Decisions of The Comptroller General of the United States

VOLUME 47 Pages 187 to 220

OCTOBER 1967

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300092400

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1968

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.
Price 25 cents (single copy); subscription price: $2.25 a year; $1 additional for foreign mailing.

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TABLE OF DECISION NUMBERS

Cite Decisions as 47 Comp. Gen. —.

Uniform pagination. The page numbers in the pamphlet are identical to those in the permanent bound volume.

[B-162343]

Military Personnel—Training—Civilian Schools—Eligibility

A United States Military Academy 1967 graduate, considered a member of the Regular Army pursuant to 10 U.S.C 3075(b)(2), who on convalescent leave because of injuries incurred while on temporary detail is receiving full pay and allowances from the Academy, is not eligible under paragraph 4(a) Army Regulations 621-5 for the financial assistance provided active duty personnel to attend a civilian school or college, as the cadet, neither an enlisted man nor a warrant officer, is unable to qualify for assistance as a commissioned officer, for until his physical condition is determined and he is commissioned there is no assurance he would be able to meet the at least 2 years active service after completion of the training requirement imposed on commissioned officers of the uniformed services.

To the Secretary of the Army, October 2, 1967:

Reference is made to letter dated August 22, 1967, from The Adjutant General, Department of the Army (file reference AGMG-G) with enclosures, requesting our views as to the eligibility of Cadet Stephen R. Sears, a 1967 graduate of the U.S. Military Academy, for tuition assistance under the circumstances described.

It appears that Cadet Sears is on convalescent leave because of injuries incurred while on a temporary detail. In the letter it is stated that he is currently drawing full pay and allowances from the U.S. Military Academy and will continue to do so until termination of his convalescent leave and a determination is made of his physical qualification for duty as a commissioned officer.

During the convalescent leave period, Cadet Sears says he would like to attend classes in a civilian school or college and has applied for financial assistance through the Army's tuition aid program as set forth in paragraph 14b, Army Regulations 621-5. That regulation is based on language included annually in the Department of Defense Appropriation Act under the heading "Operation and Maintenance, Army," (78 Stat. 467) and provides that appropriated funds may be used to pay up to 75 percent of tuition costs, or fees in lieu of tuition costs, not to exceed specified amounts, for Army personnel attending off-duty classes conducted by accredited civilian schools and colleges.

The Adjutant General says that the regulation is not definitive with respect to the eligibility of cadets for tuition assistance. Therefore, he requests our opinion as to whether Cadet Sears is eligible for such tuition assistance.

Section 3075(b)(2) of Title 10, U.S. Code, provides that the Regular Army includes cadets of the U.S. Military Academy. With respect to the status of a cadet in the U.S. Military Academy in connection with the eligibility of such cadet to accept employment with a Government agency, we have consistently held that a cadet is a member of the Regular Army, and therefore the holding of a civilian position

would be incompatible with his military duty. See decision of February 10, 1967, B-160805, to the Chairman of the Civil Service Commission and decisions cited therein. See, also, *Minnich* v. *World War II Service Compensation Board*, 57 N.W. 2d 803, 804. However, while a cadet is a member of the Army, the laws extending certain pay and allowances to members of the Army generally do not apply to cadets. For example, 37 U.S.C. 504 provides that the leave provisions in 37 U.S.C. 501-503 are not applicable to cadets. Also, cadets are not entitled to pay at the rates prescribed in 37 U.S.C. 203 for commissioned officers, warrant officers and enlisted members, but section 201(c) provides that they are entitled to monthly pay at the rate of 50 percent of the basic pay of a commissioned officer in pay grade 0-1 with 2 or less years of service.

Paragraph 4(a), Army Regulations 621-5, provides that the general educational goals for personnel on active duty are for (1) commissioned personnel, the completion of at least a baccalaureate degree at a college accredited by a regional association; (2) warrant officers, the achievement of at least the equivalency of 2 years of college, and (3) enlisted personnel, completion of high school (or equivalent as measured by the USAFIGED Tests). It further provides that the above goals are minimum standards for military personnel, and that the main objective is to bring every member of the Army as nearly as possible to his maximum performance potential.

From the foregoing, it appears that the regulation provides an opportunity for commissioned and warrant officers and enlisted personnel on active duty to participate in the program and was not intended to have any application to cadets who, being full time students at the U.S. Military Academy, would have no time or need to take courses in civilian educational institutions.

Moreover, paragraph 1, section 1 of the regulation states that the purpose is to establish poiicies and authorize the use of funds for general educational development of military personnel on active duty. With respect to personnel attending off-duty civilian schools, paragraph 14b(1) provides that enlisted members and warrant officers are eligible for tuition assistance without any agreement to remain on active duty beyond completion of the course; but that, as required by a restriction imposed by a provision contained in the "General Provisions" of the annual appropriation acts, commissioned officers must agree to remain on active duty for a minimum of 2 years after completion of the course or courses. Thus, Cadet Sears would not qualify as an enlisted member or warrant officer and until his physical condition is determined and he is commissioned there would be no assurance that he would be able to meet the statutory requirement

for a commissioned officer of serving on active duty for at least 2 years.

In these circumstances, it is our view that Cadet Sears is not eligible for tuition assistance under the cited Army Regulations.

[B-162458]

Officers and Employees—Transfers—Relocation Expenses—Transportation For House Hunting—"One Round Trip" Limitation

The house hunting trip authorized by Public Law 89-516 (5 U.S.C. 5724(a)(2)) at Government expense upon an employee's change-of-duty station may not be extended over several trips, even though transportation expenses would be allowed only for the first trip and the per diem for the several trips would not exceed the 6-calendar days prescribed by section 2.4b of the implementing regulations, Bureau of the Budget Circular No. A-56, the act authorizing allowances "only for one round trip," and the regulations limiting the duration of an advance round trip to 6-calendar days, including travel time, contemplating only one round trip and not several trips, with the per diem extending over a 6-day period.

Officers and Employees—Transfers—Relocation Expenses—Transportation For House Hunting—Mode of Transportation

The round trip travel performed by a transferred employee for the purpose of house hunting need not be performed by the same mode of transportation, the reference in sections 2.4b and 2.4c(3) of Budget Bureau Circular No. A-56, to "mode of transportation" in the singular is not intended to be restrictive but merely to provide for the most usual situation as most employees traveling to locate a residence generally use the same mode of transportation both ways.

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Automobile Parking or Storage Expenses

The costs of parking or storing an automobile which an employee occupying temporary quarters incident to a change-of-duty station pays separately from lodging expenses are not reimbursable to the employee, the use of the term "subsistence expenses" in Public Law 89-516 and implementing Bureau of the Budget regulations not extending to the garaging of a vehicle when an employee occupies temporary quarters, and section 3.5 of the Standardized Government Travel Regulations treating garaging or parking of a vehicle as a transportation expense.

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Reimbursement Basis

When incident to a permanent change-of-duty station an employee and/or his family are in a travel status and temporary quarters status for parts of the same day, the maximum limitation for temporary quarters allowance under section 2.5 (d)(2) of Bureau of the Budget Circular No. A-56 should be computed beginning with the quarter day after the last quarter day for which per diem is paid under section 6.1 of the Standardized Government Travel Regulations. However, where the travel to the new station is under 24 hours, the maximum temporary lodging allowance should be computed from the beginning of the quarter on which the per diem ceased, and on the day an employee moves into permanent quarters, the full maximum should be used to determine entitlement regardless of the time such move occurs.

Officers and Employees—Transfers—Relocation Expenses—Death or Separation of Employee—Reimbursement Basis

Where a transferred employee prior to his death or separation through no fault of his own and acceptable to his agency incurred or became obligated for expenses in connection with the purchase or sale of a residence, reimbursement under Public Law 89–516 and implementing regulations may be proper, but it is doubtful if reimbursement could be made where no expenses were incurred or binding obligations entered into prior to the death or separation without fault of the employee. Therefore, cases of this nature should be submitted for separate consideration.

To the Secretary of the Treasury, October 2, 1967:

This is in reply to the letter of your Assistant Secretary for Administration of September 8, 1967, asking a number of questions concerning Public Law 89–516, approved July 21, 1966, 80 Stat. 323, 5 U.S.C. 5724. His letter indicates that these questions arise from actual and anticipated situations.

In the first question inquiry is made as to whether a house hunting trip provided for in section 23(2) of the Administrative Expenses Act of 1946 (60 Stat. 806), as added by section 2 of Public Law 89–516, 5 U.S.C. 5724a(a)(2), may extend over several trips so long as transportation expenses are paid only for the first trip and the per diem reimbursement for the several trips does not exceed the 6-calendar days provided in subsection 2.4b of the regulations contained in Attachment A, Bureau of the Budget Circular No. A–56, Revised October 12, 1966.

Section 23(2) of the act provides that expenses for locating a residence may be allowed "only for one round trip." Subsection 2.4a of the implementing regulations limits reimbursement to "payment of travel and transportation expenses * * * for one round trip between the localities of the old and new duty stations for the purpose of seeking residence quarters * * *." With respect to the duration of the trip subsection 2.4b of the regulations provides in part as follows:

b. *Duration of trip.* The advance trip should be allowed for a reasonable period of time considering distance between the old and new official stations, mode of transportation to be used, and housing situation at the new official station location. In no case will the period of the advance round trip at Government expense be allowed in excess of 6 calendar days, including travel time. * * *.

Based on the foregoing, our view is that the statute and the regulations contemplate only one round trip, not several trips with the per diem extending over a 6-day period. Accordingly, the first question is answered in the negative.

The second question asks whether the language of subsections 2.4b and 2.4c(3) of the regulations requires that travel in both directions on a house hunting trip be made by the same mode of transportation.

Although the language of subsections 2.4b and 2.4c(3) refers to mode of transportation in the singular it is not considered that such

words are intended to be restrictive but merely to provide for the most usual situation, which is that the majority of employees traveling to locate a residence would use the same mode of transportation both ways. In this regard subsection 2.4b provides that "in authorizing or allowing a mode of transportation, consideration will be given to providing minimum time en route and maximum time at the new official station locality." The second question, therefore, is answered in the negative.

