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[B-204097]

Leaves of Absence—Annual—Accrual—Crediting Basis—Service Creditable Under Civil Service Retirement Act—Radio Free Europe Employees

Effective Feb. 15, 1981, section 2313 of the Foreign Service Act of 1980 amended 5 U.S.C. 8332 to allow civil service retirement credit for employment with Radio Free Europe. Since 5 U.S.C. 6303(a) provides that service creditable under section 8332 shall be used in determining annual leave earning category, employee's leave accrual category should be adjusted effective Feb. 15, 1981, to credit service with Radio Free Europe. Enactment of section 2313 does not entitle employee to annual leave benefits under 5 U.S.C. 6301, *et seq.*, for period of non-Federal service with Radio Free Europe or to additional leave for periods of covered service prior to Feb. 15, 1981.

Matter of: James McCargar—Entitlement to Leave, March 1, 1982:

This decision is in response to a request for an advance decision by Mr. Joseph Duffey, Chairman of the National Endowment for the Humanities (Endowment), as to the effect of section 2313 of the Foreign Service Act of 1980 on the leave entitlement of Mr. James McCargar, an employee of the Endowment who had prior service with Radio Free Europe. Since section 2313 amends 5 U.S.C. § 8332(b) effective February 15, 1981, to allow retirement credit for service with Radio Free Europe, such service is to be credited under 5 U.S.C. § 6303 for the purpose of determining Mr. McCargar's annual leave accrual category. His annual leave account is to be adjusted only for the period subsequent to February 15, 1981.

The record shows that prior to his employment with the Endowment Mr. McCargar was employed by Radio Free Europe for a total of 6 years 1 month and 5 days, of which 3 years 2 months and 20 days represents full-time service and 2 years 10 months and 15 days represents intermittent service.

Section 2313 of the Foreign Service Act of 1980, Public Law 96-465, October 17, 1980, 94 Stat. 2071, 2167, in part added subsection 8332(b)(11) to title 5, United States Code, to allow retirement credit for certain service with Radio Free Europe. Subject to 5 U.S.C. § 8334(c) and 5 U.S.C. § 8339(i) service in any capacity with Radio Free Europe for 130 days or its equivalent per calendar year after July 1, 1946, is creditable service for an annuity under the Civil Service Retirement Act if such service is not credited for benefits under any other retirement system established for that entity and only if the individual later becomes subject to coverage under the Civil Service Retirement Act.

Under 5 U.S.C. § 6303 the rate at which an employee accrues annual leave is dependent upon his years of service. Subsection 6303(a) provides in part as follows concerning years of service to be credited for leave accrual purposes.

In determining years of service, an employee is entitled to credit for all service creditable under section 8332 of this title for the purpose of an annuity under subchapter III of chapter 83 of this title.

In view of the above provision, we held in 51 Comp. Gen. 301 (1971) that all service designated as creditable under 5 U.S.C. § 8332 for the purpose of an annuity under the Civil Service Retirement Act, even though not otherwise regarded as military or Government service, may be used in determining years of service for leave accrual purposes unless excluded by other provisions of law. We see no reason why such rule would not be for application to creditable service under 5 U.S.C. § 8332(b)(11) as added by section 2313 of the Foreign Service Act of 1980. Thus, as indicated in the Endowment's submission, Mr. McCargar's service with Radio Free Europe is creditable service for the purpose of determining his annual leave accrual category.

The Endowment asks whether it is required to adjust Mr. McCargar's annual leave account for each year of his 3 years' service with the Endowment since the crediting of service with Radio Free Europe would retroactively change his annual leave earning category from 6 to 8 hours per biweekly pay period.

