competition**

Procurements under proposed Office of Federal Supply and Service (FSS), General Services Administration program of multiyear contracting in connection with Multiple Award Schedule (MAS), would not be in derogation of purpose of Federal advertising statutes, since MAS agreements contain a price reduction clause which allows Government to take advantage of falling prices occurring in market place at any time during life of MAS agreement. Also, FSS intends to allow an annual "open season" during which new firms may be added to the schedule.

#### **Matter of: GSA—Multiple Award Schedule Multi-Year Contracting, December 23, 1983:**

This decision is in response to a request from the General Counsel of the General Services Administration (GSA) asking whether a proposal for multiyear contracting in connection with the Office of Federal Supply and Services (FSS) Multiple Award Schedule (MAS) would violate 31 U.S.C. §§ 1341 (formerly 31 U.S.C. § 665(a)) or 1502 (formerly 31 U.S.C. § 712a), or 41 U.S.C. § 11 relating to an agency's authority to commit the Government to expend appropriated funds by contract or conflict with the purposes of the advertising provisions of the Federal Property and Administrative Services Act of

<sup>14</sup> See 4 C.F.R. parts 91-93; and *Matter of Veterinary and Optometry Officers*, 56 Comp. Gen. 943, 951-953 (1977).

<sup>15</sup> The voucher submitted with the request for a decision may not be approved for payment and will be retained here.

1949 (1949 Act). For the reasons given below, we find the proposed method of contracting is neither in violation of the above mentioned laws nor in conflict with the purposes of the 1949 Act.

### BACKGROUND

Under the MAS Program, FSS contracts with more than one supplier for comparable items at the same or different prices for delivery to the same area. 41 C.F.R. § 101-26.408-1 (1982). FSS schedules comparable items together. Currently, FSS has 89 schedules covering approximately 4000 contracts. When an agency which is required to use the schedules needs a scheduled item it places an order directly with a supplier and pays for the item with its own funds. Agencies are generally responsible for selecting the lowest price item unless they can justify the purchase of a more expensive one. 41 C.F.R. § 101-26.408.2 (1982). The duration of MAS contracts is currently 1 year.

FSS would like to begin MAS contracting on a 3-year basis in order to increase its efficiency and reduce the aggregate cost to the Government of procuring personal property. GSA anticipates that the Government could realize greater savings if FSS could make more items available to agencies through its contract sources.

FSS believes that MAS multiyear contracting would enable it to use its contract personnel more effectively and would decrease procurement expenses. The time and administrative expense saved by negotiating contracts every 3 years instead of every year could be used to establish schedule contracts for commodities which currently are not available through GSA sources. Presumably, the more items that are added to schedules the greater the savings to the Government.

Moreover, GSA anticipates that MAS multiyear contracting will save the Government money in other ways. The agency expects that the Government could get lower prices from schedule suppliers because it would be contracting with them for a longer period. Also, it is suggested that extended contracts protect against inflation.

### Discussion

Based upon prior decisions of this Office, GSA has expressed concern as to whether the proposed procurement violates certain provisions of law, specifically 31 U.S.C. §§ 1341, 1502, and 41 U.S.C. § 11.<sup>1</sup> These provisions prevent agencies which do not have funds on hand for a particular purpose from committing the Government

<sup>1</sup> 31 U.S.C. § 1341 provides that:

“(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—

“(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or

“(B) involve either government in a contract or obligation for the payment of

to make payments at some future time and thereby, in effect, coercing the Congress into making an appropriation to cover the commitment.

The General Counsel asks whether MAS multiyear contracting would violate 31 U.S.C. § 1341(a)(1)(B) and 41 U.S.C. § 11 since it would involve the Government in a contract for a period of time prior to the Congress enacting an appropriation to make specific payments under the contract. This is because the agency appropriations which are available to purchase MAS schedule items are generally 1 year appropriations while under the proposed procedure, FSS would enter into MAS agreements covering 3 fiscal years.

In our opinion MAS multiyear contracting would not violate 31 U.S.C. § 1341(a)(1)(B) or 41 U.S.C. § 11 at the time MAS agreements are executed because the agreements at the time they are signed do not give rise to binding commitments which will necessarily require a subsequent expenditure of funds. MAS contracts are made with more than one supplier for comparable items at varying prices. When the Government signs a MAS agreement, it merely promises that if an agency determines that it has a requirement for a scheduled item, the agency will place an order for the item from a contractor if he has offered the lowest price. This is indicated by the MAS Scope of Contracts clause which provides as follows:

Articles or services will be ordered from time to time in such quantities as needed to fill agency requirements determined in accordance with currently applicable procedures; Provided, that if any ordering agency finds an identical product \* \* \* is available from another source at a delivered price lower than the contract price, such agency is authorized to purchase such item at such lower price without violating this contract.

Thus, under the MAS agreements an agency does not actually bind the Government to make a payment unless and until it administratively determines that it has a requirement for a scheduled item and then issues a purchase order for it. Viewed as of the time FSS executes the agreements, no binding commitment which will necessitate the expenditure of funds is created because purchasing agencies have not ordered any scheduled items. Since the mere signing of an agreement does not result in a commitment for the payment of funds, no "obligation in advance of appropriations"

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money before an appropriation is made unless authorized by law."

31 U.S.C. § 1502 provides that:

"(a) The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law."

41 U.S.C. § 11 provides that:

"(a) No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Departments of the Army, Navy, and Air Force, for clothing, subsistence, forge, fuel, quarters, transportation, or medical and hospital supplies, which however, shall not exceed the necessities of current year.

prohibited by 31 U.S.C. § 1304(a)(1)(B) and in effect by 41 U.S.C. § 11 comes into being.<sup>2</sup> Consequently, FSS would not violate those two provisions at the time MAS agreements are executed.

Furthermore, agencies would not violate these laws at the time they order a scheduled item. Under FSS's proposed procedure, an agency would charge the cost of purchasing a scheduled item against the appropriation for the fiscal year in which it orders the item. Agencies are responsible for insuring that they order an item only if Congress has made an appropriation which is available for the item's purchase during the fiscal year in which the agency orders it. Presumably, an agency will not order an item if sufficient appropriated funds for the fiscal year in which it has a need for it are unavailable. Thus under the FSS proposed MAS multiyear contracting program, agencies would obligate funds to procure schedule items only if appropriations have been enacted which are available for their purchase. Accordingly, no violation of 31 U.S.C. § 1304(a)(1)(B) or 41 U.S.C. § 11 occurs at the time of purchasing under the program.

Finally, the proposed MAS multiyear agreements are distinguishable from the multiyear contract we held was in violation of these provisions of law in 42 Comp. Gen. 272 (1962) because the GSA proposal would require the making of a conscious administrative determination before any funds are obligated (which the contract at issue in the cited case did not). In that case, the Air Force entered into a 3-year contract. The Air Force agreed to purchase from the contractor all services and supplies which were necessary for Government aircraft landing on Wake Island during the contract term although the Air Force only had a 1-year appropriation available for the payments. The Air Force contended that the multiyear agreements did not violate 31 U.S.C. § 1341(a)(1)(B) (then 31 U.S.C. § 665(a)) because there would be no obligations unless and until it made an administrative determination to order the necessary services. In its view, it was not "obligating" future fiscal year appropriations by entering into the multiyear agreements.

We found, however, that the services were "automatic incidents of the use of the airfield" and that in fact no administrative determination was necessary before the Air Force was, in effect, committed to make contract payments to the contractor in future fiscal years. Since no appropriations for future years had been enacted when the Air Force entered into the agreement, we held that 31 U.S.C. § 1304(a)(1)(B) and 41 U.S.C. § 11 prohibited the kind of agreement the Air Force had with the contractor for a period greater than 1 fiscal year. However, unlike the Air Force contract, the proposed MAS agreements require administrative determinations—that a requirement for a scheduled item exists and that a

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<sup>2</sup> See our decision in the matter of *Obligations and Charges Under Small Business Administration Service Contracts*, 60 Comp. Gen. 219 (1981).

purchase order should be issued—before an obligation is incurred and therefore are not in violation of these provisions of law.

Under the GSA proposal, FSS would enter into agreements with suppliers in 1 fiscal year which would authorize the later ordering and delivery of items which represent the needs of agencies during subsequent fiscal years. GSA's General Counsel is concerned as to whether the proposed agreements are prohibited by 31 U.S.C. § 1502, which generally precludes agencies from charging costs incurred under a contract entered into during 1 fiscal year and recorded as an obligation against funds available for that year against appropriations made to meet the needs of another fiscal year. (The so-called bona fide needs rule.)

It is also our opinion that the proposed program will not violate 31 U.S.C. § 1502 because, as noted above, agencies will charge schedule item purchase costs against the appropriation which is current at the time they issue purchase orders, not the appropriation for the fiscal year in which the agreements are made. A MAS item represents a bona fide need of the fiscal year in which an agency orders it. As we discussed above, the commitment obligating the Government to expend funds is not made until the time agencies place orders under the agreement. Since agencies will charge the appropriation which covers the fiscal year in which they place their order, they will be contracting against the appropriation which is current at the time they have a genuine need for the item. Clearly, this is in accord with the bona fide needs rule.

In 60 Comp. Gen. 219 (1981) we held that a similar agreement entered into by the Small Business Administration (SBA) did not give rise to a binding commitment until the Administration placed orders under it. The SBA entered into agreements with private organizations in which they were to provide technical and management assistance to qualifying businesses. The contractors agreed to perform tasks as ordered by SBA at any time during the life of the agreement. The agreements ran for one calendar year but covered a period beginning in 1 fiscal year and ending in the next. The SBA's practice had been to charge the full estimated cost of the services against the appropriation current at the time it entered into an agreement.

A certifying officer requested our opinion on whether he could certify vouchers for services performed during the second fiscal year for payment from the later year's appropriation even though the agreement was entered into in the previous fiscal year. We found that no binding commitment to expend funds came into being until the SBA placed an order because the agreement did not require the agency to order anything at all from the contractor. We therefore concluded that the SBA should make payments for services from the appropriation covering the fiscal year in which it ordered them, and not the year the agreement was made. Since the GSA proposal does not result in a commitment to order anything,

we view its proposal as analogous to the SBA agreements discussed in 60 Comp. Gen. 219.

GSA's General Counsel has also inquired as to whether the proposed MAS multiyear program would violate the purposes of the advertising requirement in the Federal Property and Administrative Services Act of 1949 as amended (Property Act) and the implementing regulations which are designed to assure maximum feasible competition in Government procurements. Multiyear contracting has been seen as thwarting these purposes in some instances because the Government cannot take advantage of price fluctuations occurring in the market place if it is locked into a contract for an extended term. Also, extended contracts inhibit new contractors from doing business with the Government. 48 Comp. Gen. 497 (1969).

In that case, we said that contracts for indefinite quantities of stock supplies should not be made for periods in excess of 2 years even though funds are available, "in the absence of legislative authority therefor or prior determination by this Office such procurement will not be in derogation of the purposes of the advertising statutes." *Id.* at 500.