In the third question inquiry is made as to whether the costs of parking or storing an employee's automobile when paid separately from lodging is reimbursable as a separate expense for an employee occupying temporary quarters within the monetary limitation of the regulations although not specifically enumerated as a subsistence expense in subsection 2.5d(1) thereof.

5 U.S.C. 5701 defines subsistence as "lodging, meals, and other necessary expenses for the personal sustenance and comfort of the traveler." In implementing Public Law 89–516, subsection 2.5d(1) of the regulations provides that "Allowable subsistence expenses include only charges for meals, lodging, fees and tips incident to meals and lodging, laundry, cleaning and presssing of clothing." Section 6.1 of Standardized Government Travel Regulations in defining per diem allowance provides as follows:

> 6.1 *Per diem allowance.*—The per diem in lieu of subsistence expenses includes all charges for meals, lodging, personal use of room during daytime, baths, all fees and tips to waiters, porters, baggagemen, bellboys, hotel maids, dining room stewards, and others on vessels, hotel servants in foreign countries, telegrams and telephone calls reserving hotel accommodations, laundry, cleaning and pressing of clothing, fans and fires in rooms, and transportation between places of lodging or business and places where meals are taken except as otherwise provided in section 3.1*c*. * * *

In addition to the above it is noted that in section 3.5 of the Standardized Government Travel Regulations garaging or parking of a vehicle is treated as a transportation expense. In our opinion the term "subsistence expenses" as used in Public Law 89–516 and the regulations of the Bureau of the Budget does not extend to the garaging of a vehicle when the employee is in temporary quarters. The third question, therefore, is answered in the negative.

In the fourth question reference is made to the uncertainty regarding application of the limitations on reimbursement for subsistence expenses as prescribed in subsection 2.5d(2) of the regulations for fractional days in a temporary quarters status. The letter indicates that in the absence of a provision for reducing the limitation to fractions of a day as is done with per diem in a travel status it is assumed it would be proper to allow a full day for any day in which subsistence expenses for temporary quarters are incurred. Inquiry is made as to

the propriety of this method particularly when the employee and/or the family are in a travel status and temporary quarters status for parts of the same day. We enclose copies of our decisions B–161348, May 31, 1967, and B–161878, July 21, 1967, which we believe will answer this question.

Question five inquires as to the entitlement of a transferred employee or his survivors to the allowances for expenses incurred in connection with real estate transactions where the employee dies or is separated for reasons beyond his control and acceptable to his agency before completing a transaction for the sale or purchase of a residence. Inquiry is made as to the correctness of the conclusion that an employee or his heirs may be reimbursed for moving expenses of the type enumerated above arising from the transfer although no action had been taken by the employee before his death or separation that would commit him to bear the expense. This question is too speculative and broad to permit a definitive answer. It is noted, however, that the section 23(4) of the statute and subsections 4.1 and 4.1e of the regulations provide only for reimbursement of expenses that have been incurred by the employee in connection with the sale or purchase of a residence. Thus, it may be that reimbursement would be proper if a transferred employee prior to his death or separation through no fault of his own incurred certain expenses or became obligated thereon in connection with the purchase or sale of a residence which would otherwise have been reimbursable under Public Law 89–516 and the implementing regulations. However, if no expenses have been incurred or binding obligations entered into as provided by the statute and regulations prior to his death or separation through no fault of his own it is doubtful that reimbursement could be made. Any actual cases of this nature should be submitted here for separate consideration.

[B–161858]

Contracts—Labor Stipulations—Davis-Bacon Act—Applicability—Criteria

The determination pursuant to Atomic Energy Commission regulations, implementing the Federal Procurement Regulations, not to require payment of Davis-Bacon Act wage rates in the performance of a reactor system assembly for the Loss of Fluid Test (LOFT) Experiment on the basis "LOFT" will not be assembled on the site of a proposed containment and control facility, nor be installed in that building and, therefore, not constituting construction of a conventional reactor, the assembly work is not subject to the act, will not be disturbed, the Commission having the responsibility of administering and enforcing the contracts, the interpretation of its regulations that the assembly work is not "construction work" or a "public work," but experimental work is authoritative, absent a reason for the Department of Labor holding that the fact the reactor is part of a mobile system to be used for experimental work

does not remove its assembly and fabrication from the coverage of the Davis-Bacon Act.

To the Chairman, Atomic Energy Commission, October 11, 1967:

We refer to a letter dated June 19, 1967, from the General Manager, Atomic Energy Commission, requesting our decision as to whether we would take objection to the inclusion in AEC contracts for the performance of reactor system assembly for the Loss of Fluid Test (LOFT) Experiment, of provisions requiring the payment of wages at rates determined by the Secretary of Labor pursuant to the Davis-Bacon Act, 40 U.S.C. 276a. The General Manager's request for a decision on this matter stems from an opinion by the Solicitor of Labor (DB–52, October 14, 1966), affirmed by the Wage Appeals Board (67–6, April 8, 1967), to the effect that certain assembly work in connection with the AEC LOFT Experiment to be performed under contract No. AT(10–1)–1230 by Idaho Nuclear Corporation (INC) at the AEC National Reactor Testing Station (NRTS) in Idaho is of such nature as to come within the coverage of the Davis-Bacon Act.

The background facts and circumstances involved in the controversy are described in a memorandum submitted by the AEC to the Solicitor of Labor by letter dated September 27, 1966, as follows:

I. *Purpose of Loss of Fluid Experiment*

The Loss of Fluid Test Experiment (LOFT) is an engineering test program to investigate and determine the consequences of an accidental loss-of-coolant fluid in a nuclear reactor. This program is a part of the AEC Nuclear Safety Engineering and Research Test Program.

The essential element of the experimental test is to withdraw coolant fluid under controlled conditions which will result in the burn-up of the reactor core, thereby resulting in the probable destruction of the reactor. The purpose of the LOFT experiment is to gain knowledge of what happens during the coolant withdrawal period and the end result to the reactor and its components after "burn-up."

II. *Description and Location of Work to be Performed*

A. *Reactor System*

The reactor system will be mounted on two railroad flat cars which will be connected end to end. This system will consist of the following major components; reactor vessel, reactor core, steam generator, pressurizers, primary pumps and piping, and instrumentation. The major components listed above will be procured from a number of manufacturing firms throughout the United States, and will be assembled in an existing facility at NRTS, known as Building 607. This building was constructed approximately eight years ago in connection with the AEC program for Aircraft Nuclear Propulsion (ANP). It is a large building of high bay construction containing a machine shop, carpentry shop, paint shop, electronic shop, etc., in which various manufacturing, fabrication, and assembly work has been performed since its initial construction.

The direct labor cost estimated for this work is $200,000.

B. *Containment Facility*

The containment facility will consist of: a containment building, a remote control room, 1,300 feet of additional four-track railroad leading into the containment building. The containment facility will be located adjacent to existing facilities which were constructed during the ANP Program known as the Flight Engineering Test Facility (FET). The containment building will be a large

building capable of withstanding the pressures associated with coolant expulsion and of preventing fission product leakage to uncontrolled atmosphere. There will be a considerable amount of structural steel framing and concrete foundation work. Utilities will be provided to the building, and 1,300 feet of railroad track will be laid from a take-off point of an existing track. The remote control room will be a modification of a portion of an existing building, a part of the FET. The direct labor cost estimated for this work is $3.1 million.

III. *How Work to be Performed*

A. *Reactor System*

The reactor system, as described in II A. above, will be assembled in the 607 Building by Phillips Petroleum Company (Phillips) and Idaho Nuclear Company (INC) under existing contracts with the AEC *as work which is not subject to the Davis-Bacon Act.*
Those employees of Phillips and INC represented by a Collective Bargaining Agent are represented by the Oil, Chemical, and Atomic Workers.

B. *Containment Facility*

The containment facility, as described in II B. above, will be constructed by the M. W. Kellogg Company under an existing contract with the AEC *as work which is subject to the Davis-Bacon Act.*
Those employees of Kellogg represented by collective bargaining agents are represented by the Building and Construction Trades.

IV. *Issue*

The matter in issue is whether the work described in I A. above (assembly of the reactor system), to be performed by Phillips and INC, is work subject to the Davis-Bacon Act. * * *

V. *AEC Determination of Coverage*

Determination as to the application of the Davis-Bacon Act to AEC contract work performed at NRTS is a function delegated by the General Manager of the AEC to the Manager of the AEC Idaho Operations Office. In 1963 the Manager, Idaho Operations Office, determined that the assembly of the reactor system, work described in II A. above, *was not* work subject to the Davis-Bacon Act and that the construction of the containment facility, work described in II B. above, *was* work subject to the Davis-Bacon Act. This determination was made after study and recommendation by the Idaho Davis-Bacon Committee consonant with AEC Procurement Regulations 9–12.4. In June 1966, AEC Headquarters reviewed the work in question and the basis of the determination by the Idaho Manager and concurred in that determination.
The AEC Idaho Davis-Bacon Committee is composed exclusively of AEC employees of long experience in the field of construction and with the AEC Davis-Bacon criteria. Each AEC Davis-Bacon determination is based upon comprehensive knowledge of the factual situation involved and careful application of the AEC criteria and other appropriate guides. The determination in question here received very careful attention. This determination is historically consistent with all prior work of this nature at NRTS and is not a departure or extension of the application of the AEC criteria.

VI. *Detailed Description of Work Determined as Non-covered*

All of the following described work with the exception of the cold tests (Non-nuclear core tests) and the hot test (nuclear core tests), which are the final steps in the experiment, will be performed in the 607 Building.
Upon procurement and receipt of the reactor pressure vessel, it will be set on a cradle which will be fabricated in the machine and sheet metal shops. After placement of the reactor vessel, instrument access nozzles will be welded into place. The vessel will then be hydrostatically tested up to 3500 P.S.I.
Assuming satisfactory completion of the hydrostatic test, the exterior of the vessel will be extensively instrumented. Following installation of instrumentation the reactor vessel will be insulated. Insulation will be installed while the reactor vessel is setting on its cradle. Shielding consisting of water and lead will then be placed around the reactor vessel.
While the work described above is being carried out, the two railroads cars will be fitted together and a second cradle will be fabricated and assembled on the railroad cars for receipt of the reactor vessel. The two railroad cars (dolly) will

then be instrumented. In order to lift the pressure vessel and shielding as a unit, a support structure will be designed and fabricated to accommodate the lifting and movement of the vessel onto the dolly. The vessel will then be lifted by overhead cranes onto the dolly. Subsequently, the framing, piping, and additional instrumentation will be placed upon the dolly and reactor vessel. Concurrently with the above described operations, the reactor internals will be assembled, measured, and tested for installation in the vessel. Upon installation, further extensive instrumentation will be made.