Section 2403 of the Foreign Service Act of 1980, 94 Stat. 2169, 22 U.S.C. 3901 note, provides that, except as otherwise specified, the Act shall take effect on February 15, 1981. Section 2313 does not specify another effective date. Thus, Mr. McCargar's service with Radio Free Europe was not creditable service under 5 U.S.C. § 8332 until February 15, 1981. See Federal Personnel Manual Letter 831-66, June 30, 1981, which specifies that retirement credit may be given only to those individuals employed on or after February 15, 1981. Such service similarly would not be creditable for the purpose of determining Mr. McCargar's annual leave accrual category until February 15, 1981, and he would not have been entitled to accrue annual leave at the 8-hour rate until such time. Therefore, in order to reflect his additional service credit for leave accrual purposes, the Endowment is only required to adjust Mr. McCargar's annual leave account retroactive to February 15, 1981.

In the event that the change in Mr. McCargar's annual leave accrual category results in annual leave at the end of the leave year which is in excess of his maximum permissible carryover of annual leave under 5 U.S.C. § 6304, we are asked whether there is any authority for the restoration of such leave. Any annual leave subject to forfeiture in the 1981 leave year would be for restoration only under the provisions of 5 U.S.C. § 6304(d)(1) which allows the restoration of forfeited annual leave where the leave was lost because of administrative error or where the leave was properly scheduled in advance and was not used due to exigencies of the service or sickness of the employee. We are not aware of any other statutory authority under which Mr. McCargar would be entitled to the restoration of forfeited annual leave.

In related questions we are asked whether Mr. McCargar is entitled to credit for leave for the period of his employment with Radio Free Europe and whether he would be entitled to carry over 45 days annual leave into the next leave year under 5 U.S.C. § 6304(c) rather than 30 days under 5 U.S.C. § 6304(a) in view of that service.

The annual and sick leave provisions of Chapter 63 of title 5 of the United States Code apply to those employees defined at subsection 6301(2). Under 5 U.S.C. § 6304(b) certain Federal employees who are stationed overseas are entitled to a maximum permissible carryover of 45 days annual leave. Subsection 6304(c) preserves that higher ceiling for certain employees who thereafter become subject to the 30-day limitation of subsection 6304(a).

Section 2313 of the Foreign Service Act of 1980 does not change the non-Federal character of service with Radio Free Europe except for the limited purpose of allowing retirement credit under 5 U.S.C. § 8332, and consequently for crediting such service for leave accrual purposes. For that reason and because it is effective February 15, 1981, section 2313 does not bring Mr. McCargar within the definition of employee at 5 U.S.C. § 6301 for the purpose of retroactively entitling him to annual or sick leave benefits for the period that he was employed by Radio Free Europe. Thus, Mr. McCargar's overseas service with Radio Free Europe would not affect his maximum permissible carryover of annual leave which by virtue of his employment with the Endowment would be 30 days under 5 U.S.C. § 6304(a).

For the reasons indicated above, the enactment of section 2313 of the Foreign Service Act of 1980 affects Mr. McCargar's leave entitlement only insofar as the crediting of his service with Radio Free Europe under 5 U.S.C. § 6303(a) places him in a higher leave earning category on or after February 15, 1981.

[B-204582]

Bids—Invitation for Bids—Cancellation—After Bid Opening—Insufficient Funding—Sufficient for Partial Quantity

A contracting agency many properly cancel a solicitation after bid opening where it determines that sufficient funds are not available for award of the total quantity advertised.

Bids—Invitation for Bids—Award Provisions—Lesser Quantity Award Right—Insufficent Funding for Total Quantity—Partial Award Not Required

Provision of the solicitation which gives the Government the right to make an award for a quantity less than the quantity called for by the solicitation does not require the agency to make an award of a lesser quantity where there are insufficient funds to award the total quantity.

Bids—Invitation for Bids—Cancellation—After Bid Opening—Auction Prohibition—Nonapplicability

Proper cancellation of invitation for bids (IFB) because sufficient funds are unavailable does not constitute an auction as that term is used in Defense Acquisition Regulation (DAR) 3-805.3(c), which refers to negotiated procurements.