In our opinion, 3-year MAS procurements would be consistent with the requirements for competition. The extended term of MAS agreements would not prevent the Government from purchasing supplies at the lowest prices available because all of the MAS agreements contain a price reduction clause. The MAS contract price is equal to the price the supplier gives to his best commercial customer. The price reduction clause provides that if the contractor reduces his price to that customer at any time during the contract term, the Government will receive a like reduction. Through the operation of the price reduction clause, agencies can take advantage of lower prices resulting from market conditions which occur at any time during the life of a MAS agreement. Furthermore, under the Scope of Contracts clause, quoted above, agencies are allowed to procure identical items from suppliers who are not on the schedule if they offer a price lower than the schedule price. The agreement's extended term, therefore, would not be an impediment to the Government's securing its needs at the lowest possible cost.

Multiyear contracting under the proposed programs will not prevent new persons from doing business with the Government because the FSS will hold an "open season" during the contract period. The open seasons will consist of 30-day periods at the end of each year of the contract term in which new offerors may submit proposals and current contractors may add items. All new suppliers with acceptable offers can receive an award. Contract terms and conditions will remain the same except that open season offerors will only have contracts for 1 or 2-year periods. Consequently, with one exception discussed in the next paragraph, businesses will

not be precluded from contracting with the Government for longer than 1 year.

Under its proposal FSS will not award a contract to a new firm during the open season if it offers to supply an item which is identical to one already on the MAS. Thus, a new company which offers to supply an identical item could be precluded from competing with the existing supplier for a period of up to 2 years. However, as discussed above, the Government's interest is protected by the price reduction clause, mentioned above, and by the preservation of the ordering agency's authority to buy off schedule if lower prices for an identical item are available.

Finally, we note that in A-60589, July 12, 1935, we held that an indefinite quantity supply contract, similar to the proposed MAS agreements, could not run for more than 1 year without being in violation of 41 U.S.C. § 13.<sup>3</sup> The proposed agreement does not suffer from the same infirmities, however, since most Federal agencies, including GSA, have been exempted from the application of this provision of law. See sections 3(a) and 310 of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 472(a) and 41 U.S.C. § 260 respectively. Of course, this exemption does not authorize agencies to obligate funds in advance of appropriations, as was pointed out in 48 Comp. Gen. 497, *supra*. However, as previously stated, the GSA proposal does not purport to obligate any funds at all at the time the contract is signed. Only when an actual order is placed with a schedule contractor would an obligation be recorded, and only the fiscal year current at that time would be charged.

Accordingly, in our opinion the GSA proposed procurement plan does not violate 31 U.S.C. §§ 1341 and 1502, and 41 U.S.C. § 11, nor does it conflict with the requirements to secure maximum feasible competition in Government procurements.

### [B-211797]

#### **Military Personnel—Courts-Martial—Review Pending— Appellate Leave Benefits—Home Travel**

The Military Justice Amendments of 1981, Public Law 97-81, added article 76a to the Uniform Code of Military Justice, which provides that court-martialed personnel sentenced to receive punitive discharges or dismissals may be compelled to take leaves of absence pending the completion of the appellate review of their cases, in contemplation of their eventual separation from service *in absentia* under less than honorable conditions. When they are placed on leave they may be provided personal transportation home at Government expense by the least costly means available, in the same manner as is generally authorized for persons separated under conditions other than honorable.

<sup>3</sup> 41 U.S.C. § 13 provides that:

"Except as otherwise provided, it shall not be lawful for any of the executive departments to make contracts for stationery or other supplies for a longer term than one year from the time the contract is made."

### **Military Personnel—Courts-Martial—Review Pending— Appellate Leave Benefits—Travel to Judicial Proceedings, etc.**

In the event a court-martialed service member who has been involuntarily placed on appellate leave under the Uniform Code of Military Justice is returned to a designated post for the purpose of participating in further judicial proceedings ordered in his case, or for other purposes of an official nature, his return travel may be regarded as having been performed under orders on official business while away from his designated post, so that his personal transportation at Government expense may be authorized.

### **Military Personnel—Courts-Martial—Review Pending— Appellate Leave Benefits—Transportation of Dependents, etc.**

Under the statutes and regulations currently in effect, service members stationed outside the United States who are separated under less than honorable conditions are authorized return transportation of their dependents and household goods under 37 U.S.C. 406(h), but such authority does not extend to those stationed within the United States. However, under the recently enacted provisions of 37 U.S.C. 406(a)(2)(A), members stationed in the United States who are separated under those conditions are authorized transportation of dependents by the least expensive transportation available, but not household goods. Court-martialed personnel sentenced to receive punitive discharges who are stationed outside the United States and who are placed on appellate leave to await final separation may be allowed transportation of dependents and household goods on that same basis. Such personnel stationed inside the United States and placed on appellate leave may be authorized dependents' transportation but not household goods transportation.

### **Matter of: Travel for Service Members on Appellate Leave, December 23, 1983:**

This action is in response to a request from the Assistant Secretary of the Air Force (Manpower, Reserve Affairs and Installations) for a decision on the question of whether the Joint Travel Regulations may be amended to authorize travel and transportation at Government expense for court-martialed service members who are required to take leaves of absence under article 76a of the Uniform Code of Military Justice pending the completion of the appellate review of their cases.<sup>1</sup>

We conclude that the Joint Travel Regulations may be amended to authorize these persons to be sent home in the same manner as authorized for individuals separated from service under other than honorable conditions, and to allow them transportation at Government expense in the event they are subsequently recalled for the purpose of attending further judicial proceedings or for other purposes of an official nature.

#### **Background**

The Assistant Secretary notes that the Military Justice Amendments of 1981, Public Law 97-81, approved November 20, 1981, 95 Stat. 1085, added article 76a to the Uniform Code of Military Justice (10 U.S.C. 876a), which provides that service members convict-

<sup>1</sup> The request was forwarded here after being assigned Control Number 83-12 by the Per Diem, Travel and Transportation Allowance Committee.

ed of crimes in court-martial proceedings may be required to take leaves of absence pending the completion of appellate review, if their sentences include an unsuspended dismissal (officers) or an unsuspended bad-conduct or dishonorable discharge (enlisted personnel). The Joint Travel Regulations currently do not authorize these persons to be sent home at Government expense.

The Assistant Secretary further notes that prior to enactment of the Military Justice Amendments of 1981, these individuals were encouraged to take leaves of absence pending the completion of the appellate review of their cases after they had served any confinement adjudged, since they were not considered fit for return to duty because of the punitive discharge or dismissal included in their court-martial sentences. Those who volunteered to take leave were allowed to go home and were ordinarily separated from service *in absentia* after the appellate review was completed. Those who declined to take leave had to be restored to duty while awaiting the results of their appeals.

The Assistant Secretary observes that in 1959 we were asked to render a decision on the question of whether the Joint Travel Regulations could then be amended to authorize travel at Government expense for court-martialed personnel who volunteered to take appellate leave, either under the statute authorizing home travel upon separation from service or under some other statute. At the time it was pointed out to us that many of these persons would be without funds as a result of their courts-martial and that they would often have difficulties getting home without Government assistance. However, in decision B-139244 of July 29, 1959, we held that the regulations could not be so amended because there was no statutory basis for allowing travel at Government expense to persons who volunteered to take leave in those circumstances.

In requesting the present decision, the Assistant Secretary suggests that there has been a significant change in the circumstances of these court-martialed individuals, since the 1981 legislation now permits them to be placed on appellate leave involuntarily. He therefore questions whether the Joint Travel Regulations may now be amended to authorize travel at Government expense to send these individuals home when they are placed on appellate leave, and to bring them back in the event they are recalled for a new trial or for other official purposes. In addition, he questions whether the regulations may also be amended to authorize the transportation of dependents and shipment of household goods in these circumstances.

#### Personal Travel

Subsections 404(a)(3) and 404(f) of title 37, United States Code, provide that under regulations prescribed by the Secretaries concerned, a member of a uniformed service who is separated or re-

leased from active duty under conditions other than honorable may be provided transportation in kind by the least expensive means available, or a monetary allowance not in excess of the cost of that transportation which is to be paid only for travel actually performed, for travel to his home or the place from which he was called or ordered to active duty. In addition, subsection 404(a)(1) generally provides that travel allowances may be authorized by regulation for a service member whenever he is "away from his designated post" under orders on official business.

Implementing regulations are contained in Volume 1 of the Joint Travel Regulations (1 JTR). Paragraphs M5300 to M5304, 1 JTR, in general authorize service members discharged under other than honorable conditions to be transported at Government expense by the least expensive mode available from their places of separation to their homes of record. However, the regulations do not authorize any service members to travel at Government expense while on leave except in certain limited circumstances because leave is ordinarily granted for a member's personal convenience or accommodation and leave travel is normally not to be regarded as a matter of public or official business. See, generally, 36 Comp. Gen. 257 (1956), 49 *id.* 744 (1970), 55 *id.* 1332 (1976), and 60 *id.* 648 (1981). In our 1959 decision B-139244, cited above, we expressed the view that even though court-martialed service members who had been sentenced to be separated under other than honorable conditions may then have been encouraged to take leaves of absence pending the completion of the appellate review of their sentences, their election to take leave nevertheless essentially remained a matter primarily of personal choice, convenience, or accommodation. We said that "the persons involved would be in a voluntary leave status," and that we knew of "no statutory authority for transportation at Government expense for travel incident to such a leave status." We therefore concluded that their travel at Government expense could not properly be authorized by regulation under the governing provisions of statute either as separation travel or as travel on official business.

Congress added article 76a to the Uniform Code of Military Justice with enactment of the Military Justice Amendments of 1981, Public Law 97-81, to give military commanders the authority to compel court-martialed service members with sentences including punitive dismissals or discharges to take leaves of absence pending the completion of appellate review, so that these persons adjudged as unfit to serve would no longer have the option of being restored to duty while awaiting the outcome of their appeals. The intent of the Congress, as reflected in the legislative history of article 76a, is that all appellate leave be involuntarily imposed in contemplation of final separation from service under other than honorable conditions. However, it is also intended that since persons on appellate leave still have a residual status as military members, in appropri-

ate circumstances they may be brought back for further judicial hearings, for medical evaluation and treatment, or for other purposes of an official nature. See H.R. Rep. No. 306, 97th Cong., 1st Sess. 1-4, reprinted in 1981 U.S. CODE CONG. & AD. NEWS 1769-1772.

It thus appears that appellate leave has become a method formally sanctioned under the Uniform Code of Military Justice by which the Armed Forces can compel those adjudged as unfit to leave the military environment even though not finally discharged. Since it is now imposed involuntarily in prospect of the accused's final separation from service, and the accused can be barred from ever returning to duty of his own volition in the meantime, it is our view that an accused placed on appellate leave may now be sent home at Government expense under 37 U.S.C. 404(a)(3) and 404(f) as a member separated or released from active duty under less than honorable conditions. We would therefore now have no objection to amendment of the Joint Travel Regulations to authorize the individuals in question to have the same personal home travel entitlements when they are placed on appellate leave as are authorized for persons who have been separated or discharged under other than honorable conditions.