At this point the "reactor system" will be moved from the cold assembly area of the 607 Building into the hot shop area where remote handling equipment will simulate a disassembly of the reactor system to test whether the remote control equipment can cope (i.e., take apart) with the geometric configuration of the assembly. If it cannot, the reactor system will be returned to the cold assembly area of the 607 Building, disassembled, and modified.

When the reactor system's assembled configuration meets the disassembly requirements, it will be moved on the dolly the one and a quarter (1¼) miles into the containment building where it will be plugged into utilities and instrumentation contained in the remote control building. A number of cold tests with a non-nuclear core will be performed. If these tests show anything wrong with the materials, workmanship, or design, the system will be unplugged, and returned to the 607 Building for correction. Ultimately the system will be in proper condition for the nuclear test in the containment building. After the nuclear test, the "burned out" reactor and dolly will be partially decontaminated, unplugged, and moved back to the hot shop in the 607 Building, where the reactor will be disassembled and the effects of the test studied.

Pertinent Federal Procurement Regulations defining the applicability of the Davis-Bacon Act are as follows:

1–12.402 *Applicability.*

The requirements of this Subpart 1–12.4 apply to contracts for construction, and, under some circumstances, to other types of contracts involving construction.

1–12.402–1 *Construction contracts.*

(a) A contract is for construction if it is solely or predominantly for construction, alteration, or repair (including painting and decorating) of a public building or public work. The appropriate clauses set forth in this Subpart 1–12.4 shall be included in such contracts * * *.

(1) These requirements are applicable only if the construction work is, or reasonably can be foreseen to be, performed at a particular site, so that wage rates can be obtained for the locality (see § 1–12.404–2).

(2) These requirements are not applicable to contracts for the construction or repair of vessels, aircraft, or other kinds of personal property.

(3) These requirements are not applicable to contracts requiring construction work which is so closely related to research, experiment, and development that it cannot be performed separately, or which is itself the subject of research, experiment, or development.

(4) These requirements are applicable to the manufacture or fabrication of construction materials and components on the site by a construction contractor or subcontractor under a contract otherwise subject to these requirements, but are not applicable to manufacturing or furnishing of equipment, components, or other materials.

(b) Under such contracts for construction, the requirements apply only to work performed by mechanics and laborers at the site of the work.

(1) Mechanics and laborers are those working predominantly with their hands or with construction tools and equipment. The requirements do not apply to office workers, superintendents, technical engineers, or scientific workers, but they do apply to cooks, storekeepers and working foremen. The requirements apply to mechanics and laborers whether they are employed by the prime contractor or by a subcontractor of any tier.

(2) The site of the work may include the sites of the job headquarters, storage yards, prefabrication or assembly yards, quarries or borrow pits, batch plants, and similar facilities if they are set up for and serve exclusively the particular construction operation and are reasonably near the construction site. Transportation of materials, equipment, or personnel to and from the construc-

tion site by employees of construction contractors or subcontractors is covered by the requirements; however, such transportation by common carriers, material suppliers, or manufacturers is not subject to the requirements.

The AEC has issued labor standards regulations in implementation the Federal Procurement Regulations. See Subpart 9–12.4, Title 41 of the Code of Federal Regulations. Pertinant sections of these regulations, cited by the Solicitor of Labor in support of his opinion, are as follows:

9–12.401–50 *Department of Labor Approval.*

The Department of Labor has previously reviewed and approved the criteria, standards, and guides set forth in §§ 9–12.402, 9–12.450 and subsection 9–12.404–2 and the contract clause in § 9–12.403–50.

9–12.402–52 *Administrative controls and criteria for application of the Davis-Bacon Act in operational or maintenance activities.*

(a) Particular contracts or work items falling within one or more of the following criteria will be classified as non-covered.

* * * * * * *

(5) Experimental development of equipment, processes and devices, including assembly, fitting, installation, testing, reworking, and disassembly. This refers to equipment, processes and devices which are assembled for the purpose of conducting a test or experiment. The design may be only conceptual in character, and professional personnel responsible for the experiment participate in the assembly. Specifically excluded from the category of experimental development are buildings, building utility services, structural changes, and modifications to building utility services—as distinguished from temporary connections thereto. Also specifically excluded from this category is equipment to be used for continuous testing, e.g., a machine to be continuously used for testing the tensil strength of structural members. * * *

(6) Experimental work in connection with peaceful uses of nuclear energy. This refers to equipment, processes and devices which are assembled and/or set in place and interconnected for the purpose of conducting a test or experiment. The nature of the test or experiment is such that professional personnel responsible for the test or experiment and/or the data to be derived therefrom necessarily must participate in the assembly and interconnections. Specifically excluded from experimental work are buildings, building utility services, structural changes, drilling, tunneling, excavation and backfilling work which can be performed according to customary drawings and specifications, and utility services or modification to utility services—as distinguished from temporary connections thereto. Work in this category may be performed in mines or in other locations specifically constructed for tests or experiments * * *.

9–12.450–1 *General.*

Section 9–12.402–52 necessarily uses general language, and in some cases the application of the criteria discussed therein to particular situations may not be clear. Therefore, this subsection covers more specifically some of the areas of particular concern to AEC and is promulgated to clarify the application of the criteria.

9–12.450–2 *Specific examples.*

The following are applications of the regulations to particular situations. Additional narrative statements describing items of work and applicability of the Davis-Bacon Act will be developed from time to time and added to this subsection.

* * * * * * *

(h) *Experimental installations.* Within AEC programs, a variety of experiments are conducted involving materials, fuels, coolants, processes, equipment, etc. Certain types of situations where tests and experiments have sometimes presented coverage questions are described below:

* * * * * * *

(3) *Reactor component experiments.* Other experiments are carried on by insertion of experimental components within reactor systems without the use of a loop assembly. Illustrative of reactor facilities erected for such experimental purposes are the special power excursion test reactors (SPERT) at the National Reactor Test Site, which are designed for studying reactor behavior and performance characteristics of certain reactor components. Such a facility may consist of a reactor vessel, pressurizing tank, coolant loops, pumps, heat exchangers, and other auxiliary equipment as needed. The facility also may include sufficient shielding to permit work on the reactor to proceed following a short period of power operation and buildings as needed to house the reactor and its auxiliary equipment. The erection and on-site assembly of such a reactor facility is covered work, but the components whose characteristics are under study are excluded from coverage. To illustrate, one of the SPERTs planned for studies of nuclear reactor safety is designed to accommodate various internal fuel and control assemblies as required to conduct a particular test. Accordingly, the internal structure of the pressure vessel is so designed that cores of different shapes and sizes may be placed in the vessel for investigation, or the entire internal structure may be easily removed and replaced by a structure which will accept a different core design. Similarly, the control rod assembly is arranged to provide for flexibility in the removal of instrument leads and experimental assemblies from within the core.

* * * * * * *

(i) *Construction site contiguous to an established manufacturing facility.* As AEC-owned property sometimes embraces several thousands of acres of real estate, a number of separate facilities may be located in areas contiguous to each other on the same property. These facilities may be built over a period of years, and established manufacturing activities may be regularly carried on at one site on the property at the same time that construction of another facility is underway at another site. On occasion, the regular manufacturing activities of the operating contractor at the first site may include the manufacture, assembly and reconditioning of components and equipment which in other industries would normally be done in established commercial plants. While the manufacture of components and equipment in the manufacturing plant is noncovered, the installation of any such manufactured items on a construction job is covered.

Pursuant to the request of the International Brotherhood of Electrical Workers and the Building and Construction Trades Department of the AFL–CIO, the Solicitor of Labor on October 14, 1966, issued an opinion (DB–52) to the AEC Director of the Office of Industrial Relations that the assembly work in question was subject to the Davis-Bacon Act. The Solicitor reasoned that "on-site assembly of manufactured components" and subsequent installation as a portion of a public work has long been considered subject to the Davis-Bacon Act. "Thus, the erection of a $3 million concrete building together with the on-site assembly and permanent installation therein of a 'conventional' 40-ton nuclear reactor ordinarily would constitute the construction of a public work of the United States within the meaning of that Act." The mere fact that the reactor in this case is a part of a mobile system to be used for experimental purposes did not remove, in his judgment, its assembly and fabrication from the ambit of the act.

This conclusion, in the Solicitor's opinion, was supported by the AEC regulations relating to SPERT (section 9–12.450–2(h)(3)), which admittedly was covered work. The description of the reactor in question which he had been furnished, he stated, revealed no significant differences between it and the SPERT reactor. He noted that

both reactors are assembled for use in an experiment and are designed to accommodate control assemblies and measuring instruments to facilitate their employment in various tests. "We are persuaded," he stated, "that these accommodations in design do not render the subject reactor of such an experimental character as to exclude coverage of its assembly under the considerations stated in AECPR 9–12.402–52 (a)(5) and (6)."

The Solicitor concluded his opinion as follows:

> Finally, the fact that the assembly of the reactor is to take place in an existing AEC facility (Building 607) a little over a mile from the containment building is not decisive of coverage. The reactor itself is a public work of the United States. No argument is made to the contrary. Its major components will be procured from manufacturing firms throughout the country and will be fabricated and assembled in Arco, we are informed, by two large independent contractors under existing AEC contracts. The place of its assembly and fabrication in Building 607 is its own job site. That unrelated AEC work may be performed there by others contemporaneous with its assembly is, under these circumstances, immaterial.
>
> For these reasons, we have concluded that the assembly of the subject reactor constitutes "construction" within the meaning of the Davis-Bacon Act.