Defense Acquisition Regulation—Cancellation of Invitation After Bid Opening——Justification—Additional *v.* Stated Quantity Needs—Availability of Funds

Stipulation in DAR 2-404.1(a) that an IFB should not be canceled after opening solely because of increased requirements for items being procured does not apply where the agency is unable to award a contract for the stated quantity because of insufficient funds. Rather, the stipulation applies where the stated quantity can be awarded in its entirety and additional quantities can be obtained separately under a new procurement.

Matter of: Genco Tool and Engineering Co., March 1, 1982:

Genco Tool and Engineering Company (Genco) protests the cancellation of invitation for bids NOO123-81-B-1124 issued by the Naval Regional Contracting Office, Long Beach, California. The canceled IFB was for the supply of 77 lift-loader adapters with first article testing. The IFB also gave the Government an option for the delivery of an additional 78 units.

The following three bids were received by the Navy:

Bidder	Price for first article and production units	Price for option quantity	Evaluated price
Genco	$1,511,552	$1,481,610	$2,993,162
Advance Machine Corp.	1,559,220	1,559,220	3,118,440
Modern Aire Cyclone Corp.	2,251,050	2,433,600	4,684,650

The Navy procuring activity had budgeted the amount of $1,248,000 for the 77 unit requirement and the first article testing. Because Genco's bid price of $1,511,552 was $263,552 higher than the budgeted amount, the Navy canceled the IFB. Genco protested the cancellation to this Office.

We deny the protest.

Genco contends that the Navy did not have a compelling reason to cancel the IFB after bids were opened. Genco argues it was neither necessary or proper to cancel the IFB where there was adequate funding for at least a portion of it. In support of this argu-

ment, Genco cites paragraph 10(c) of the IFB, Solicitation Instructions and Conditions, which stated:

> The Government may accept any item or group of items of any offer, unless the Offeror qualifies his offer by specific limitations. UNLESS OTHERWISE PROVIDED IN THE SCHEDULE, OFFERS MAY BE SUBMITTED FOR ANY QUANTITIES LESS THAN THOSE SPECIFIED: AND THE GOVERNMENT RESERVES THE RIGHT TO MAKE AN AWARD ON ANY ITEM FOR A QUANTITY LESS THAN THE QUANTITY OFFERED AT THE UNIT PRICES OFFERED UNLESS THE OFFEROR SPECIFIES OTHERWISE IN HIS OFFER.

According to Genco, the above-quoted language clearly gave the Navy the right to award a contract for any quantity less than the initial 77 units. Therefore, Genco concludes that unless absolutely no money was available for the award of any quantity of items under the IFB, the Navy should have awarded a contract to Genco for as many units as there were available funds.

The Navy states that after finding that Genco's bid exceeded the amount budgeted for the procurement, a determination was made that the budgeted funds could be more effectively utilized on other programs. The Navy further states that this determination was influenced by the fact that in fiscal year 1982 there would be a firm requirement for between 200 and 300 lift load adapters. According to the Navy, a competitive procurement for this increased quantity would likely result in a unit price reduction of between $1,000 and $1,500.

With respect to Genco's contention that a contract should have been awarded for as many units as there were available funds, the Navy concedes that under paragraph 10(c) of the IFB the Government reserved the right to make an award for a quantity less than the quantity offered and that Genco's bid did not specify any limitations on this right. The Navy asserts, however, that Genco is attempting to convert the Government's right to make award on a lesser quantity to a duty on the Government to do so to the extent that funds are available. The Navy points out we have held that the cancellation of an IFB because of the lack of sufficient funds is a proper exercise of the agency's internal management of its funds. See *Somers Construction Company, Inc.—Reconsideration,* B-193929, July 24, 1979, 79-2 CPD 54. In the Navy's opinion, any requirement that an award of lesser quantities be made would unduly limit the Government's administrative discretion to cancel a solicitation due to a lack of available funds.