In addition, we would have no objection to amendment of the Joint Travel Regulations to authorize travel in a reasonably appropriate manner at Government expense for these persons in the event they are recalled under orders to a designated post from appellate leave for the purpose of participating in further judicial proceedings in their cases or for other purposes of an official nature. Although service members returning to their posts of duty from voluntary leaves of absence are ordinarily responsible for paying their own personal traveling expenses, appellate leave is now involuntary and, as indicated, recall from that leave would be for purposes related to public business. Hence, return travel at Government expense could be authorized by regulation for the individuals in question in the event they are recalled, on the basis of 37 U.S.C. 404(a) as travel under orders.

### Transportation of Dependents and Household Goods

Prior to 1964 we held that there was no statutory basis for authorizing transportation of dependents and household goods at Government expense for a service member separated under less than honorable conditions, notwithstanding that those dependents were sometimes left stranded in a foreign country. See 37 Comp. Gen. 21 (1957) and 42 *id.* 568, 571 (1963).

Public Law 88-431, approved August 14, 1964, 78 Stat. 439, added subsection 406(h) to title 37 of the United States Code, which generally provides that the dependents and household effects of a service member stationed overseas may be returned to the United States

at Government expense whenever the Secretary of his service determines that this would be in the best interests of all concerned. We then held that under 37 U.S.C. 406(h) regulations could be issued authorizing service members stationed overseas who were separated under less than honorable conditions to have their dependents and household goods returned to the United States at Government expense. See 44 Comp. Gen. 724 (1965), 55 *id.* 1183 (1976), and B-131632, November 30, 1977. Regulations based on those decisions are currently contained in subparagraphs M7103-2 (item 8) and M8303-1, 2, and 8, 1 JTR, which authorize the transportation of dependents and household goods from overseas duty stations for persons separated under conditions less than honorable, generally in the same manner as is authorized for a return from overseas in emergencies and other unusual circumstances.

Section 121 of the Uniformed Services Pay Act of 1981, Public Law 97-60, approved October 14, 1981, 95 Stat. 999, added subsection 406(a)(2)(A) to title 37 of the United States Code, which specifically authorizes a service member who is separated or released from active duty under less than honorable conditions to be furnished transportation in kind for his dependents by the least expensive means available, or to be paid a monetary allowance in an amount that does not exceed the cost of that transportation. However, the statute was not amended to authorize shipment of such member's household goods. Implementing regulations currently contained in subparagraph M7009-5 and M8261-5, 1 JTR, authorize the dependents of service members separated at stations within the United States under less than honorable conditions to be transported to the members' homes by the least costly mode available, but prohibit any shipment of household goods within the United States in that situation.

For the reasons previously discussed, we would now have no objection to amendment of the regulations to authorize persons who are stationed within the United States and who are involuntarily placed on appellate leave to await their final separation from service under less than honorable conditions to be allowed transportation home of their dependents by the least expensive means available, as provided by the new provisions of 37 U.S.C. 406(a)(2)(A). However, since no statutory authority was enacted to provide for transportation of such members' household goods, the regulations may not be amended to authorize transportation of their household goods at Government expense.

The questions presented are answered accordingly.

[B-200923]

**Courts—Judges—Compensation—Increases—Comparability  
Pay Adjustment—Specific Congressional Authorization  
Requirement**

Question presented is whether Federal judges are entitled to 3.5 percent comparability pay increase in January 1984, based on the President's alternative plan. Section 140 of Public Law 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. Since there has been no specific congressional authorization, Federal judges are not entitled to a comparability increase on January 1, 1984, despite some legislative history implying that some members of the Senate believed that Federal judges would receive the increase.

**Matter of: Federal Judges III—Entitlement to January 1984  
Comparability Pay Increase, December 28, 1983:****ISSUE**

The issue presented is whether Federal judges are entitled to a 3.5 percent salary increase effective January 1984. We hold that since section 140 of Public Law 97-92 precludes pay increases for Federal judges unless specifically authorized by Act of Congress, Federal judges are not entitled to a comparability adjustment of 3.5 percent effective in January 1984, since there has been no such specific authorization to date.

**BACKGROUND**

This decision is in response to a request from the Honorable William E. Foley, Director, Administrative Office of the United States Courts. The Administrative Office seeks our opinion as to whether Federal judges are entitled on January 1, 1984, to the 3.5 percent comparability adjustment which will be paid to other Federal employees including Members of Congress.

***Pay Adjustments for Federal Judges***

The salaries of Federal judges are subject to adjustments by two mechanisms: (1) the Federal Salary Act of 1967, Public Law 90-206, December 16, 1967, Title II, 81 Stat. 613, 624, providing for a quadrennial review of executive, legislative, and judicial salaries (2 U.S.C. §§ 351-361); and (2) the Executive Salary Cost-of-Living Adjustment Act, Public Law 94-82, August 9, 1975, Title II, 89 Stat. 419, 422, providing that salaries covered by the Federal Salary Act of 1967 will receive the same comparability adjustment on October 1 of each year as is made to the General Schedule under 5 U.S.C. § 5305 (5 U.S.C. § 5318 and 28 U.S.C. § 461).

For the years prior to 1982, under *United States v. Will*, 449 U.S. 200, 224-225 (1980), Federal judges received these annual comparability adjustments despite the enactment of "caps" on executive, legislative, and judicial salaries. The Supreme Court held that, since the pay caps were enacted after October 1, these caps dimin-

ished the compensation of Federal judges which had increased automatically on October 1 by the amount of comparability adjustment granted to the General Schedule. Such diminution of compensation was held to violate Article III of the Constitution. Therefore, Federal judges, in contrast to other high-level officials, received salary increases in 1976, 1979, 1980, and 1981. See *Federal Judges I*, B-200923, November 23, 1982, 62 Comp. Gen. 54.

Subsequent to the October 1981 pay increase, the Congress enacted Public Law 97-92, December 15, 1981, 95 Stat. 1183, a continuing appropriations act which provides in section 140 that Federal judges are not entitled to any salary increase, "except as may be specifically authorized by Act of Congress." We held in our decision in *Federal Judges I*, cited above, that section 140 was permanent legislation and that, in the absence of a specific authorization by Congress, Federal judges were not entitled to any pay increase in October 1982. See also B-200923, October 1, 1982.

Shortly after our decision in *Federal Judges I*, the Congress enacted Public Law 97-377, December 21, 1982, 96 Stat. 1830, 1914, which provided in section 129(b) (5 U.S.C. 5318 note) for pay increases in January 1983, of up to 15 percent for "senior executive, judicial, and legislative positions (including Members of Congress)." We held that the language of section 129 of Public Law 97-377, combined with specific legislative intent as demonstrated in the legislative history, constituted the specific authorization for a pay increase for Federal judges required by section 140 of Public Law 97-92. *Federal Judges II*, B-200923, May 6, 1983, 62 Comp. Gen. 358.

#### *January 1984 Pay Increase*

Under the authority of 5 U.S.C. § 5305, the President submitted an alternative plan for the comparability pay adjustment of 3.5 percent to be effective in January 1984. Presidential Message No. 74, 129 Cong. Rec. S11982 (daily ed. September 12, 1983). Although the Omnibus Reconciliation Act of 1983 would have provided a 4 percent increase effective January 1984, this legislation was not enacted in the first session of the 98th Congress. See S. Rep. No. 98-300, 98th Cong., 1st Sess. 185-188 (1983). Therefore, in the absence of any other congressional action, the President's "alternative plan" will take effect in January 1984. However, neither the President's "alternative plan" nor any legislation enacted in this session of Congress specifically refers to any pay increases for Federal judges.

#### *Arguments of Administrative Office*

The Administrative Office of the United States Courts argues that there is legislative history indicating the Congress understood that the Federal judges would receive the 3.5 percent increase in January 1984. The Administrative Office points to a discussion be-

tween several United States Senators concerning a proposed amendment by Senator Don Nickels to deny the pay increase to Members of Congress. The gist of the discussion was that the proposed amendment by Senator Nickels would deny the comparability increase only to Members of Congress and not to Federal judges. See 129 Cong. Rec. S16851-16852 (daily ed. November 18, 1983) (statements of Sens. Mitchell, Nickels, McClure, and Stevens).

The Administrative Office further contends that unlike the situation presented in *Federal Judges I*, virtually all Federal employees including Members of Congress and high-level executive officials will receive a salary increase by virtue of the President's alternative plan. The Administrative Office states that since the enactment of section 140 of Public Law 97-92 in 1981, Federal judges have never been denied the same pay increases received by other high-level Federal officials. Therefore, the Administrative Office concludes that to deny Federal judges this increase is discriminatory and is not consistent with congressional intent.

### DISCUSSION

Against this background of *Federal Judges I*, where a pay raise was denied because there was no specific authority for it, and *Federal Judges II*, where the specific authority for the pay raise was present, we must now consider the current year. No legislation has been enacted that amends or repeals section 140 of Public Law 97-92, which we continue to believe is permanent legislation.

In the present case we are aware of no specific statutory language granting Federal judges a pay increase in January 1984. Rather, the Administrative Office argues that Congress understood that Federal judges would receive an increase in January 1984, as evidenced by debate over a proposal to exclude Members of Congress from that pay increase.

We do not believe that such legislative history, a discussion on a proposed amendment to a bill which was not enacted into law, rises to the level of the specific congressional authorization required by section 140 of Public Law 97-92. While certain Members of Congress may have presumed that the Federal judges would receive the January 1984 pay increase, this does not overcome the requirements of section 140 of Public Law 97-92. As noted in our prior decision in *Federal Judges I*, section 140 is an implied repeal of that portion of Public Law 94-82 providing annual comparability adjustments to Federal judges. Therefore, where the Congress has not

A specifically authorized pay increase for Federal judges, Federal judges may not receive a comparability adjustment in their salaries under the authority of 5 U.S.C. §§ 5305, 5318 and 28 U.S.C. § 461.