On January 4, 1967, the AEC and Idaho Nuclear Corporation jointly petitioned the Wage Appeals Board for a review of the Solicitor's opinion. The Commission and Idaho Nuclear argued before the Board, *inter alia*, that: (1) the work in question is "experimental work" within the meaning of AEC Procurement Regulations 9–12 and Federal Procurement Regulations 1–12.402–1(a)(2) and (3) and therefore by regulation is excluded from coverage under the Davis-Bacon Act; (2) the work in question does not constitute "construction work" or a "public work" within the meaning of the Davis-Bacon Act; (3) the work in question is a manufacturing activity excluded from the coverage of the Davis-Bacon Act; and (4) the work in question is significantly different from work performed as covered work under the Davis-Bacon Act in connection with SPERT and the assembly of the reactor system in this case for the LOFT is not the type of work which has ever been performed under a contract subject to the Davis-Bacon Act at NRTS—on the contrary, work of this type has consistently been performed under contracts which were not subject to the act and does not represent a departure from past AEC Davis-Bacon determinations made in connection with work of a similar nature.

The Wage Appeals Board rendered its opinion [67–6] on April 8, 1967. It upheld the determination by the Solicitor of Labor, stating in pertinent part:

> The petitioners state that the erection of the reactor system involves a configuration which is conceptual in nature; it will involve supervision and participation in the erection by professional personnel. The reactor is then described as "an experiment involving peaceful uses of nuclear energy; i.e., safety of private

and public reactor facilities which are or will be utilized in the generation of electrical power."

However, as noted in 41 CFR 9–12.5005–1 [now 9–12.450–1], the quoted regulations necessarily use general language and in some cases the application of the criteria is unclear, such as in this case. The specific examples of how the criteria have been applied, which are contained in 41 CFR 9–12.5005–2 [now 9–12.450–2], provide helpful guidance. We agree with the Solicitor that, for purposes of the Davis-Bacon Act, there is no significant difference between the LOFT reactor and the SPERT reactors described in 41 CFR 9–12.505–2(i)(3) [now 9–12.450–2(h)(3)]. The SPERT reactors are being used to conduct experiments, one of which is to test various cores of different shapes and sizes. The LOFT reactor is to be used to experiment also; i.e., to determine what will happen when the coolant is withdrawn. In the former, the AEC wants to study "reactor behavior" and what happens when different kinds of shapes of cores are inserted. In the latter, it wants to study "reactor behavior" and see what happens when the coolant is removed. Both LOFT and SPERT have many characteristics of standard reactors which are built and subsequently used for experimental purposes. Experimental projects usually deal with work, the definition, delineation, or scope of which involves such difficulties that full specification is not possible or practical. According to the facts before us, this is not that kind of situation.

We conclude that the LOFT reactor is to be treated the same as the SPERT reactors for purposes of coverage under the Davis-Bacon Act. There is no question among the parties that the SPERT reactors are covered "public works" under the Act and that their erection constitutes "construction." Therefore, there is no need in this decision for further exposition on the generic and specific meanings of these terms in the administration of the Davis-Bacon Act. * * *

Apparently there is no disagreement among the interested parties here, including the Solicitor of Labor and the Wage Appeals Board, that the controlling criteria to be used in determining applicability of the Davis-Bacon Act in this case are the AEC procurement regulations. These regulations were properly promulgated in implementation of the Federal Procurement Regulations and they were reviewed and approved by the Department of Labor to be used, obviously, for the very purpose to which they were applied here, i.e., to serve as criteria in determining coverage.

The promulgation and adoption of these regulations by the AEC is in line with our observation in 44 Comp. Gen. 498, 502, that the primary responsibility for determining whether Davis-Bacon Act provision should, or should not, be included in a particular contract rests with the contracting agency which must award, administer and enforce the contract. We also noted in that decision (with respect to the Solicitor of Labor's disagreement with a determination of noncoverage by a NASA contracting officer), that neither the Department of Labor nor our Office should lightly disturb a contracting agency's determination in that regard. The propriety and soundness of the latter observation is demonstrated by the facts in this case. For the reasons stated below, we believe the initial determination by the AEC that the Davis-Bacon Act does *not* apply to the assembly of LOFT is legally correct.

The Solicitor of Labor's opinion is premised on the statement that the erection of a $3 million concrete building together with the "on-site assembly" and "permanent" installation therein of a "conventional"

40-ton nuclear reactor ordinarily would constitute the construction of a public work of the United States within the meaning of that act. (See in this connection section 1–12.402–1(a)(4) FPR *supra.*) The mere fact, he states, that the reactor in this case is a part of a mobile system to be used for experimental purposes does not remove its assembly and fabrication from the ambit of the act. We note that the Solicitor gives no reasons why he believes that the fact the reactor is a part of a mobile system to be used for experimental purposes does not remove its assembly and fabrication from the ambit of the act. The essential facts, which are not in dispute, establish that LOFT: (1) will *not* be assembled *on the site* of the $3 million concrete building; (2) will *not* be "*permanently installed*" therein; and (3) is *not* a "*conventional*" 40-ton nuclear reactor.

LOFT will be assembled in the 607 Building. The brief accompanying your petition for review before the Wage Appeals Board notes that Building 607 was constructed 13 years ago for work in connection with the AEC Aircraft Nuclear Propulsion Program, and has been used as a manufacturing and maintenance facility for support of operational work at NRTS since that time. It is noted that the AEC procurement regulations [9–12.450–2(i)] give approved recognition to the particular circumstances which involve AEC manufacturing facilities on AEC property upon which construction activities also take place. The site of the work (i.e., the assembly of LOFT) is not the $3.1 million containment and control facility which will be constructed by N. W. Kellogg Company and which is admittedly covered by the Davis-Bacon Act. Nor do we think it is an answer to say that "The place of its assembly and fabrication in Building 607 is its own job site." This contention is adequately controverted by the following observations, with which we agree, set forth in the brief accompanying your petition for review:

> In the next to last paragraph of DB–52 it is indicated that no argument was made that the reactor was not a public work of the United States and continues by stating that "[t]he place of its assembly and fabrication in Building 607 is its own job site."
> The reactor system is a manufactured item of machinery or equipment in the same sense that a lathe, a diesel generator, a transformer, a truck, an armored tank, an aircraft, a space capsule, a rocket are items of manufactured equipment. When the Government purchases or causes to be manufactured a diesel generator, a truck or a rocket and pays for it with appropriated funds, it of course is acquiring same for the benefit of the public and the manufacture of such equipment involves work which in a generic sense is a "public work." However, to suggest that the manufacture of a transformer is a public work within the meaning of the Davis-Bacon Act and carries with it its own job site would be tantamount, in its potential application, to saying that when a particular transformer is being manufactured by the X Company for the specific purpose of being utilized at a Government installation then under construction, and subject to the Act, there is a "flow back" of the Davis-Bacon coverage to the work involved in the manufacture of the transformer by the X Company in its own manufacturing facility.

We are not aware of any prior decision, interpretation or opinion that would support this proposition. To our knowledge the concept of manufacturing as a public work under the Davis-Bacon Act has never gone beyond an application to manufacturing or fabrication of *construction* materials and components on the construction site under a contract otherwise subject to the act.

From the AEC explanation of the LOFT project, which is the sole and undisputed factual statement of the case, we find no rational basis for the conclusion that the LOFT will undergo "permanent installation" within the containment building. As the Solicitor's opinion recognizes, LOFT will be a mobile system. After its assembly in Building 607 it will be moved on a railroad dolly one-and-a-quarter miles into the containment building where it will be "plugged into" utilities and instrumentation contained in the remote control building. LOFT will then undergo a nuclear test of approximately 5 days duration after which it will be partially decontaminated, unplugged, and moved back to the hot shop in the 607 Building, where the reactor will be disassembled and the effects of the tests studied. The "plugging in" of the reactor system to the utilities of the containment facilities under these circumstances can hardly be regarded as a "permanent installation;" rather, it would more aptly be described as a "temporary connection." In either case, the "installation" or "connection" is not for utilization for the normal functions of a reactor, but solely for the conduct of destructive testing and experimentation.

As to the third distinction above noted, LOFT, we are informed, is not a "conventional" reactor in the sense used by the Solicitor in his opinion. While it is true that many of the reactor's component parts are "standard" (in the sense of nuclear reactor standards) the reactor system itself is not standard. In the memorandum, above mentioned, which was submitted by the AEC to the Solicitor by letter of September 27, 1966, it is stated:

* * * If we were considering a standard reactor system, it could be purchased as a completed piece of equipment from a reactor manufacturer. The real crux of the matter here lies in the method of assembly, the "art" of designing the configuration, the instrumentation, the necessity for improvising, and the requirements for developing machine methods and tools, all to achieve a nuclear reactor system capable of producing by its destruction, the desired scientific data. The work * * * involves a detailed step-by-step procedure of assembly, fitting, testing, disassembly, reworking and reassembly. The reactor system once finally assembled will be an experimental device just as is a model of an aircraft that is put into a wind tunnel and subjected to atmospheric forces to determine at what velocity the aircraft's wings will be torn from the fuselage or at what point metal fatigue will cause a rupture of the aircraft's structure.
It is essential that scientific personnel, which will be called upon to evaluate the test and which originally dictated the needs and scope of the test, participate in the arrangement (configuration) of the component's parts and their assembly, in the technical methods of assembly, such as types, places, and kinds of welds, and particularly in type, kind, and location of instrumentation. [Footnote omitted.]

We turn now to a consideration of the AEC procurement regulations which, the Solicitor asserted, supported his opinion and which

formed the basis for affirmance of his opinion by the Wage Appeals Board. The Solicitor reasoned that since the assembly of the SPERT reactor was admittedly covered work [AECPR 9–12.450–2(h)(3)] and the description furnished him about LOFT revealed no significant differences, assembly of LOFT was therefore also covered. Both reactors, he stated, are assembled for use in an experiment and, accordingly, are designed to accommodate control assemblies and measuring instruments to facilitate their employment in various tests. He was persuaded, he stated, that these accommodations in design did not render LOFT of such an experimental character as to exclude coverage of its assembly under the considerations stated in AECPR 9–12.402–52(a)(5) and (6).