Contracting officers have broad discretion to cancel a solicitation. However, because the cancellation of a solicitation after bid opening and after prices are exposed tends to discourage competition, the Defense Acquisition Regulation (DAR) and our cases require that the contracting officer have a "compelling reason" to reject all bids and cancel a solicitation after bids have been opened. DAR § 2-404.1(a); *Bentley, Inc.,* B-200561, March 2, 1981, 81-1 CPD 156. In this connection, we have taken the position that an agency's determination that funds are not available for contract obligation is a

sufficient reason upon which to cancel a solicitation and that it is not our role to question the unavailability of funds. See *Norfolk Dredging Company,* B-201295, September 23, 1981, 81-1 CPD 245; *McCain Trail Construction Co.,* B-196856, July 8, 1980, 80-2 CPD 16.

While DAR § 2-404.1(a) stipulates that an invitation for bids should generally not be concealed and readvertised after opening solely because of increased requirements for the items being procured, this admonition applies to situations where the Government determines additional quantities of an item are needed which could be obtained separately under a new procurement. *See* 39 Comp. Gen. 396 (1959); 36 *id.* 62 (1956). However, we do not think that this admonition applies here where the contracting agency is unable to award the total quantity set forth in the solicitation because of insufficient funds. Rather, DAR § 2-404.1(a), in our opinion, applies where the stated quantity can be awarded in its entirety.

As to Genco's contention that paragraph 10(c) of the IFB required the Navy to award a contract to it for as many units as there were available funds, we do not think that this paragraph was designed to force the agency to make an award of a lesser quantity where there are insufficient funds to award the total quantity. Rather, paragraph 10(c) was intended to permit an award of a lesser quantity where the Government's minimum needs decrease subsequent to bid opening. In our opinion, then, paragraph 10(c) cannot be relied upon to challenge an agency's unquestioned legal right to cancel a solicitation because of a lack of funds because the internal management of an agency's funds generally depends on the agency's judgment concerning which projects and activities should receive greater (or lesser) amounts of funds. *Somers Construction Company, Inc.—Reconsideration, supra.*

Genco asserts that in starting a procurement in fiscal year 1982 for an increased quantity of lift-loader adapters would result in a $1,000 to $1,500 savings per unit, the Navy has created an "auction situation" by disclosing the price that it would like to see in the next procurement. Also, Genco questions whether the Navy in issuing the IFB was not actually trying to obtain pricing information for the prospective 200 to 300 unit procurements in fiscal year 1982. In this regard, Genco cites DAR § 1-309, which prohibits the solicitation of bids for purely informational purposes, and argues that IFBs cannot be used merely to plan future procurements.

We do not agree that the factual situation presented here constitutes an auction as that term is used in the DAR. While DAR § 3-805.3(c), which pertains to negotiated procurements, prohibits auctions, it prescribes no penalties. Moreover, there is nothing inherently illegal in the conduct of an auction in a negotiated procurement. *Engineering Research Inc.,* 56 Comp. Gen. 364 (1977), 77-1 CPD 106. This case, moreover, involves a formally advertised procurement and, although this Office does not sanction the disclosure

of competitive information with regard to any procurement, we cannot conclude that the increased quantity reason given by the agency in support of the decision to cancel constitutes an auction or an improper disclosure of information. All that the Navy is doing in our opinion is indicating the possibility that the price for each individual lift-load adapter will decrease because of the significant increase in the number of them that will have to be procured in fiscal year 1982.

We deny Genco's protest.

[B-205151]

Fees—Services to the Public—Charges—Collection and Disposition—Agency Record Duplication, etc.—Federal Election Commission

Federal Election Commission (FEC) proposal to have members of public who request microfilm copies of reports and statements filed with FEC pay firms which make copies is not legally objectionable. Procedure whereby FEC specifies schedule of fees in contract with duplicating firm, rather than reviewing each bill individually, would also be acceptable.

Matter of: Federal Election Commission—Sale of microfilm copies of candidate and committee reports, March 1, 1982:

The Chairman of the Federal Election Commission (FEC; Commission) seeks our approval of a proposed change in the procedure by which members of the public who request copies of candidate and committee reports are billed for the expenses of duplication. We have no legal objection to the proposed procedure, but recommend that the Commission consider other systems which would minimize the administrative burden which is placed on the FEC.