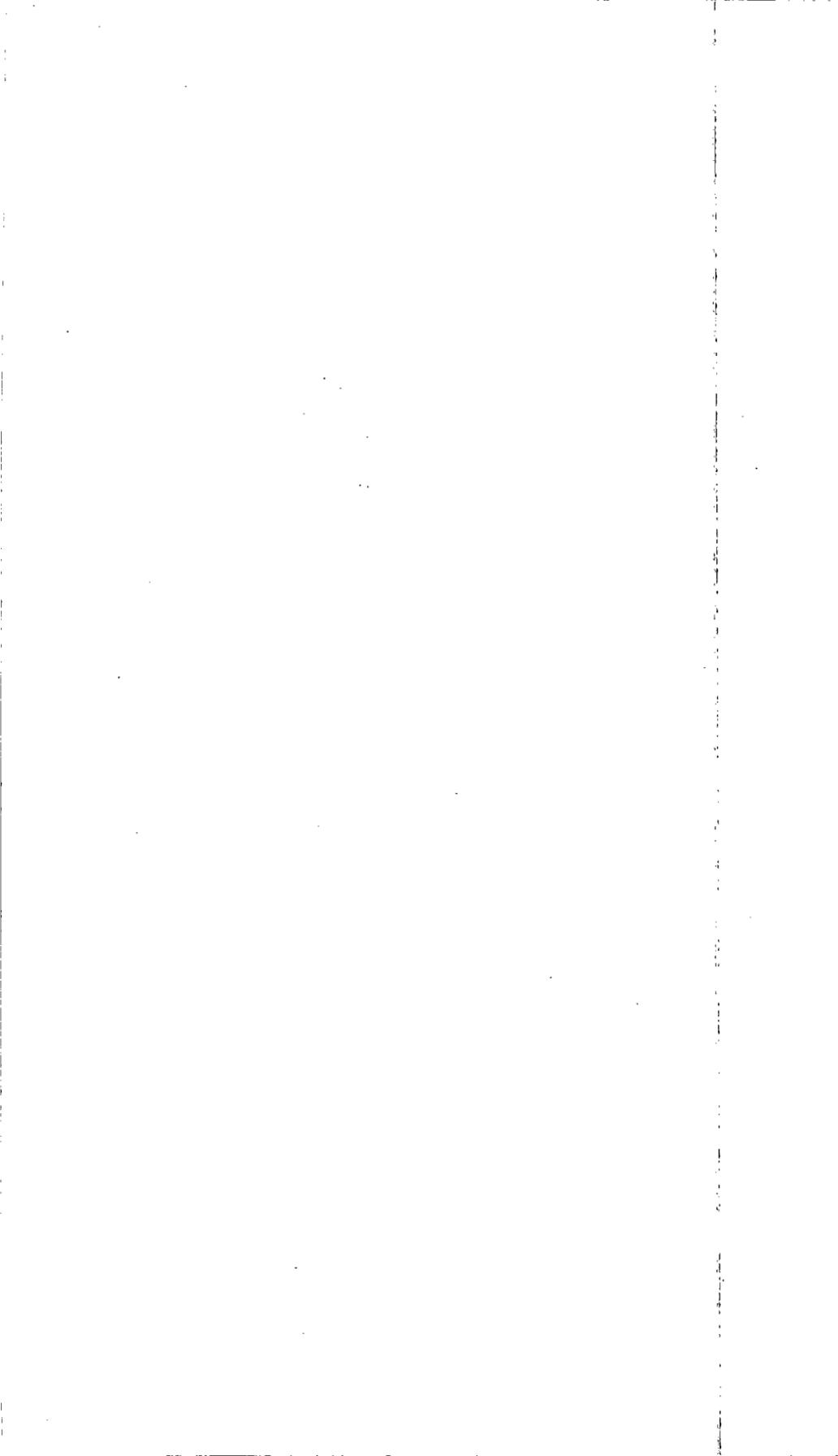
Accordingly, we conclude that section 140 of Public Law 97-92 bars implementation of any pay increase for Federal judges effective January 1, 1984, in the absence of a specific authorization by Congress.

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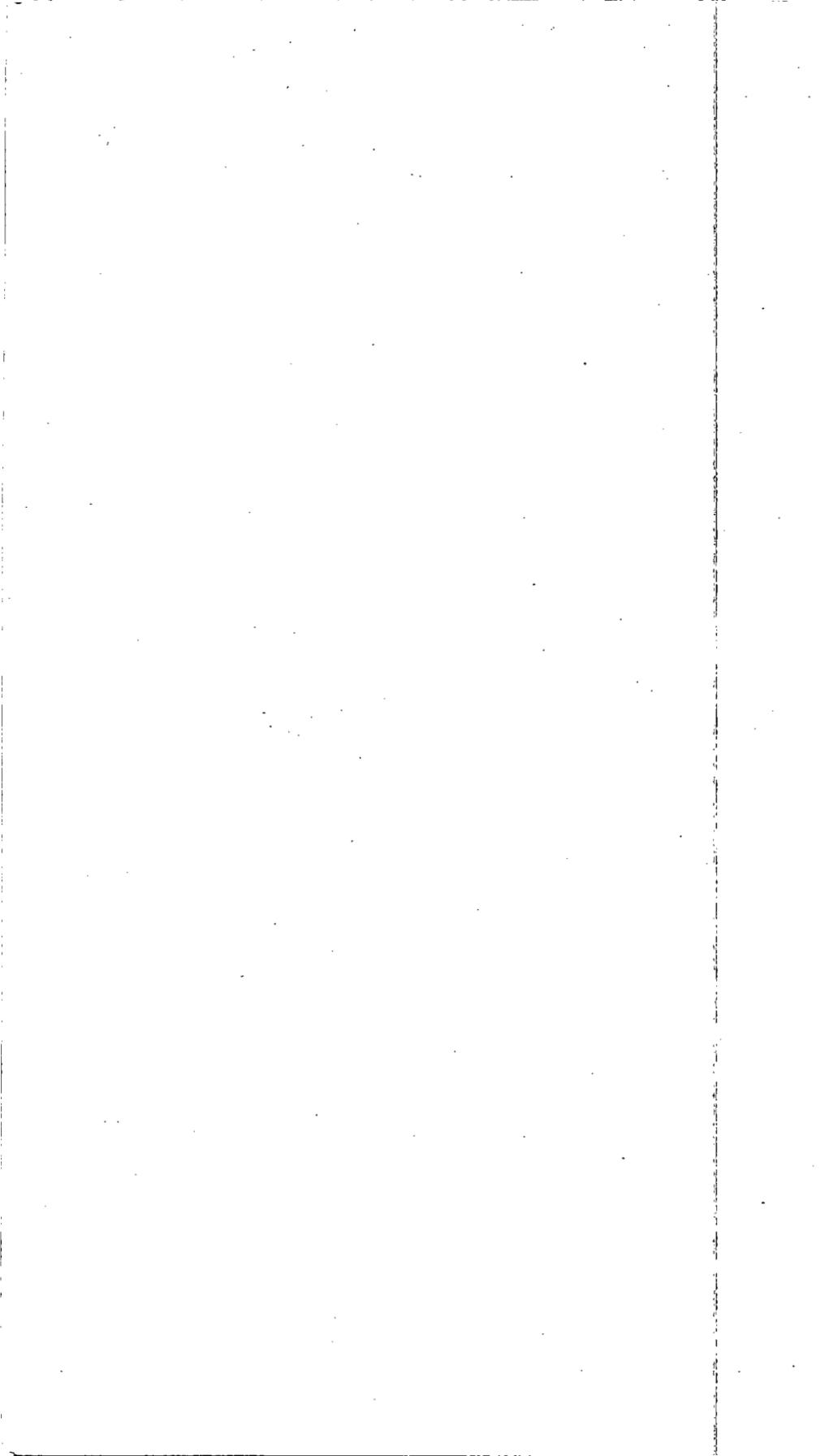
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Quarters allowance. (See QUARTERS ALLOWANCE)

#### Temporary duty allowances

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AMTRAK. (See NATIONAL RAILROAD PASSENGER CORPORATION)

## APPOINTMENTS

### Retroactive

#### Entitlement

Law clerk to Federal judge was appointed to a grade 11 position although she was eligible for a grade 12 position. She seeks a retroactive appointment to the higher grade with appropriate backpay. The appointment may not be changed retroactively since there is no evidence of administrative error or a nondiscretionary administrative policy requiring that the employee be appointed to the highest grade for which she was eligible. There is no authority to allow the backpay claim on equitable grounds.....

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## APPROPRIATIONS

### Availability

#### Contracts

#### Future needs

Proposed Office of Federal Supply and Service (FSS), General Services Administration program of multiyear contracting in connection with Multiple Award Schedule (MAS), does not violate 31 U.S.C. 1502 since under FSS program, binding commitment obligating Government to expend funds is not made until the time of ordering MAS item and current appropriation, not appropriation of year MAS agreement entered into, is charged. 60 Comp. Gen. 219. Ruling A-60589, July 25, 1935, is superseded by Federal Property and Administrative Services Act of 1949. 48 Comp. Gen. 497 and 42 Comp. Gen. 272 are distinguished.....

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- Fiscal year**
- Availability beyond**
- Contracts**
- Multi-year**

Proposed Office of Federal Supply and Service, General Services Administration program of multiyear contracting in connection with Multiple Award Schedule, does not violate 31 U.S.C. 1341(a)(1)(B) or 41 U.S.C. 11, because MAS agreements do not give rise to binding commitments obligating the Government to expend funds unless and until agencies issue purchase order and agencies will not make the administrative determinations necessary for placing order until after appropriations have been made for purchases. 48 Comp. Gen. 497 and 42 Comp. Gen. 272 are distinguished.....

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**ASSIGNMENT OF CLAIMS**

- Generally. (See CLAIMS, Assignments)**

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- Employee transfer expenses. (See OFFICERS AND EMPLOYEES, Transfers, Attorney fees)**

**BIDS**

- Evaluation**
- Qualified bids. (See BIDS, Qualified)**
- Invitation for bids**
- Labor stipulations. (See CONTRACTS, Labor stipulations)**
- Specifications**
- Adequacy**

Where 11 firms submit bids in response to allegedly vague solicitation and four bidders specifically state that they had no difficulty in preparing fixed-price bids, General Accounting Office cannot conclude that specifications inhibited competition or prevented bidders from preparing bids properly.....

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- Minimum needs requirement**
- Administrative determination**
- Reasonableness**

Procuring agency generally must give bidders sufficient details in solicitation to enable them to compete intelligently and on relatively equal basis; specifications must be unambiguous and describe agency's minimum needs accurately. However, when precise estimates of work to be performed cannot be made, solicitation is sufficient if it places bidders on notice and permits them to use business judgment in setting prices to cover risk of being asked to provide greater amount or different type of services than indicated .....

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- Qualified**
- Prices**
- Escalation**

Although condition in low bid which stipulated that price adjustment would be made in the event that services of certain personnel were required constituted a price qualification in the nature of an escalation clause, low bid may be considered in the absence of an administrative determination that there was a real and not merely the-

**COMPENSATION—Continued**

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**Removals, suspensions, etc.—Continued**

**Backpay—Continued**

**Availability of employee to work—Continued**

Equal Employment Opportunity Commission. The Commission ordered the Army to offer her employment with backpay and, if she declined employment, the pay she would have received from September of 1979 until the date the offer was made. The applicant is entitled to the full amount of her claim because, according to the applicable regulations, she was available for the position during the entire period even though she accompanied her husband, a military officer, on a tour of duty in Korea for part of the period. ....