On the other hand, the AEC takes the firm position that the LOFT reactor system is significantly different than the SPERT facilities described in AECPR 9–12.450–2(h)(3). The AEC relies on that part of 9–12.450–2(h)(3) which states that "the components whose characteristics are under study are excluded from coverage." The portion of 9–12.450–2(h)(3) which follows the quoted statement concerning components was omitted from the Solicitor's opinion and was apparently given no effect. The AEC argues that this omitted portion of the regulation is the crux of the matter and that LOFT can more logically by compared to the SPERT *components* whose characteristics are under study, and which have never been produced under Davis-Bacon coverage, than to the SPERT *facilities* which were covered and which were only the permanent part of the reactor.

In that connection, the AEC states that the LOFT reactor system is, in and of itself, an experimental device (the subject of research). It has no utilitarian purpose in the ordinary sense of the word (e.g., it is not treated for budgetary purposes as capital equipment, but to the contrary it is treated as an expendible). It is assembled in order that it may be destroyed and thereafter it is examined to determine what happens to such a device. The AEC notes that LOFT is experimental in nature, and while perhaps not as exotic as rockets, space capsules and Mach 3 aircraft, it is basically the same type of personalty. Moreover, the AEC notes that like the rocket or an airplane LOFT is not attached to realty, it is not a fixture of a building, it is not an integral part of a building and it is not equipment or machinery integral to construction or construction processes.

On the other hand, the AEC points out that the SPERT facilities are permanent facilities and involve reactor dynamic studies. The SPERT tests utilize experiments within the reactor core. In other words, according to the AEC, the reactor facilities of SPERT are permanent facilities comparable to the *containment and control fa-*

cility of LOFT. The components tested in SPERT, says the AEC, consist of the reactor cores which are placed in the reactor for exposure to experimental conditions of temperature and pressure. *Consequently, the core itself is the component whose characteristics are under study whereas in LOFT the reactor system is the component under study.*

Pursuant to our request the AEC, on August 4, 1967, furnished our Office a set of pictures depicting LOFT, SPERT, SPERT II, SPERT III, SPERT IV and other reactor systems together with descriptions thereof. In addition, a more detailed comparative description of LOFT and SPERT was furnished which we need not go into except to say that this comparative analysis, along with the pictures, convinces us that the AEC assertions above outlined with respect to LOFT falling within the "component language" of AECPR 9–12.450–2(h)(3) are clearly correct.

We are also convinced that the AEC position on LOFT is entirely consistent with past determinations by the AEC which have excluded other reactor test assemblies similar to LOFT from Davis-Bacon Act coverage. Particularly significant in this respect are the two experimental High Temperature Reactor Experiments (HTRE) and the SNAPTRAN experiments.

The HTRE systems were dolly mounted nuclear power plants used in the ANP program which was undertaken to develop an airplane powered by nuclear reactors. These reactors were moved on their dollies into test facilities the same as LOFT. The dolly mounted experimental equipment was assembled by operating personnel as non-covered work in Building 607 and then moved to the IET building for testing. Photographs of the two HTRE systems reveal configurations which are strikingly similar to LOFT.

The objective of the SNAPTRAN programs, we are informed, was to assess the ability of the SNAP reactors to withstand severe reactivity additions which might occur during launch of the system into space. The tests consisted of a series of increasing reactivity additions to the SNAP reactor until gross destruction occurred. In the tests the reactor equipment, which was the equipment under test, was mounted on railroad dollies and transported to a permanent test facility (IET) where the experiments were conducted. The assembly of the reactor systems on dollies was accomplished in the 607 Building under contracts which did not contain Davis-Bacon Act provisions.

In the instant case, the Manager, Idaho Operations Office, determined that assembly of LOFT was work not subject to the Davis-Bacon Act. This determination was made only after careful study of the question by the Idaho Davis-Bacon Committee. Thereafter AEC

Headquarters reviewed the work in question and the basis for the determination and concurred in that determination. It would appear that the manager's determination was made not only in good faith but on a basis which was consistent with applicable procurement regulations (FPR 1-12.402-1(a)(3) and AECPR 9-12.402-52(a)(5) and (6) and with past determinations by the AEC excluding other reactor test assemblies similar to LOFT from coverage of the act. Compare 44 Comp. Gen. 489, 503. In the light of the weight customarily given to settle administrative interpretation, and the principle that the interpretation of a regulation by the agency which promulgated it is more authoritative than that of some other agency, and having regard also to the terms of the Davis-Bacon Act itself, we see no valid reasons to disturb that determination.

Accordingly, you are advised it is the view of this Office that any contract, or contracts, for the performance of reactor system assembly for the Loss of Fluid Test Experiment should not contain the minimum wage stipulations required by the Davis-Bacon Act, and we would be constrained to apply this view in the audit of expenditures of appropriated funds under such contract or contracts.

A copy of this decision is being furnished to the Secretary of Labor for his information.

[B-103315]

Transportation—Travel Agencies—Use Approved

The procurement of transportation through group or charter arrangements made by travel agents for employees traveling on official business between points in the United States and points in its possessions or foreign countries which results in substantial savings over the costs of regular individual air accommodations would be consistent with sections 1.2 and 3.9 of the Standardized Government Travel Regulations and, therefore, such arrangements may be used upon administrative determination of substantial savings over the cost of regular individual air fare. However, tickets should not be obtained with Government transportation requests but should be paid for by the traveler and the cost reimbursed to him, and appropriate travel advances may be made to employees to cover the cost of the travel procurement.

To the Administrator, National Aeronautics and Space Administration, October 12, 1967:

Further reference is made to the letter dated July 7, 1967, file BFG, from Mr. H. Frank Hann, Acting Director of Financial Management, of your Administration, forwarding a letter of July 3, 1967, from your Ames Research Center, Moffett Field, California, in which we were requested to grant authority to deviate from our regulations covering the procurement of official passenger transportation services.

In our decision of July 21, 1967, B-103315, authority was granted to reimburse two travelers for transportation procured with cash

through travel agencies. We also said that we would study and advise you later as to the proposal of Ames Research Center that we remove the requirement that special authority be sought for similar travel where substantial savings to the Government would be realized. The proposal was made in anticipation that this type of travel will become more prevalent in the months ahead.

Although the Research Center suggests that requests for exemption from our regulations to use the services of travel agencies will become more prevalent, our records show that during the past year for all Government agencies we received only approximately seven such requests. After our consideration of such requests, in each case we authorized the use of group or charter travel arrangements made by travel agencies for overseas or foreign air travel for official business between points in the United States and points in its possessions or foreign countries where there would be a substantial savings over the costs of regular individual air accommodations otherwise chargeable to the Government. Our authorizations generally directed that the tickets not be obtained through the use of transportation requests but should be paid for by the traveler who would be reimbursed for the expense and that we had no objection to appropriate travel advances to cover the costs of such procurement.

While the relatively small number of such requests might suggest that any general exception to the individual advance authorization requirement may be unnecessary, we believe the relative paucity of such requests may be attributable to the difficulties, delays and administrative expense incident to processing the individual requests and that a general advance approval of such method of procuring official transportation through group travel arrangements made through travel agents offering substantial savings from regular individual air fares would promote the economical use of Government funds and would be consistent with sections 1.2 and 3.9 of the Standardized Government Travel Regulations.

Accordingly, group travel arrangements made by travel agencies administratively determined to offer substantial savings from regular air fares may be used for official business between the United States and its possessions or foreign countries. The tickets should not be obtained with transportation requests but should be paid for by the traveler who may be reimbursed therefor and we have no objection to appropriate travel advances to cover the costs of such procurement.

[B-162377]

Pay—Retired—Election of Pay Computation Method—Most Favorable Formula—Restrictions

A Regular chief warrant officer, W–4, relieved from active duty and retired as an Air Force reservist in the grade of lieutenant colonel under 10 U.S.C. 1201 by reason of permanent physical disability who was also eligible to be retired under 10 U.S.C. 1293, having had more than 20 years' active service, properly is being paid retired pay computed under formula 1 of 10 U.S.C. 1401, the formula "most favorable to him," and his retired pay may not be computed under formula 4, based on his higher Reserve commission grade, to establish the "most favorable formula" for him under 10 U.S.C. 1401, formula 4 pertaining exclusively to persons retired as warrant officers, and the member having been retired as a commissioned officer, formulas 1 and 4 may not be combined to provide a greater amount of retired pay, and the computation of the member's retired pay is restricted to formula 1, 10 U.S.C. 1401.

To Lieutenant Colonel J. R. Kelliher, Department of the Air Force, October 17, 1967:

Further reference is made to your letter of August 10, 1967, your file ALRA–1, requesting an advance decision as to the propriety of payment on a voucher in the amount of $24.81 in favor of Lieutenant Colonel Bertie L. Hawkins, USAF, retired, representing the difference in retired pay computed under formulas 1 and 4, 10 U.S.C. 1401, on the pay of the grade of lieutenant colonel. Your request was forwarded to this Office by letter dated August 28, 1967, from the Directorate of Accounting and Finance and has been assigned Air Force Request No. DO–AF–959 by the Department of Defense Military Pay and Allowance Committee.

By Special Order No. AC 567, dated January 10, 1967, Chief Warrant Officer Bertie L. Hawkins, W–4, was relieved from active duty effective February 28, 1967, and retired in the grade of lieutenant colonel under the provisions of 10 U.S.C. 1201 by reason of permanent physical disability rated at 10 percent. Since he held an appointment as lieutenant colonel in the Air Force Reserve he was entitled, on the basis of the holding in the case of *Tracy* v. *United States*, 136 Ct. Cl. 211 (1956), to have his retired pay computed on the basis of his permanent Reserve grade of lieutenant colonel. At the time of his retirement the member, having had more than 20 years of active service, also was eligible to be retired under 10 U.S.C. 1293.