The Federal Election Campaign Act of 1971 (FECA), as amended, provides in relevant part that:

> The Commission shall * * * within 48 hours after the time of the receipt by the Commission of reports and statements filed with it, make them available for public inspection, and copying, *at the expense of the person requesting such copying* * * *. 2 U.S.C. § 438(a)(4). [Italic supplied.]

The Chairman indicates that the FEC currently responds to requests for microfilm copies of reports by sending an unoriginal reel of the microfilm to a private firm for duplication. The FEC charges the requester a sum equal to the amount which the Commission itself is billed. The payment from the requester is forwarded to Treasury, while the amount due the private firm is paid from the FEC's appropriation. According to the Chairman, "the main problem with this current practice is that whenever copies of FECA [Federal Election Campaign Act of 1971, as amended] reports are duplicated, the Commission must deduct such cost from its budget without the possibility of reimbursement."

Under the proposed procedure, the Commission would continue to send unoriginal reels of microfilm to private firms for duplica-

tion. The billing procedure would be amended, however. At the time at which an order is placed, the Commission would indicate that the particular item be billed to the requester. The microfilm would be returned to the Commission, and the bill examined to assure that the requester was not overcharged. Upon receipt of a check made out to the private firm, the Commission would turn the copy over to the requester. As a final step, the check would be forwarded to the firm.

The proposed revision would accomplish the end desired by FEC. Because payment for report copies would be made by the requester to the contractor, it would not be necessary for FEC to charge its appropriation. Nor would requester payments have to be deposited in the Treasury since the payments would not be "for the use of the United States" pursuant to 31 U.S.C. § 484. We therefore have no legal objection to the proposal.

We note, however, that the task of handling, and thus being accountable for, requester payments might prove to be administratively burdensome. In our opinion, it is not necessary for FEC to monitor the price charged for each transaction so long as the price is regulated by contract. Therefore, there is no reason why requester payments may not be made directly to FEC's contractor and report copies transmitted directly to requesters by the contractor.

We have, for example, approved at least one other system which was proposed in order to accomplish essentially the same goals as the FEC's proposal. In B-166506, October 20, 1975, the Environmental Protection Agency (EPA) requested our views as to the propriety of a procedure similar to the one proposed by the FEC, the significant difference between the two being that EPA did not perform the administrative services which the FEC proposes to furnish.

According to the EPA submission, the agency had contracted with a number of private firms for the processing, storage, and retrieval of various types of data. For example, one contractor developed and printed film, and stored the negatives so that custom printing might be accomplished as directed by EPA. EPA advised us that this information was available under the Freedom of Information Act, and that it incurred considerable expense in satisfying requests from members of the public. These expenses were paid with funds appropriated to the agency, while any sums collected from requesters were deposited in the Treasury as miscellaneous receipts pursuant to 31 U.S.C. § 484.

EPA thus sought our approval of a system whereby it would advise requesting parties to deal directly with the private company which provided the agency with its information-handling services. EPA argued that when a contractor filled a request, the United States was not providing any services, and accordingly was not entitled to charge any fees when "the entire transaction occur[red]

solely between the requester and the firm holding the Government contract."

We held that so long as the proposed procedures were not used to delay or deny access to information or otherwise circumvent the intent or specific provisions of the Freedom of Information Act, 5 U.S.C. § 552(a)(4), or the User Charge Statute, 31 U.S.C. § 483a, we had no objection to the EPA proposal. We noted that although the FOIA provided for the promulgation by each agency of regulations specifying a uniform schedule of fees for the recovery of the direct costs of document search and duplication, neither that Act nor any other statute authorized the United States to recover any of the costs associated with developing the information contained in the requested documents. We thus required that FPA assure, by including a provision to this effect in its agreement with its contractors, that the fees charged requesters not exceed the fees which EPA itself would be authorized to charge if the agency provided the services directly. We further concluded that the contractors filling requests for information were acting independently, and not as agents of EPA, and that they were therefore entitled to retain any fees which they collected since these were not "moneys recieved * * * for the use of the United States" pursuant to 31 U.S.C. § 484.