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**Deductions. (See COMPENSATION, Removals, suspensions, etc.,**

**Deductions from backpay)**

**Deductions from backpay**

**Unemployment compensation**

The Commissioner of Customs asks whether unemployment compensation paid by a State to a Federal civilian employee during a period of wrongful separation may be deducted from a subsequent backpay award under 5 U.S.C. 5596. Under the law providing Unemployment Compensation for Federal Employees (5 U.S.C. 8501, *et seq.*) and Department of Labor regulations (20 C.F.R. Part 609), overpayments of unemployment compensation are to be determined and recovered under the applicable State's law. Since unemployment compensation received from a State by a Federal employee during a period of wrongful separation may be required to be refunded to the State, no deduction should be made from the backpay award. ....

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**Within-grade increases. (See COMPENSATION, Periodic step-increases)**

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**Responsibility**

**Determination**

**Review by GAO**

**Affirmative finding accepted**

Allegation that unrealistically low bid is due to failure to understand what may be required under contract involves bidder responsibility and, if agency makes affirmative determination, GAO will not generally review it. ....

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**CONTRACTS**

**Architect, engineering, etc. services**

**Procurement practices**

**Evaluation of competitors**

**Application of stated criteria**

**Prior architect-engineering contracts**

It is not improper for an architect-engineer (A-E) evaluation board to rely solely upon the information in the qualifications statements and performance data (Standard Forms 254 and 255) required to be submitted by A-E firms in determining with which firms discussions will be held. ....

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**Evaluation board**

In view of the language of relevant regulations and the nature of the work to be performed under the contract, procuring agency did

**BIDS—Continued**

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**Qualified—Continued**

**Prices—Continued**

**Escalation—Continued**

oretical possibility that low bidder's final price to the Government will exceed the price of the next acceptable bid .....

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**President's Commission on Executive Exchange.** (See **PRESIDENT'S EXECUTIVE EXCHANGE PROGRAM, President's Commission on Executive Exchange**)

**CLAIMS**

**Assignments**

**Assignment of Claims Act**

**Notice requirements**

**Noncompliance**

The Assignment of Claims Act requires, for the Government's protection, that the assignee file written notices of the assignment with the contracting officer and the disbursing officer designated to make payment. Where the assignee notified the contracting officer but failed to notify the disbursing officer, who had no other reason to know of the assignment, and the disbursing officer then paid the assignor, the assignee's claim for a second payment is denied .....

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**COMPENSATION**

**Backpay**

**Removals, suspensions, etc.** (See **COMPENSATION, Removals, suspensions, etc., Backpay**)

**Deductions from backpay.** (See **COMPENSATION, Removals, suspensions, etc., Deductions from backpay**)

**Judges**

**Federal.** (See **COURTS, Judges, Compensation**)

**Periodic step-increases**

**Waiting period commencement**

**Repromotion**

**During period of pay retention**

A General Schedule employee was reduced in grade when he exercised his right under 10 U.S.C. 1586 (1976 & Supp. IV 1980) to return to a position in the United States following overseas duty. In accordance with 10 U.S.C. 1586, as implemented by Department of Defense Instruction 1404.8 (April 10, 1968), the employee was afforded pay retention under 5 U.S.C. 5363 (Supp. IV 1980). The employee's subsequent repromotion to his former grade and step commenced a new waiting period for within-grade increases, since the constructive increase in pay which occurs upon repromotion during a period of pay retention is an "equivalent increase" under 5 U.S.C. 5335(a) (1976 & Supp. IV 1980); 5 C.F.R. 531.403 (1982). 62 Comp. Gen. 151 is reversed based on new information furnished .....

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**Removals, suspensions, etc.**

**Backpay**

**Availability of employee to work**

An applicant was not selected for a teaching position at West Point Elementary School and filed a discrimination complaint with the

**CONTRACTS—Continued**

**Protests—Continued**

**Authority to consider—Continued**

**Pension Benefit Guaranty Corporation procurements—Continued**

since the corporation is a wholly owned Government corporation and has broad authority to determine character and manner of its expenditures.....

**General Accounting Office procedures**

**Timeliness of protest**

**Solicitation improprieties**

**Apparent prior to bid opening/closing date for proposals**

A protest that an agency's preference for awarding a single contract for agency-wide architect-engineer (A-E) services and that its use of evaluation criteria related to the size, current workload and location of competing firms discriminates against small, minority-owned firms is untimely where this information appeared in a Commerce Business Daily announcement of the proposed procurement, yet the protest was not filed until after the closing date specified in the announcement for receipt of qualifications statements (Standard Forms 254 and 255) from interested A-E firms.....

**Procedures**

**Bid Protest Procedures. (See CONTRACTS, Protests, General Accounting Office procedures)**

**Timeliness. (See CONTRACTS, Protests, General Accounting Office procedures, Timeliness of protest)**

**Requirements**

**Estimated amounts basis**

**Best information available**

Where agency solicits bids for a requirements contract on the basis of estimated quantity, estimate in solicitation should be based on the best information available and present a reasonably accurate representation of the agency's anticipated needs. Protest that providing estimated total square footage of major floor finishing required, instead of estimate of square footage of each of three different types of floor finishing to be performed is defective, is denied where protester has not established that the more general estimate is not based on best information available.....

**Small business concerns**

**Awards**

**Set-asides**

**Administrative determination**

General Accounting Office will not review the merits of a protest which, in effect, claims that the procuring agency's misrepresentation of its requirements to the Small Business Administration caused a procurement not to be set aside for small businesses. A decision as to whether a particular procurement should be set aside for small businesses essentially is within the discretion of the contracting officer, since, with certain exceptions not relevant here, nothing in the Small Business Act or the procurement regulations makes it mandatory to set aside any particular procurement.....

**CONTRACTS—Continued**

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**Architect, engineering, etc. services—Continued**

**Procurement practices—Continued**

**Evaluation of competitors—Continued**

**Evaluation board—Continued**

not abuse its discretion by convening an architect-engineer evaluation board, none of whose members was an architect or an engineer. In any event, the protester had no substantial chance for award in view of serious deficiencies in regards to its staff.....

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**Awards**

**Small business concerns.** (See **CONTRACTS, Small business concerns, Awards**)

**Conflicts of interest prohibitions**

**Negotiated contracts.** (See **CONTRACTS, Negotiation, Conflict of interest prohibitions**)

**Federal Supply Schedule**

**Multi-year procurement**

**Effect on competition**

Procurements under proposed Office of Federal Supply and Service (FSS), General Services Administration program of multi-year contracting in connection with Multiple Award Schedule (MAS), would not be in derogation of purpose of Federal advertising statutes, since MAS agreements contain a price reduction clause which allows Government to take advantage of falling prices occurring in market place at anytime during life of MAS agreement, Also, FSS intends to allow an annual "open season" during which new firms may be added to the schedule. 48 Comp. Gen. 497 and 42 Comp. Gen. 272 are distinguished.....

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**Labor stipulations**

**Davis-Bacon Act**

**Applicability**

**Construction contracts**

Where one item under bid schedule, which requires separate bid price, is undisputedly construction work, agency properly included in solicitation Davis-Bacon Act wage provisions which are applicable to construction work.....

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**Negotiation**

**Conflict of interest prohibitions**

**Status of offeror**

Protest is sustained where agency's rejection of a proposal based on an alleged conflict of interest was unreasonable. Although the protester proposed to hire an employee of the agency and the employee accompanied the firm during its negotiations with the agency, the employee did not participate in the negotiations and there is no evidence that he exerted any improper influence on behalf of the protester. Since the protester has a substantial chance for award but for the agency's improper action, proposal preparation costs are recommended.....

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**Protests**

**Authority to consider**

**Pension Benefit Guaranty Corporation procurements**

Protest of solicitation issued by the Pension Benefit Guaranty Corporation will not be considered by the General Accounting Office

**FEDERAL CREDIT UNIONS**

**National Credit Union Administration**

**Relocation expenses of new employees.** (See OFFICERS AND EMPLOYEES, New appointments, Relocation expense reimbursement and allowances, Nonentitlement)

**Status**

**Executive agency**

The National Credit Union Administration (NCUA) is an independent agency within the executive branch of the Government. Hence, NCUA is an "Executive agency" within the meaning of 5 U.S.C. 5721(1) (1976), and the entitlement of its employees to relocation expenses is governed by 5 U.S.C. Chapter 57, subchapter II. Furthermore, fees which are collected from Federal credit unions and deposited into a revolving fund for administrative and supervisory expenses of NCUA are appropriated funds which are subject to statutory restrictions on the use of such funds.....

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**FEES**

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**Employee transfer expenses.** (See OFFICERS AND EMPLOYEES, Transfers, Attorney fees)

**GENERAL ACCOUNTING OFFICE**

**Jurisdiction**

**Contracts**

**Pension Benefit Guaranty Corporation contracts.** (See CONTRACTS, Protests, Authority to consider, Pension Benefit Guaranty Corporation procurements)

**Grants-in-aid**

**Protests not concerning award propriety**

**No authority to consider**

General Accounting Office will not consider a bidder's complaint that a municipality, seeking to construct a swimming pool partially funded by a Federal grant, was improperly making a claim under the bidder's bid bond where the municipality conducted three rounds of bidding, the last of which was under specifications differing from the others, and then made a claim against the bid bond of the low bidder, under the first solicitation, who had refused to execute a contract at a price it maintained was mistaken and which the city would not permit the bidder to correct. Such a complaint does not sufficiently concern the propriety of the award of a contract as to come within the purview of GAO's review of grant complaints.....

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**HEALTH AND HUMAN SERVICES DEPARTMENT**

**Saint Elizabeths Hospital.** (See ST. ELIZABETHS HOSPITAL)

**INSURANCE**

**Government**

**Self-insurer**

**Exception**

As the insurance is for privately owned works of art temporarily entrusted to Government on condition that they be insured, Government's self-insurance rule does not apply. Government would achieve

**CONTRACTS—Continued**

**Small business concerns—Continued**

**Awards—Continued**

**Small Business Administration's authority**

**Procurement under 8(a) program. (See SMALL BUSINESS ADMINISTRATION, Contracts, Contracting with other Government agencies, Procurement under 8(a) program)**

**COURTS**

**Judges**

**Compensation**

**Increases**

**Comparability pay adjustment**

**Specific Congressional authorization requirement**

Question presented is whether Federal judges are entitled to 3.5 percent comparability pay increase in January 1984, based on the President's alternative plan. Section 140 of Public Law 97-92 bars pay increases for Federal judges except as specifically authorized by Congress. Since there has been no specific congressional authorization, Federal judges are not entitled to a comparability increase on January 1, 1984, despite some legislative history implying that some members of the Senate believed that Federal judges would receive the increase .....

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**CREDIT UNIONS**

**Federal (See FEDERAL CREDIT UNIONS)**

**DEBT COLLECTIONS**

**Interest. (See INTEREST, Debts owed U.S.)**

**Waiver**

**Military personnel**

**Pay, etc.**

**Retired**

An Army officer is liable to refund overpayments of military retired pay he received when that pay was not properly reduced under the dual compensation laws on account of his civilian Government employment. However, he is eligible to apply for a waiver of his indebtedness under the statute which authorizes the Comptroller General to waive the collection of overpayments of military pay and allowances .....