The monthly retired pay of a person retired under 10 U.S.C. 1201 is for computation under formula 1 of 10 U.S.C. 1401. Under that formula Colonel Hawkins was entitled to retired pay computed by multiplying the monthly basic pay of a lieutenant colonel with over 22

years of service (maximum amount payable) by 2½ times 28, the years of service credited to him under 10 U.S.C. 1208(b). Thus he was entitled to 70 percent of $992.40, or $694.68 per month, and it appears that he has been paid at that rate.

Section 1401 of 10 U.S. Code, setting forth the methods of computing retired pay for persons retired under certain sections of Title 10, provides in pertinent part that "if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or of any other provision of law, he is entitled to be paid under the applicable formula that is most favorable to him." Since Colonel Hawkins was also eligible for retirement under 10 U.S.C. 1293, he would be entitled to computation of his retired pay under formula 4 of 10 U.S.C. 1401 if that formula is more favorable to him than formula 1. 37 Comp. Gen. 794; 38 Comp. Gen. 715; and 47 Comp. Gen. 74.

Under formula 4 he would be entitled to retired pay computed by multiplying the maximum monthly basic pay of a chief warrant officer (W–4) (with over 26 years of service), $767.70, by 72½ percent (2½ times the years of service (29) creditable to him under 10 U.S.C. 1405, including his inactive service), or $556.58.

Formula 1 therefore is the one "most favorable to him." However, you say that "Colonel Hawkins contends, in effect, that the computation under formula 4 should be 72½% of the *monthly basic pay of a Lt. Colonel* (his retired grade) and not that of a Warrant Officer (W–4)." On that premise his monthly retired pay would be $719.49 per month (72½ percent of $992.40) instead of $694.68, or a difference of $24.81 per month, represented by the voucher as the adjustment of retired pay due him for the month of March 1967.

In view of the doubtful aspects of the case, you request a decision as to whether a member serving on active duty as a Regular warrant officer who is found physically unfit for active military service and eligible for retirement under 10 U.S.C. 1293, 1401,

a. may have retired pay computed under formula 4, 10 U.S.C. 1401, based on a higher Reserve commissioned grade, when otherwise qualified, or

b. is restricted to retired pay computed under formula 1, 10 U.S.C. 1401?

The statutory source of 10 U.S.C. 1401, formula 4, is stated to be section 14(d) (less first sentence), (f) (first sentence, less applicability to retired grade; and last sentence), of the Warrant Officer Act of 1954, approved May 29, 1954, ch. 249, 68 Stat. 163, 164.

The second sentence of section 14(d) of the 1954 act provided that:

> Retired pay under this section shall be 2½ per centum of the active duty basic pay he would have been entitled to receive if he had been serving on active duty in the warrant officer grade in which retired on the day before the date of his retirement under this section, multiplied by the number of years of service creditable in the computation of such basic pay, but not to exceed 75 per centum of that basic pay.

We have recognized that formula 4 pertains exclusively to persons retired as warrant officers. See 38 Comp. Gen. 715, 717.

While Colonel Hawkins was eligible for retirement as a warrant officer under 10 U.S.C. 1293, he actually was retired as a lieutenant colonel under the provisions of 10 U.S.C. 1201 with retired pay computed under formula 1 of 10 U.S.C. 1401. In order to be entitled to the higher rate of pay claimed by him, it would be necessary to combine column 1 of formula 4 with column 2 of formula 1. That is to say, he desires to have the best of both formulas.

The second sentence of section 1401 appears to bar such a combination of formulas since it is there provided that "For each case governed by a section of this title named in the column headed 'For sections,' retired pay is computed by taking, in order, the steps prescribed opposite it in columns 1, 2, 3 and 4, as modified by the applicable footnotes." Colonel Hawkins was entitled to retirement either as a Reserve lieutenant colonel under the provisions of 10 U.S.C. 1201 with retired pay computed under formula 1, 10 U.S.C. 1401, or as a chief warrant officer (W–4) under the provisions of 10 U.S.C. 1293 with retired pay computed under formula 4. Such pay may not be computed by using a combination of those formulas. Accordingly, question a. is answered in the negative. Question b. is answered by stating that retired pay may be computed under the formula that is most favorable to the member involved.

With respect to the case considered in 38 Comp. Gen. 521, to which you refer, attention is invited to the fact that there was not there involved an attempt to compute retired pay by using a combination of parts of the different pay formulas prescribed in 10 U.S.C. 1401.

Since Colonel Hawkins has been paid all of the retired pay to which he was entitled for the month of March 1967, there is no authority for payment on the voucher submitted with your letter of August 10, 1967, and it will be retained here.

[B-137754]

Gratuities—Six Months' Death—Children—Payment to Natural Guardian, Etc.

The $1,000 limitation prescribed in paragraph 40504(b)(5), Department of Defense Military Pay and Allowances Entitlements Manual, on the payment of the 6 months' death gratuity to a parent as the natural guardian of a minor child may be exceeded to conform to the amounts prescribed by the statutes of the States in which claimants reside where means are provided for the Government to obtain a good acquittance. Therefore, the death gratuity due the minor son of a deceased member of the uniformed services may be paid to the mother supporting her claim in behalf of the child with an affidavit substantially complying with the requirements of the California Code, upon a determination the showing of compliance with the $2,000 limitation imposed on the payment of money and personal property includes the death gratuity, and that any insurance proceeds due, plus other amounts, will not cause either the $2,000 limitation or the $2,500 restriction on the total estate to be exceeded.

Claims—Evidence to Support—Decedents' Estates—Payments Due Minor Children

The natural guardian of the minor child of a deceased member of the uniformed services in documenting a claim for the 6 months' death gratuity in excess of the $1,000 prescribed by paragraph 40504(b)(5), Department of Defense Military Pay and Allowances Entitlements Manual, should cite the State statute involved, and the facts bringing payment to the guardian within the purview of the State statute in which the persons concerned reside should be furnished in affidavit form, and care should be exercised to determine that the parent understands the requirements of the law permitting payment to parents of small amounts due minors, if the matter is free from doubt, to avoid the expense of obtaining legal guardianship.

Releases—Proper Release or Acquittance—Decedents' Estates

As the 6 months' death gratuity payment is not considered an asset of the estate of a deceased member of the uniformed services but in the nature of survivor insurance that is payable in accordance with Federal law to persons listed in 10 U.S.C. 1477, the principal concern of the Government is to obtain a good acquittance when payment to a minor is involved, therefore, when a State statute provides for a good acquittance, payment of the death gratuity due the minor child of a deceased member of the uniformed services may be made to the natural guardian of the child upon compliance with the requirements of the law of the State in which the claimants reside, thereby avoiding the cost of obtaining legal guardianship in the settling of small estates.

To Major I. L. Ray, Department of the Navy, October 18, 1967:

Further reference is made to your letter dated August 22, 1967, your file ILR-skh 5001, with enclosures, requesting an advance decision as to whether Mrs. Janis Sharp, custodian and natural guardian of Benny M. Barela, minor son of the late Lance Corporal Ignacio Barela, 2222704, U.S. Marine Corps, may be paid a death gratuity in the amount of $1,174.80 under the circumstances cited therein. Your request was forwarded to this Office with letter dated

September 11, 1967, written by direction of the Commandant of the Marine Corps and has been assigned Control Number DO-MC-960 by the Department of Defense Military Pay and Allowance Committee.

You say that Lance Corporal Barela, who died June 2, 1967, as a result of wounds received in combat, was divorced from Janis on September 23, 1965, and that she was awarded custody of their son, Benny M. Barela, present age 4. You forwarded with your letter DD Form 397, Claim Certification and Voucher For Death Gratuity, in the amount of $1,174.80, payable in the case of the deceased member, signed by Janis Sharp requesting payment to her as custodian of Benny M. Barela, minor son of the decedent. The application is supported by her affidavit under sections 1430 and 1432 of the California Probate Code in which she says that she is the mother of Benny Barela; that she is entitled to his custody; that he has no guardian of his estate, which is not in excess of $2,500; that he has due from his father's estate money or personal property not exceeding $2,000; that she will account to the minor for all property she may receive when he reaches his majority; and that she agrees to receipt for the property due the minor. With one exception, the affidavit substantially complies with the provisions of the California law permitting payment to a parent of sums up to $2,000 without the necessity of a guardian of the minor's estate being appointed.

Paragraph 40504(b)(5), Department of Defense Military Pay and Allowances Entitlements Manual, effective January 1, 1967, provides:

> If death gratuity does not exceed $1,000, it may be paid to a parent as natural custodian if the parent has physical custody of the minor child or children. Substantiate this payment with a notarized statement executed by the natural guardian containing the relationship of the minor to the natural guardian; the fact that a legal guardian has not been appointed; that the minor child is in the actual custody of the natural guardian; the child has not been legally adopted by other person(s) before the member's death; and that any amounts paid will be held for, or applied to, the use and benefit of the minor.

This provision apparently is based on our decision of December 16, 1958, 38 Comp. Gen. 436, in which we held that regulations which would permit 6 months' death gratuity payments due minors to be made to the father or the mother as natural guardian would not be objectionable provided that payments do not exceed $1,000.

In view of the disparity between the limitation of the amount mentioned in the 1958 decision and the $2,000 amount prescribed in the California Probate Code, as amended in 1965, and the "apparent unwarranted expense involved in the appointment of a guardian," you ask whether an objection would be interposed to the payment of the voucher, if otherwise correct. In the event that payment is allowed,

you also ask for guidance as to whether and under what circumstances future cases of similar nature may be paid, if otherwise in consonance with the statutes of the State in which the claimant resides, together with advice relative to the appropriate documentation that would be acceptable to support these payments.

The letter dated September 11, 1967, requested a decision as to whether paragraph 40504(b)(5), DODPM, may be revised to permit payments to the parent as natural guardian without appointment of a legal guardian to the extent authorized by the statutes of the State in which the parent and child reside.

Our decision of December 16, 1958, was reached after careful consideration of the general rule of law relating to guardianship by nature and a review of State statutes which generally provide for the appointment by the probate court, when found necessary, of a guardian of the person or of the estate of the minor, or of both, who will have the care and management of the person or of the estate of such minor, or both. Our decision to allow payment of death gratuity due minors—not in excess of $1,000—to a parent as a natural guardian was based on the longstanding procedure followed by our Claims Division of paying parents relatively small amounts due minors, if the matter is otherwise free from doubt, based on the premise that the expense of obtaining legal guardianship would generally be disproportionate to the amount due from the United States. That rule is one of convenience and avoids the necessity for the consideration of the laws of the domicile of the claimants, many of which do not recognize a parent as a natural guardian or provide an acquittance upon the payment to a parent of an amount due a minor.

The death gratuity payment is not an asset of the estate of the deceased member, being more in the nature of survivor insurance. It is payable in accordance with Federal law to the persons listed in 10 U.S.C. 1477 and if a minor is involved, the principal concern of the Government is that a good acquittance be obtained when payment is made.

The provisions of section 1430 of the California Probate Code currently in effect are as follows:

> If a minor has no guardian of his estate, money belonging to the minor not exceeding the sum of two thousand dollars ($2,000) or other property belonging to the minor not exceeding two thousand dollars ($2,000) in value may be paid or delivered to a parent of the minor entitled to the custody of the minor to hold for the minor until his majority, upon written assurance verified by the oath of such parent that the total estate of the minor does not exceed two thousand five hundred dollars ($2,500) in value; and *the written receipt of such parent shall be an acquittance of the person making such payment of money* or delivery of other property. [Italic supplied.]

Although our decision of December 16, 1958, recognized the cost of guardianship proceedings as a factor for consideration in cases involving small estates of minors not in excess of $1,000, the size of the estate is of no relevance if the Government can obtain a good acquittance by payment to a natural guardian. Where, as here, the law of the State where the persons concerned reside provides a means of obtaining a good acquittance by payment to the parent having custody of the minor, we see no reason why payment of the death gratuity should not be made in an amount in excess of $1,000 if the other requirements of the statute are met. Your questions are answered accordingly, and the above-quoted regulations may be amended in the manner suggested.

Concerning the matter of documentation, any claim from a natural guardian for a death gratuity in excess of $1,000 due a minor child, should cite the State statute involved and the facts bringing payment to the guardian within the purview of such statute should be furnished in affidavit form. Also, as is illustrated by the present case, care should be exercised to determine that the parent understands the requirements of the law. The affidavit furnished by Mrs. Sharp in this case shows that the "minor has due from the above estate [estate of his father] money or personal property not exceeding $2,000.00."

We have no way of knowing whether Mrs. Sharp views the amount of the death gratuity as a part of her former husband's estate and it may be that her son's share of the money and personal property in the estate, plus the $1,174.80 death gratuity exceeds $2,000. Then too, the minor may have been the beneficiary of an insurance policy issued on the life of his father, the proceeds of which, plus the foregoing amounts, may have exceeded both the $2,000 and $2,500 limitations prescribed in the statute. It is thus possible that Mrs. Sharp cannot qualify for payment of the death gratuity under the statute involved.

Accordingly, payment of the gratuity is not authorized on the present record. However, the voucher is returned herewith to await the outcome of further development action to determine whether all the requirements of section 1430 of the California Probate Code exist in this case. If at that time further doubt exists as to the action which should be taken, the matter should be resubmitted here for further consideration.

[B-162571]

Officers and Employees—Transfers—Relocation Expenses—House Purchase—Closing Charges

If the various financing costs incurred by civilian employees incident to a permanent change of station in connection with the purchase of a dwelling and referred to as "placement fee," "commission loan fee," or "origination fee" are interchangeable terms for the expense of originating and closing a loan as distinguished from "points"—mortgage discounts—part of the price for the hire of money, the fees are reimbursable under section 4.2d of the Bureau of the Budget Circular No. A-56, which provides for the reimbursement of fees for loan applications and lender's loan origination, but not for the reimbursement of mortgage discounts or "points."

To the Secretary of the Army, October 23, 1967:

Reference is made to the request of September 18, 1967, from your Under Secretary, the Honorable David E. McGiffert, forwarded here by the Per Diem, Travel and Transportation Allowance Committee on September 22, 1967, PDTATAC 67-32, for an advance decision concerning the propriety of reimbursing an employee for certain costs incident to a permanent change of station and in connection with the purchase of a dwelling.

The Under Secretary says that section 4.2d of the Bureau of the Budget Circular No. A-56, Revised October 12, 1966, provides for reimbursement under certain conditions for various financing costs required to be paid incident to the sale or purchase of a residence. Included among the reimbursable expenses are the fee for loan application and the fee for the lender's loan origination. On the other hand, there are certain expenses which are excluded from reimbursement such as mortgage discounts ("points").

It is stated that in connection with the sale of a residence the cost of a percentage loan placement fee is customarily paid by the purchaser and that this fee is sometimes referred to as a "commission loan." A decision is requested as to whether the fees variously referred to as a "placement fee," "commission loan fee" or "origination fee," associated with the placement of a loan and normally paid by the purchaser, is properly reimbursable to otherwise eligible civilian employees under the provisions of the Bureau of the Budget Circular No. A-56, Revised October 12, 1966.

Section 4.2d of the Bureau of the Budget Circular No. A-56, Revised October 12, 1966, provides that fees for loan applications and lender's loan origination are reimbursable. Mortgage discounts ("points") are not reimbursable.

The Under Secretary refers to a Federal Housing Administration

regulation which permits a "placement fee" not to exceed 1 percent of the loan to be charged to the purchaser. Federal Housing Administration regulation contained in 24 CFR 203.27 provides that the mortgagee may collect from the mortgagor certain fees among which is a charge to compensate the mortgagee for expenses incurred in originating and closing the loan, the charge not to exceed $20 or 1 percent of the original principal amount of the mortgage, whichever is greater.

If the various fees referred to as "placement fee," "commission loan fee," or "origination fee," are interchangeable terms as indicated and are charges made by the mortgagee to compensate for expenses incurred in originating and closing a loan, as distinguished from "points" which is a part of the price for the hire of the money, they may be reimbursed to eligible civilian employees incident to a permanent change of station and in connection with the purchase of a house.

A copy of this decision is being furnished to the Per Diem, Travel and Transportation Allowance Committee.

[B-162244]

Pay—Absence Without Leave—Civil Arrest—Unexcused, Etc.

A member of the uniformed services who at the time of conviction for a crime by civil authorities was found sane, a similar finding being made by the military authorities, but who subsequently was committed to a State hospital for the criminally insane, followed by placement on the Temporary Disability Retired List, pursuant to 10 U.S.C. 1202, has forfeited entitlement to pay and allowances under 37 U.S.C. 503(a) for the period from date of apprehension by the civil authorities until his placement on the Temporary Disability Retired List, the member's commanding officer properly declining to excuse his absence from duty as unavoidable, and the disability of the member having been incurred during a period of unauthorized absence, he was not in a pay status on the day preceding the date of his retirement, a prerequisite to physical disability retirement and, therefore, the member also is not entitled to retired pay.

To Lieutenant Colonel Frank Berrish, Department of the Army, October 24, 1967:

Further reference is made to your letter of July 31, 1967, requesting an advance decision as to the propriety of making payment on several vouchers in favor of an enlisted member, retired, representing active duty pay and allowances for the period January 1, 1965, through October 19, 1966, totaling $8,040.03, and retired pay from October 20, 1966, through April 30, 1967, totaling $1,471.19, under the circumstances disclosed. Your letter was forwarded here by the Office of the Comptroller of the Army under date of August 8, 1967, and has been

allocated D.O. Number A954 by the Department of Defense Military Pay and Allowance Committee.

You state that the member, while assigned to the 2nd Armored Division, Fort Hood, Texas, was apprehended on January 1, 1965, by the civil authorities and confined in the city jail for the offense of rape; that on January 2, 1965, he was transferred to another jail; and that on January 28, 1965, he appeared before a grand jury and was indicted for rape. You say that he was seen at the Mental Hygiene Consultation Service where a sanity board was held on March 10, 1965, which found him legally sane at that time. You state that on April 26, 1965, he appeared for a sanity hearing where it was determined that he was sane at the time of his alleged offense on January 1, 1965, but that he was insane on April 26, 1965. On the basis of those findings it is stated that the court ordered that he be committed to the State hospital for the criminally insane for an indefinite period of treatment and he was so transferred. You report that the sanity determinations made by the civilian psychiatrists were concurred in by a military psychiatrist after an evaluation of the member's mental state on September 27, 1965.

You further state that a medical board convened January 7, 1966, found the member medically unfit and recommended his appearance before a Physical Evaluation Board. The latter board, which convened March 29, 1966, found the enlisted man to be physically unfit by reason of disability rated at 100 percent and recommended his placement on the Temporary Disability Retired List. Presumably, such action was based on his mental condition at that time. This action was concurred in by the Army Physical Review Council on July 13, 1966. You state that active duty pay was last paid to include December 31, 1964.

By orders dated October 18, 1966, the member was retired by reason of physical disability pursuant to 10 U.S.C. 1202 with a disability rating of 100 percent and placed on the Temporary Disability Retired List effective October 20, 1966. You state that it was not until October 26, 1966, that it was learned that the district court on October 6, 1966, had found that the member was sane at that time, had convicted him of the crime as charged and had sentenced him to not less than 5 nor more than 75 years imprisonment.

It appears that the enlisted man is currently at a treatment center. The file contains a certificate dated March 7, 1967, signed by the Chief, Psychiatry Service, to the effect that a psychiatric evaluation was made in the member's case at the treatment center and that his disabling mental condition remains essentially unchanged. The report further

states that he continues to be totally disabled and recommended continuation on the Temporary Disability Retired List status with periodic evaluation in 18 months.

The right of members of the uniformed services to receive pay and allowances while absent without leave is governed by the provisions of 37 U.S.C. 503(a)—derived from section 4(b) of the Armed Services Leave Act of 1946—which reads as follows:

> A member of the Army, Navy, Air Force, Marine Corps, Coast Guard, or Coast and Geodetic Survey, who is absent without leave or over leave, forfeits all pay and allowances for the period of that absence, unless it is excused as unavoidable.