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**DISTRICT OF COLUMBIA**

**Saint Elizabeths Hospital. (See ST. ELIZABETHS HOSPITAL)**

**ENERGY**

**Clinch River Breeder Reactor project**

**Termination proposed**

Congress' failure to approve fiscal year 1984 monies for the Clinch River Breeder Reactor Project, either specifically in appropriations or in legislative history, allows the Energy Department to invoke the provision set forth in section 4 (i) of the Project justification data and in its contracts calling for termination when there is "insufficiency of project funds to permit the effective conduct of the project." B-115398.33, June 23, 1977; B-164105, December 5, 1977; and B-164105, March 10, 1978, are distinguished.....

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**LEAVES OF ABSENCE—Continued**

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**Military personnel—Continued**

**Payments for unused leave on discharge, etc.—Continued**

**Court-martial review pending—Continued**

**Appellate leave benefits—Continued**

**Computation—Continued**

may be in a nonpay or reduced pay status that day because their enlistments have expired or for some other reason, they still have a "rate" of basic pay, which is the full rate applicable by law to the enlisted grade they hold, and the lump-sum settlement is to be computed on the basis of that rate ..... 25

The appropriate rate of pay to be used, in computing the lump-sum leave settlement or pay and allowances payable to court-martialed enlisted personnel with adjudged punitive discharges who are required to take appellate leave, is the appropriate rate of the grade to which the enlisted member was reduced as a result of the court-martial ..... 25

**MEDICAL TREATMENT**

**Officers and employees**

**Employee v. Government interest**

An employee, who was required to undergo a fitness-for-duty examination and who, prior to the examination, underwent medical tests in the course of diagnosis and treatment, may not be reimbursed for the cost of these tests even though they were relied upon by the physician administering the fitness-for-duty examination. Costs of treatment are personal to the employee. Use of the tests by the physician performing the fitness-for-duty examination as part of the medical history furnished by the employee did not result in any cost to the employee beyond that already incurred for treatment..... 96

**MEDICARE AND MEDICAID. (See SOCIAL SECURITY, Medicare, Medicaid, etc.)**

**MILEAGE**

**Travel by privately owned automobile**

**First duty station travel**

**Manpower shortage positions**

Travel orders of Navy civilian employee limited reimbursement for first duty station travel by privately owned automobile (POA) to the constructive cost of commercial air. Both the Federal Travel Regulations (FTR) and 2 Joint Travel Regulations (2 JTR), however, state that use of POA for such travel is advantageous to the Government. Where the applicable regulations prescribed payment the claim must be allowed, regardless of the wording of the travel orders. See FTR 2-2.3a; 2 JTR C2151(3) ..... 2

**MILITARY PERSONNEL**

**Courts-martial**

**Review pending**

**Appellate leave benefits**

**Home travel**

The Military Justice Amendments of 1981, Public Law 97-81, added article 76a to the Uniform Code of Military Justice, which provides that court-martialed personnel sentenced to receive punitive

**INSURANCE—Continued**

**Government—Continued**

**Self-insurer—Continued**

**Exception—Continued**

no economy by applying rule and would lose the benefit of using the property to be insured.....

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**INTEREST**

**Debts owed U.S.**

**Debt Collection Act of 1982**

**Section 11**

**Assessment pending waiver determination**

The assessment of interest on Federal overpayments pursuant to section 11 of the Debt Collection Act prior to completion of a statutory waiver process depends upon whether the applicable waiver provision is permissive or mandatory. If the waiver provision is permissive, interest should be assessed from the date of the agency's initial notification of the overpayment. If the waiver provision is mandatory, interest should not be assessed until the waiver process is completed.....

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**JUDGES. (See COURTS, Judges)**

**LEAVES OF ABSENCE**

**Military personnel**

**Payments for unused leave on discharge, etc.**

**Court-martial review pending**

**Appellate leave benefits**

Amendments to 10 U.S.C. 706 and 876a provide that court-martialed enlisted personnel with adjudged bad conduct or dishonorable discharges may be compelled to take leaves of absence pending completion of appellate review, and that when they are placed on appellate leave they may elect to receive payment for any accrued leave to their credit either in a lump-sum settlement or as pay and allowances during leave. The amendments were designed to avoid any necessity of restoring these persons to duty after their courts-martial, and to allow them some monetary assistance in their transition to civilian life. Payments may be made even though the member's term of enlistment has expired.....

25

The rule is well settled that no credit for pay and allowances accrues to court-martialed enlisted personnel during periods after their enlistments expire, unless they are restored to full duty status, or they are found to have been held over in service for the convenience of the Government if their sentences are completely set aside on appeal. The payment of pay and allowances to court-martialed enlisted members involuntarily placed on appellate leave after their terms of enlistment have expired, as specifically authorized by statute on the basis of unused leave previously accrued during past periods of creditable service, is not in conflict with this rule.....

25

**Computation**

The lump-sum monetary leave settlement authorized by 10 U.S.C. 706 for court-martialed enlisted personnel required to take appellate leave is to be "based on the rate of basic pay" to which they are entitled on the day before they are placed on leave. Even though they

**MILITARY PERSONNEL—Continued**

**Permanent duty station—Continued**

**What constitutes—Continued**

**Training or school assignments for 20 weeks or more—Continued**

weeks constituted valid permanent change-of-station orders, and the assignment could not properly be classified as temporary duty on the basis that it might later be, and in fact was, curtailed to less than 20 weeks .....

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**Quarters allowance. (See QUARTERS ALLOWANCE)**

**Reservists**

**Death or injury**

**Inactive duty training, etc.**

**Injured outside scope of duties**

A naval reservist sustained an injury outside the Reserve Center building following dismissal from an inactive-duty training drill. He is not eligible to receive benefits (medical care, pay and allowances, etc.) under 10 U.S.C. 6148 and 37 U.S.C. 201(i) (1976) since under those statutes the injury must have been incurred while the member was employed in inactive-duty training which extends only from the time the reservist is first mustered in until dismissal from that day's activities.....

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**Retired pay. (See PAY, Retired, Reservists)**

**Retired pay. (See PAY, Retired)**

**Survivor Benefit Plan. (See PAY, Retired, Survivor Benefit Plan)**

**Transportation**

**Dependents. (See TRANSPORTATION, Dependents, Military personnel)**

**NATIONAL RAILROAD PASSENGER CORPORATION**

**Applicability of Freedom of Information, Privacy and Sunshine Acts**

It is the policy of the General Accounting Office to refrain from commenting on matters in litigation unless the court expresses an interest in our opinion. Therefore, because the question is currently before the U.S. Court of Appeals for the District of Columbia Circuit, it would be inappropriate for GAO to comment on whether National Railroad Passenger Corporation (AMTRAK) is subject to the Government in the Sunshine Act, 5 U.S.C. 552b. However, subsequent to GAO decision at 57 Comp. Gen. 733 (1978), the Omnibus Budget Reconciliation Act of 1981 amended the Rail Passenger Service Act, reducing from a majority to a minority the number of directors on Amtrak's board that are appointed by the President with the advice and consent of the Senate. Because 5 U.S.C. 552(b) defines agencies covered by the act to include collegial bodies, a majority of whom are Presidential appointees, this amendment has an obvious bearing on the question of whether Amtrak is subject to the Government in the Sunshine Act.....

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**OFFICERS AND EMPLOYEES**

**Appointments. (See APPOINTMENTS)**

**Backpay**

**Removals, suspension etc.**

**Deductions from backpay. (See COMPENSATION, Removals, suspensions, etc., Deductions from backpay)**

**MILITARY PERSONNEL—Continued**

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**Courts-martial—Continued**

**Review pending—Continued**

**Appellate leave benefits—Continued**

**Home travel—Continued**

discharges or dismissals may be compelled to take leaves of absence pending the completion of the appellate review of their cases, in contemplation of their eventual separation from service *in absentia* under less than honorable conditions. When they are placed on leave they may be provided personal transportation home at Government expense by the least costly means available, in the same manner as is generally authorized for persons separated under conditions other than honorable.....

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**Transportation of dependents, etc.**

Under the statutes and regulations currently in effect, service members stationed outside the United States who are separated under less than honorable conditions are authorized return transportation of their dependents and household goods under 37 U.S.C. 406(h), but such authority does not extend to those stationed within the United States. However, under the recently enacted provisions of 37 U.S.C. 406(a)(2)(A), members stationed in the United States who are separated under those conditions are authorized transportation of dependents by the least expensive transportation available, but not household goods. Court-martialed personnel sentenced to receive punitive discharges who are stationed outside the United States and who are placed on appellate leave to await final separation may be allowed transportation of dependents and household goods on that same basis. Such personnel stationed inside the United States and placed on appellate leave may be authorized dependents' transportation but not household goods transportation.....

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**Travel to judicial proceedings, etc.**

In the event a court-martial service member who has been involuntarily placed on appellate leave under the Uniform Code of Military Justice is returned to a designated post for the purpose of participating in further judicial proceedings ordered in his case, or for other purposes of an official nature, his return travel may be regarded as having been performed under orders on official business while away from his designated post, so that his personal transportation at Government expense may be authorized.....

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**Field duty**

**Per diem.** (See **SUBSISTENCE, Per diem, Military personnel, Field duty**)

**Leaves of absence.** (See **LEAVES OF ABSENCE, Military personnel**)

**Orders.** (See **ORDERS**)

**Per diem.** (See **SUBSISTENCE, Per diem, Military personnel**)

**Permanent duty station**

**What constitutes**

**Training or school assignments for 20 weeks or more**

The Joint Travel Regulations provide that when a service member is ordered to attend courses of instruction at an installation for 20 weeks or more, that installation constitutes his permanent duty station. Thus, orders issued to a Marine which were intended to assign him to courses of instruction at Quantico, Virginia, for more than 20

**OFFICERS AND EMPLOYEES—Continued**

**Transfers—Continued**

**Real estate expenses—Continued**

Attorney fees, House purchase and/or sale)

**Relocation expenses**

Miscellaneous expenses. (See OFFICERS AND EMPLOYEES, Transfers, Miscellaneous expenses)

New appointees. (See OFFICERS AND EMPLOYEES, New appointments, Relocation expense reimbursement and allowances)

**Travel by privately owned automobile**

Mileage. (See MILEAGE, Travel by privately owned automobile)

**ORDERS**

**Canceled, revoked, or modified**

**Expenses prior to change**

When a service member is in the process of making a permanent change-of-station move and his orders are canceled before the move is completed, he is then generally entitled simply to travel and transportation allowances sufficient to cover expenses incurred in undertaking the canceled move and expenses involved in returning to the original permanent duty station. However, there is nothing to preclude a service member in that situation from being ordered to perform a temporary duty assignment before returning to the permanent station. Therefore, when a Marine's permanent change-of-station orders for assignment at Quantico, Virginia, were properly canceled, it was also then proper to give him a temporary duty assignment at Quantico prior to his return to his original permanent duty station.....

4

**Rule**

Legal rights and liabilities in regard to per diem and other travel allowances vest when the travel is performed under orders, and such orders if valid may not be canceled or modified retroactively to increase or decrease the rights which have become fixed under the applicable statutes and regulations. Consequently, if a service member completes a permanent change-of-station move under valid orders, those fully executed orders are not susceptible to cancellation upon the curtailment of the permanent assignment at a later date. Instead, the member's further reassignment upon his completion of the curtailed assignment could properly be accomplished only through the issuance of new permanent change-of-station orders.....

4

Permanent change-of-station orders may be canceled at any time before the orders have been fully executed, that is, before all of the travel and transportation activities involved in the relocation have been completed. Hence, when a Marine traveled to Quantico, Virginia, under permanent change-of-station orders and the orders were later canceled after his assignment there was curtailed, the cancellation was proper because in the particular circumstances involved the Marine had not yet been afforded an opportunity to exercise his statutory right to relocate his dependents and household goods as part of his permanent change-of-station move, and the orders had thus not yet been fully executed.....

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**OFFICERS AND EMPLOYEES**

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**Medical treatment.** (See **MEDICAL TREATMENT, Officers and employees**)

**New appointments**

**Relocation expense reimbursement and allowances**

**Non-entitlement**

**National Credit Union Administration chairman**

The Chairman of the National Credit Union Administration (NCUA) was reimbursed for relocation expenses he incurred following his appointment to that position. The general rule is that an employee must bear the expenses of travel to his first duty station in the absence of a statute to the contrary. Since 5 U.S.C. 5722 and 5723, as implemented by the Federal Travel Regulations, authorize relocation allowances only for those new appointees who are assigned overseas or are serving in Senior Executive Service or manpower shortage positions, the Chairman of the NCUA was not entitled to reimbursement for relocation expenses .....

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The Chairman of the National Credit Union Administration (NCUA) was reimbursed for relocation expenses following his appointment to that position. The NCUA paid these expenses but was later reimbursed by the NCUA's Central Liquidity Facility (CLF), a Government-controlled corporation not subject to the relocation statutes contained in 5 U.S.C. Chapter 57, subchapter II. However, since the Chairman of NCUA is not an employee of the CLF, these relocation expenses may not be paid by the CLF .....

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**Transfers**

**Attorney fees**

**House purchase and/or sale**

**Construction costs**

An employee incurred an attorney's fee for closing on a lot on which he built his residence and another attorney's fee for a construction contract for that residence. The Federal Travel Regulations limit reimbursement to expenses comparable to those reimbursable in connection with the purchase of existing residences and does not include expenses which result from construction. Since the attorney's fee for the construction contract was incurred because he chose to build a residence as opposed to purchasing an existing one, and since he has already been reimbursed an attorney's fee for closing on the lot, he may not be reimbursed the fee for the construction contract ....

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**Miscellaneous expenses**

**Real estate deposit forfeiture**

Employee transferred to new duty station and contracted to purchase residence there. When agency delayed establishment of new office at this duty station, employee, due to uncertainty of the situation, chose to forfeit deposit on residence. Since agency delay appears to be the proximate cause of forfeiture, the deposit may be claimed as a miscellaneous relocation expense. The claim is not so unusual or extraordinary as to warrant consideration as a meritorious claim.....

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**Real estate expenses**

**Attorney fees.** (See **OFFICERS AND EMPLOYEES, Transfers,**

**PAY—Continued**

Page

**Retired—Continued**

**Reservists—Continued**

**Erroneous notification of eligibility—Continued**

**What constitutes—Continued**

the Armed Forces are required to notify reservists when they have completed 20 years' creditable service and that such notification is irrevocable, since the informal erroneous advice plainly did not constitute an official statutory notice of completed service.....

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**Survivor Benefit Plan**

**Spouse**

**Prior undissolved marriage**

A former military member who retired prior to the enactment of the Survivor Benefit Plan elected coverage under the Plan for his spouse and minor children during the 1981 "open enrollment" period. He died 8 months after the effective date of his election. The total amount deducted from his retired pay on account of his Survivor Benefit Plan election is not payable to either his lawful wife or the individual he designated on his election form as his spouse, in the absence of evidence that he was ever legally married to her. Rather, the deductions are payable to his two dependent children whom he also designated as his beneficiaries under the Plan .....

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**PER DIEM (See SUBSISTENCE, Per diem)**

**PRESIDENT'S EXECUTIVE EXCHANGE PROGRAM**

**President's Commission on Executive Exchange**

**Expenses**

**Appropriations**

**Availability**

President's Commission on Executive Exchange may use its private sector participation fees maintained in OPM revolving fund described in 5 U.S.C. 1304(e)(1) for the costs of a word processor and postage machine as those expenditures are directly in furtherance of the statutory purposes, *i.e.*, the costs of education, set forth in Public Law 97-412 .....

110

Expenses for the reupholstered furniture and insurance for works of art are general administrative costs that must be paid out of OPM salary and expense account rather than from private sector participation fees.....

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**QUARTERS ALLOWANCE**

**Members without dependents**

**Assigned to vessels**

**Transfer to another vessel**

**Homeport remains the same**

A naval officer or enlisted member above grade E-6 who is "without dependents" is entitled to a basic allowance for quarters while assigned to a ship at its homeport if he elects not to occupy available Government quarters. The member continues to receive the allowance for the first 90 days the ship is deployed. He is also entitled to receive the allowance for 90 days after transfer to a deployed vessel if the homeport of that ship is the same as the homeport of his previ-

**ORDERS—Continued**

**Canceled, revoked, or modified—Continued**

**Subsequent orders**

**Effective date**

When permanent change-of-station orders are canceled and are replaced by temporary duty orders, the temporary duty orders become effective on the date they are issued and may not be backdated to increase or decrease retroactively the vested travel and transportation entitlements which had accrued to the member's credit under the canceled orders. Temporary duty orders issued to a Marine in those circumstances therefore became effective on the date of their publication on April 2, 1981, rather than on March 14 as stated in the orders.....

**PAY**

**Additional**

**Demolition duty**

**Primary assignment requirement**

Military officer, who was not assigned by orders to demolition of explosives as his primary duty and whose work with explosives is not shown to have come within the meaning of "duty involving demolition of explosives" under applicable regulations, is not entitled to hazardous duty incentive pay on the basis of working with explosives.....

**Incentive**

**Generally.** (See PAY, Additional)

**Reservists**

**Retired pay.** (See PAY, Retired, Reservists)

**Retired**

**Reduction**

**Civilian employment**

The Board of Governors of the Federal Reserve System is authorized to appoint its employees and fix their compensation without regard to the civil service laws, and those employees are paid from sources other than appropriated funds. Nevertheless, the Board performs a governmental function and is an establishment of the Federal Government. Hence, a retired Army officer who obtained civilian employment with the Board was subject to reductions in his military retired pay under the dual compensation restrictions which are currently prescribed by statute and which apply to all military retirees who hold civilian positions in the Government.....

**Reservists**

**Erroneous notification of eligibility**

**What constitutes**

At various times between 1940 and 1959 an individual served on full-time active duty, and participated satisfactorily in part-time Reserve programs, with both the Army and the Navy. However, he completed a total of only 7 of the 20 years' creditable service required to establish entitlement to Reserve retired pay at age 60. Years later in 1979 an Army personnel officer informally and erroneously advised the individual that he would be eligible for retired pay when he reached age 60. The individual is not entitled to retired pay on the basis of the erroneous advice, notwithstanding that by statute

**QUARTERS ALLOWANCE—Continued**

Page

**Members without dependents—Continued**

**Assigned to vessels—Continued**

**Transfer to another vessel—Continued**

**Homeport remains the same—Continued**

ous assignment and he was receiving the allowance at the homeport at the time of the transfer..... 18

**RAILROADS**

**Amtrak. (See NATIONAL RAILROAD PASSENGER CORPORATION)**

**REHABILITATION ACT OF 1973**

**Handicapped employees**

**Special equipment, etc.**

**Appropriation availability**

In appropriate circumstances, the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 *et seq.*, authorizes the expenditure of appropriated funds for special equipment that will enable a qualified handicapped employee to perform his or her official duties. These circumstances were not present in our previous decision, Matter of Internal Revenue Service, 61 Comp. Gen. 634 (1982), and the result therein is hereby affirmed..... 115

**What constitutes a handicap**

A reference in 61 Comp. Gen. 634 to an employee's allergic reaction to tobacco smoke as a handicap was not intended to refer to the term as defined in the Rehabilitation Act or its implementing regulations. 61 Comp. Gen. 634 is clarified..... 115

**ST. ELIZABETHS HOSPITAL**

**Indigent patients**

**Appropriation chargeable**

**Commitment ordered by Federal court**

The District of Columbia, rather than the United States District Court for the District of Columbia, is financially responsible for services provided by Saint Elizabeths Hospital to indigent patients committed pending restoration of competency to stand trial or after acquittal in the District Court by reason of insanity when such patients are D.C. residents. .... 44

The costs of care provided to indigent patients who are not residents of the District of Columbia who are committed to Saint Elizabeths Hospital pending restoration of competency to stand trial or after acquittal by reason of insanity should be paid from the Federal appropriation for Saint Elizabeths Hospital. .... 44

**SMALL BUSINESS ADMINISTRATION**

**Contracts**

**Contracting with other Government agencies**

**Procurement under 8(a) program**

**Procedures**

**Administrative appeal process**

Protest against agency determination of fair market price for negotiations with the Small Business Administration under the section 8(a) program is dismissed where the administrative appeal process is being followed. .... 22

**SOCIAL SECURITY**

**Medicare, medicaid, etc.**

**Withholding**

**Propriety**

**Employee not eligible for benefits**

Agency properly deducted Medicare tax from the final paycheck of an employee who retired in December 1982, but received the paycheck in January 1983, even though the employee is not eligible for Medicare benefits based on Federal service. Section 278 of the Tax Equity and Fiscal Responsibility Act of 1982 provides that the tax applies to all remuneration received after Dec. 31, 1982, but provides credit for pre-1983 Federal employment only to individuals who performed service both during January 1983 and before Jan. 1, 1983. Although under these provisions some employees subject to the tax will not be eligible for Medicare benefits, there is nothing in the statute or its legislative history which permits a different result. ....

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**SUBSISTENCE**

**Per diem**

**Military personnel**

**Field duty**

Under the statute authorizing per diem and other travel allowances for service members on official travel assignments, no per diem at all is ordinarily payable for periods of an assignment that are properly classified as "field duty," since ordinarily service members have no additional living expenses during such periods. Superseded provisions in the Joint Travel Regulations are not interpreted as making sleeping and subsistence conditions the sole criteria for determining whether field duty is involved because the statutory authority for payments of per diem does not authorize denial without reference to the type of duty being performed.....