Regulations implementing that law and in effect during the period here involved provided in paragraph 12122a, Army Regulation 37–104, February 15, 1965, that a member who is charged with a civil offense and confined by civil authorities is in an unauthorized absence status (except for the part of the period covered by authorized leave) and is entitled to pay and allowances for the period of confinement only if his commander excuses the absence as unavoidable after results of the trial are known. Paragraph 12122a further provides that pay and allowances are not authorized unless so excused, regardless of the outcome of the civil proceedings.

Paragraphs 12124 and 12125 of the same regulations describe the circumstances for excusing or not excusing an absence as unavoidable, and one of the circumstances for not excusing the absence as unavoidable is where the member is tried and convicted. Similar regulations in substantially the same form are now contained in chapter 3, section B, Department of Defense Military Pay and Allowances Entitlements Manual, Rules 5 and 6, tables 1–3–2 and 1–3–3, respectively. In this connection, you state that the member's commanding officer on June 6, 1966, declined to excuse his absence as unavoidable on the basis that his case did not fall within the categories set out by the regulations.

The above regulations are in line with the longstanding rule that a member of the Armed Forces who is not on authorized leave and whose conduct has caused him to be in the hands of the civil authorities and thus unable to fulfill his obligation to be at his post of duty, must be regarded as absent without leave and his pay for such period of unauthorized leave is forfeited, regardless of the outcome of the civil proceedings, unless his absence from duty is excused as unavoidable. See 36 Comp. Gen. 173. We stated in 39 Comp. Gen. 781, cited in your submission, that the question of whether sufficient grounds exist for excusing absence of members of the Armed Forces as unavoidable under section 4(b) of the Armed Forces Leave Act, as amended, is primarily for administrative determination based on the actual facts involved.

The mere determination that an enlisted man was mentally incompetent during a period of absence without leave will negative the imposition of any punishment for such absence, but such a determination does not remove the requirement that he comply with the contractual obligations of his enlistment in order for him to be entitled to pay. See 40 Comp. Gen. 366, and the authorities there cited. Also, compare *Merwin* v. *United States*, 78 Ct. Cl. 561 (1933).

While the record indicates that the medical authorities have determined that the member was insane subsequent to committing the criminal offense for which he was charged and convicted, the record also shows that the court found him to be sane at the time of the commission of the alleged offense. It is also shown that he was represented by legal counsel at the judicial proceedings held on October 6, 1966, in which a jury held him to be sane at that time and that following such hearing he pleaded guilty to the offense for which he was charged.

Although he was judicially determined to be insane on April 26, 1965, his mental condition at that time was not the reason for his being absent from his post of duty. It appears clear that if he had been found to be sane on April 26, 1965, the only change which would have followed would have been an earlier trial, conviction and sentence. He would not have been returned to military control. We see no reason why his absence from his station should have been excused as unavoidable and, since his commanding officer declined to so excuse him, his pay and allowances for the period involved were forfeited under the provisions of 37 U.S.C. 503(a). In the circumstances, payment on the vouchers representing active duty pay and allowances for the period January 1, 1965, to October 19, 1966, is not authorized.

With respect to the member's entitlement to retired pay by reason of disability commencing on October 20,1966, 10 U.S.C. 1202 provides, in pertinent part, that upon a determination by the Secretary concerned that a member of a Regular component of the Armed Forces "entitled to basic pay" who has been called or ordered to active duty for a period of more than 30 days, would be qualified for retirement under section 1201 of Title 10 but for the fact that his disability is not determined to be of a permanent nature, the Secretary shall if he also determines that accepted medical principles indicate that the disability may be of a permanent nature, place the member's name on the Temporary Disability Retired List, with retired pay computed under section 1401 of Title 10. Section 1201(2) of Title 10 provides a limitation on retirement for a disability of a permanent nature to the effect that the disability not be incurred during a period of unauthorized absence. The

information furnished indicates that the member's mental disability was incurred after January 1, 1965, while absent from his station without leave.

As pointed out in your submission, we said in 35 Comp. Gen. 626, in answer to the first question, that in the absence of a controlling definition in the statute, or other statutory language requiring a different conclusion, it was our view that the term "incurred" as used in subsections (a) and (b) of section 402 of the Career Compensation Act of 1949, ch. 681, 63 Stat. 816, 817, now codified in 10 U.S.C. 1201 and 1202, properly is to be considered as referring to the date of onset of the disease or occurrence of the injury. That decision, however, affords no basis for concluding that the member incurred disability because of his mental condition prior to January 1, 1965, while entitled to receive basic pay. This fact must be supported by a clear and unequivocal medical conclusion and the record before us does not support such a conclusion. The only information on this matter is a statement in the military psychiatrist's certificate of March 7, 1967, referring to a "background history of schizoid adjustment." This falls far short of the legal requirements in a case of this type.

As stated in your submission and as shown by the record, since the member's term of enlistment was to have expired on October 20, 1966, and in order to protect any interest that the member may have, it was administratively recommended that he be retired by reason of physical disability and placed on the Temporary Disability Retired List pursuant to 10 U.S.C. 1202, and that the disbursing officer should submit the matter to the Comptroller General for an advance decision as to the propriety of payment of retired pay.

Since, as shown above, the member was not in a pay status during any part of the period January 1, 1965, to October 19, 1966, the day preceding the date of his retirement, and since he thus was not "entitled to basic pay" (which is a prerequisite to physical disability retirement under 10 U.S.C. 1202), the validity of his retirement orders is questionable. Compare *Heins* v. *United States*, 137 Ct. Cl. 658 (1957), and 34 Comp. Gen. 65. Accordingly, on the basis of the record before us there is no basis for the payment of retired pay on and after October 20, 1966. See *Longwill* v. *United States*, 17 Ct. Cl. 288 (1881) and *Charles* v. *United States*, 19 Ct. Cl. 316 (1884).

Payment not being authorized on the submitted vouchers, they will be retained here.

[B-162021]

Fees—Parking—Space on a Monthly Basis—Official and Personal Use

Where an employee rents a parking space on a monthly basis at his official headquarters and utilizes the space for his personal use and for the purposes of official travel, he may be reimbursed under 5 U.S.C. 5704 on a pro rata basis for those days on which he uses his automobile, based on the monthly parking rate paid, upon administrative determination the use of the rental parking space is necessary because of official business and is advantageous to the Government. However, if the advantage or necessity is conjectural, the Government should not assume the cost of parking.

To the Secretary of Health, Education, and Welfare, October 31, 1967:

Letter dated July 11, 1967, from the Acting Secretary of Health, Education, and Welfare, concerns the payment of parking fees incident to the use of privately owned automobiles on official business.

The Acting Secretary states that a question has arisen as to whether parking fees may appropriately be paid or reimbursed in situations where the employee rents a parking space at his official headquarters and utilizes that space both for his personal use and for purposes of official travel. Certain district office employees of the Social Security Administration who are required to perform frequent official travel by use of automobile have rented parking spaces near their offices at monthly rates which are perhaps half of what the daily rate would amount to over an entire month. In those instances where employees have rented parking spaces at monthly rates, they have done so because free parking was not available within several blocks of the offices and it is usually necessary when performing travel to carry materials such as supplies of pamphlets, administrative forms, claims folders, and visual aid material between the office and the automobile.

The Acting Secretary states that the use of free parking space located more remotely from the office would invariably entail a loss of productive time, the cost of which would frequently equal or exceed the cost of parking fees incurred at nearby parking facilities. He further states that it is desirable for these employees to have their automobiles immediately available for use, should the necessity arise, even on those days when travel is not planned in advance.

Under these circumstances our decision is requested on the following questions:

1. May the costs of employee parking at headquarters on a monthly rate basis be reimbursed for those days on which the employee must use his automobile for official travel?

2. If your answer to the above question is in the affirmative, then (a) may the costs of employee parking at headquarters be reimbursed on a monthly basis where the monthly rate is less than the costs based on daily and hourly rates for those days on which the employee must use his automobile for official travel, or

(b) should the costs be reimbursed on a prorata basis for the actual number of days during the month on which the employee must use his automobile for official travel?

3. If your answer to number 2.(a) is in the affirmative, may reimbursement on a monthly rate be made on the basis of a determination by the officer approving the reimbursement voucher that reimbursement on a monthly rate is advantageous to the U.S., so as to avoid the recordkeeping, computations, and reviews necesary to establish actual comparative costs?

4. If your answer to number 1. above is in the negative, then, where necessary, may the Social Security Administration directly rent on parking lots near its district offices a minimum number of spaces in which employees may park on days when their automobiles will be required for official travel?

Section 5704, Title 5, United States Code, authorizes payment on a mileage basis for the use of privately owned automobiles by employees when engaged on official business within or outside their designated place of service, and in addition authorizes reimbursement for parking fees. Section 3.5c(1) of the Standardized Government Travel Regulations provides, in part, that:

Reimbursement for the cost of automobile parking fees, ferry fares, and bridge, road and tunnel tolls also will be allowed unless the travel order or other administrative determination restricts their allowance. * * *

It is clear that under the above-cited code provision and regulations an employee who is authorized to use his car on official business may be reimbursed for the cost of parking fees. We would not object to the costs of employee parking at his headquarters on a monthly basis being reimbursed (on the basis set forth in our answer to question 2) for those days on which the employee uses his automobile for official travel, provided it be determined administratively that the use of the rented parking space by each of the employees concerned is necessary because of official business and a factual determination of advantage to the Government is made. We do not believe that any such policy should be applied to situations of conjectural advantage or necessity. To apply it in the latter class of cases could result in the Government assuming the cost of parking fees in a variety of situations not contemplated by your questions and our views as herein expressed. The first question is answered accordingly.

As to question 2, 5 U.S.C. 5704 authorizes reimbursement of the cost of parking fees. Accordingly the cost of employee parking should be reimbursed on a pro rata basis for actual number of days during the month the employee used his automobile for official travel, based on the monthly parking rate paid by such employee. For example, if an employee uses his car on official business 12 days during a 31-day month, he may be reimbursed 12/31 of the monthly parking rate. Question number 2 is answered accordingly.

In view of our answers to questions 1 and 2, answers to questions 3 and 4 are unnecessary.