37

In 1982 a group of marines on a temporary duty assignment at Fort Bragg, North Carolina, where billeted in on-post barracks and received their meals in adjacent dining halls. In determining that the assignment was "field duty" for which no per diem was payable the appropriate authority noted that the buildings used were not suitable for regular use, one of the criteria in the regulations then in effect under which "field duty" determinations could be justified. The fact that the facilities were regular barracks and messhalls does not preclude a determination that they were occupied under field duty conditions.....

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**Temporary duty**

**At permanent post**

An employee who was transferred from Boston to New York was instructed by the employing agency to incur no permanent change-of-station expenses prior to receipt of travel orders. He received those orders 8 months after the effective date of his transfer. He claims temporary duty allowances for the entire period prior to the issuance of the travel orders. Because payment of these allowances to an employee at his permanent duty station is prohibited, the claim is denied. ....

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<b>SUBSISTENCE—Continued</b>	
<b>Per diem—Continued</b>	
<b>Temporary duty—Continued</b>	
<b>At permanent post—Continued</b>	
<b>SURVIVOR BENEFIT PLAN. (See PAY, Retired, Survivor Benefit Plan)</b>	
<b>TAX EQUITY AND FISCAL RESPONSIBILITY ACT</b>	
<b>Medicare tax. (See SOCIAL SECURITY, Medicare, Medicaid, etc.)</b>	
<b>TAXES</b>	
<b>Federal</b>	
<b>Interest and penalties</b>	
<b>Payment by Federal agencies</b>	
Section 6611 of the Internal Revenue Code does not require the payment of interest on overpayments of employer taxes by Federal Government agencies, since the funds are already in the hands of the Government. B-161457, May 9, 1978, is extended.....	81
<b>Gasoline</b>	
<b>State. (See TAXES, State, Gasoline)</b>	
<b>State</b>	
<b>Gasoline</b>	
<b>Vermont</b>	
<b>Government immunity</b>	
Subsequent to decision in 57 Comp. Gen. 59 (1977), which held that the Federal Government was constitutionally immune from Vermont gasoline tax, Vermont amended applicable statute, removing language which placed legal incidence of tax on purchaser. Legal incidence to tax now falls on seller and the Federal Government is no longer immune from tax. Therefore, 57 Comp. Gen. 59 is no longer for application.....	49
<b>Government immunity</b>	
<b>Gasoline tax</b>	
<b>Vermont. (See TAXES, State, Gasoline, Vermont, Government immunity)</b>	
<b>Withholding</b>	
<b>Medicare tax. (See SOCIAL SECURITY, Medicare, Medicaid, etc., Withholding)</b>	
<b>TRANSPORTATION</b>	
<b>Dependents</b>	
<b>Military personnel</b>	
<b>Courts-martial review pending</b>	
<b>Appellate leave benefits. (See MILITARY PERSONNEL, Courts-martial, Review pending, Appellate leave benefits, Transportation of dependents, etc.)</b>	
<b>Dislocation allowance</b>	
<b>Transportation non-entitlement effect</b>	
A member under permanent change-of-station orders traveled concurrently with his wife, who was traveling under separation orders. He is not entitled to dependent transportation allowance on account of his wife as his dependent since she was paid travel and transportation expenses to her home of record in connection with her separation from active service in the Air Force. However, he may be paid a dislocation allowance at the with-dependent rate on account of his	

**TRANSPORTATION—Continued**

**Dependents—Continued**

**Military personnel—Continued**

**Dislocation allowance—Continued**

**Transportation non-entitlement effect—Continued**

wife since she is considered his dependent on the effective date of his transfer.....

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**Household effects**

**Military personnel**

**Courts-martial review pending**

**Appellate leave benefits.** (See **MILITARY PERSONNEL, Courts-martial, Review pending, Appellate leave benefits, Transportation of dependents, etc.**)

**TRAVEL EXPENSES**

**Mileage.** (See **MILEAGE**)

**Military personnel**

**Leaves of absence**

**Courts-martialed personnel.** (See **MILITARY PERSONNEL, Courts-martial, Review pending, Appellate leave benefits**)

**WORDS AND PHRASES**

**“Agency”**

It is the policy of the General Accounting Office to refrain from commenting on matters in litigation unless the court expresses an interest in our opinion. Therefore, because question is currently before the U.S. Court of Appeals for the District of Columbia Circuit, it would be inappropriate for GAO to comment on whether National Railroad Passenger Corporation (AMTRAK) is subject to the Government in the Sunshine Act, 5 U.S.C. 552b. However, subsequent to GAO decision at 57 Comp. Gen. 733 (1978), the Omnibus Budget Reconciliation Act of 1981 amended the Rail Passenger Service Act, reducing from a majority to a minority the number of directors on Amtrak’s board that are appointed by the President with the advice and consent of the Senate. Because 5 U.S.C. 552(b) defines agencies covered by the act to include collegial bodies, a majority of whom are Presidential appointees, this amendment has an obvious bearing on the question of whether Amtrack is subject to the Government in the Sunshine Act.....

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**Appellate leave benefits**

Amendments to 10 U.S.C. 706 and 876a provide that court-martialed enlisted personnel with adjudged bad conduct or dishonorable discharges may be compelled to take leaves of absence pending completion of appellate review, and that when they are placed on appellate leave they may elect to receive payment for any accrued leave to their credit either in a lump-sum settlement or as pay and allowances during leave. The amendments were designed to avoid any necessity of restoring these persons to duty after their courts-martial, and to allow them some monetary assistance in their transition to civilian life. Payments may be made even though the member’s term of enlistment has expired.....

25

The lump-sum monetary leave settlement authorized by 10 U.S.C. 706 for court-martialed enlisted personnel required to take appellate leave is to be “based on the rate of basic pay” to which they are enti-

**WORDS AND PHRASES—Continued**

Page

**Appellate leave benefits—Continued**

tled on the day before they are placed on leave. Even though they may be in a nonpay or reduced pay status that day because their enlistments have expired or for some other reason, they still have a "rate" of basic pay, which is the full rate applicable by law to the enlisted grade they hold, and the lump-sum settlement is to be computed on the basis of that rate. .... 25

The rule is well settled that no credit for pay and allowances accrues to court-martialed enlisted personnel during periods after their enlistments expire, unless they are restored to a full duty status, or they are found to have been held over in service for the convenience of the Government if their sentences are completely set aside on appeal. The payment of pay and allowances to court-martialed enlisted members involuntarily placed on appellate leave after their terms of enlistment have expired, as specifically authorized by statute on the basis of unused leave previously accrued during past periods of creditable service, is not in conflict with this rule. .... 25

The appropriate rate of pay to be used, in computing the lump-sum leave settlement or pay and allowances payable to court-martialed enlisted personnel with adjudged punitive discharges who are required to take appellate leave, is the appropriate rate of the grade to which the enlisted member was reduced as a result of the court-martial. .... 25

The Military Justice Amendments of 1981, Public Law 97-81, added article 76a to the Uniform Code of Military Justice, which provides that court-martialed personnel sentenced to receive punitive discharges or dismissals may be compelled to take leaves of absence pending the completion of the appellate review of their cases, in contemplation of their eventual separation from service *in absentia* under less than honorable conditions. When they are placed on leave they may be provided personal transportation home at Government expense by the least costly means available, in the same manner as is generally authorized for persons separated under conditions other than honorable. .... 135

**Clinch River Breeder Reactor Project**

Congress' failure to approve fiscal year 1984 monies for the Clinch River Breeder Reactor Project, either specifically in appropriations or in legislative history, allows the Energy Department to invoke the provision set forth in section 4(i) of the Project justification data and in its contracts calling for termination when there is "insufficiency of project funds to permit the effective conduct of the project." B-115398.33, June 23, 1977; B-164105, December 5, 1977; and B-164105, March 10, 1978, are distinguished. .... 75

**"Duty involving demolition of explosives"**

Military officer, who was not assigned by orders to demolition of explosives as his primary duty and whose work with explosives is not shown to have come within the meaning of "duty involving demolition of explosives" under applicable regulations, is not entitled to hazardous duty incentive pay on the basis of working with explosives. .... 70

**WORDS AND PHRASES—Continued**

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**“Equivalent increases”**

A General Schedule employee was reduced in grade when he exercised his right under 10 U.S.C. 1586 (1976 & Supp. IV 1980) to return to a position in the United States following overseas duty. In accordance with 10 U.S.C. 1586, as implemented by Department of Defense Instruction 1404.8 (April 10, 1968), the employee was afforded pay retention under 5 U.S.C. 5363 (Supp. IV 1980). The employee’s subsequent repromotion to his former grade and step commenced a new waiting period for within-grade increases, since the constructive increase in pay which occurs upon repromotion during a period of pay retention is an “equivalent increase” under 5 U.S.C. 5335(a) (1976 & Supp. IV 1980); 5 C.F.R. 531.403 (1982). 62 Comp. Gen. 151 is reversed based on new information furnished.....

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**Executive agency**

The National Credit Union Administration (NCUA) is an independent agency within the executive branch of the Government. Hence, NCUA is an “Executive agency” within the meaning of 5 U.S.C. 5721(1) (1976), and the entitlement of its employees to relocation expenses is governed by 5 U.S.C. Chapter 57, subchapter II. Furthermore, fees which are collected from Federal credit unions and deposited into a revolving fund for administrative and supervisory expenses of NCUA are appropriated funds which are subject to statutory restrictions on the use of such funds.....

31

**“Field duty”**

Under the statute authorizing per diem and other travel allowances for service members on official travel assignments, no per diem at all is ordinarily payable for periods of an assignment that are properly classified as “field duty,” since ordinarily service members have no additional living expenses during such periods. Superseded provisions in the Joint Travel Regulations are not interpreted as making sleeping and subsistence conditions the sole criteria for determining whether field duty is involved because the statutory authority for payments of per diem does not authorize denial without reference to the type of duty being performed.....

37

In 1982 a group of marines on a temporary duty assignment at Fort Bragg, North Carolina, were billeted in on-post barracks and received their meals in adjacent dining halls. In determining that the assignment was “field duty” for which no per diem was payable the appropriate authority noted that the buildings used were not suitable for regular use, one of the criteria in the regulations then in effect under which “field duty” determinations could be justified. The fact that the facilities were regular barracks and messhalls does not preclude a determination that they were occupied under field duty conditions.....

37

**Fitness-for-duty examination**

An employee, who was required to undergo a fitness-for-duty examination and who, prior to the examination, underwent medical tests in the course of diagnosis and treatment, may not be reimbursed for the cost of these tests even though they were relied upon by the phy-

**WORDS AND PHRASES—Continued**

Page

**Fitness-for-duty examination—Continued**

physician administering the fitness-for-duty examination. Costs of treatment are personal to the employee. Use of the tests by the physician performing the fitness-for-duty examination as part of the medical history furnished by the employee did not result in any cost to the employee beyond that already incurred for treatment.....

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