Thus, we would have no objection to a procedure, for example, in which the Commission would confine itself to advising public requesters that they may deal directly with the private firms providing the duplication. Like the EPA, of course, the FEC would have to assure, in its agreement with its contractors, that the fees charged members of the public for copies not exceed the fees which the FEC would have been authorized to charge had it processed the request itself.

[B-203380]

Pay—Retired—Survivor Benefit Plan—Dependency and Indemnity Compensation—Offset—Refund of Contributions

When upon a service member's death the surviving spouse is eligible for both a Survivor Benefit Plan (SBP) annuity and Veterans Administration Dependency and Indemnity Compensation (DIC), the amount of the SBP payment is reduced by the amount of the DIC and a corresponding refund of the member's SBP contributions is due the spouse. If DIC entitlement is subsequently lost due to remarriage of the spouse, SBP may be reinstated provided the refund is returned. However, no refund in payable once the benefit of the plan has been derived. Accordingly, when a refund is repaid and SBP payments are thereafter made, no additional refund is authorized should the spouse again become eligible for DIC.

Matter of: Mary J. Hogsed, March 2, 1982:

This action is in response to a letter of May 18, 1981, from the Special Disbursing Agency, United States Army Finance and Accounting Center, requesting an advance decision whether Survivor Benefit Plan contributions previously made by a deceased member of the uniformed services may be refunded to his surviving spouse

under the circumstances described in the letter. As is explained below, since in this case the widow did receive, for a time, Survivor Benefit Plans annuity payments, she may not receive the refund of the member's contributions to the Plan.

The request has been assigned submission number DO-A-1363 by the Department of Defense Military Pay and Allowance Committee.

The facts are as follows. Specialist Five Harold W. Hogsed retired on November 1, 1965, after more than 22 years of active service in the Army. In 1972 he elected to provide an annuity for his spouse, Mrs. Mary J. Hogsed, under the Survivor Benefit Plan (SBP), 10 U.S. Code § 1447-1455. Accordingly, Mr. Hogsed's retired pay was reduced by the appropriate amount to cover his cost of participation in the plan. Mr. Hogsed died on August 5, 1977. The total cost to Mr. Hogsed was $482.82 representing the deductions from his retired pay from December 1, 1972, through August 5, 1977.

An annuity was established for Mrs. Hogsed in the amount of $194.73 per month, effective August 6, 1977. The Veterans Administration also determined her to be eligible to receive Dependency and Indemnity Compensation (DIC) in the amount of $300 per month effective August 1, 1977, pursuant to the provisions of 38 U.S.C. § 411(a). As a result of the widow's entitlement to DIC payments in excess of her SBP annuity entitlement, no SBP payments were authorized. This is because under 10 U.S.C. 1450(c) when a surviving spouse is eligible for DIC, the amount of the SBP payment is to be reduced by a corresponding amount or eliminated entirely if the amount of DIC is equal to or greater than the annuity payment. However, 10 U.S.C. 1450(e) provides that if no SBP annuity is payable because of a DIC entitlement, any amounts deducted from the retired pay of the deceased member as the cost of participation in the SBP shall be refunded to the surviving spouse. Accordingly, a refund in the amount of $482.82 was paid to Mrs. Hogsed.

On October 16, 1978, Mrs. Hogsed remarried at the age of 61 years thereby terminating her entitlement to DIC. Under a 1978 amendment to the law governing SBP entitlements, loss of entitlement to DIC because of remarriage on or after age 60 entitles the beneficiary to reinstatement of SBP payments, readjusted to the amount which would have been in effect upon the date of remarriage had the beneficiary never received DIC. Reinstatement of adjusted SBP benefits is contingent, however, upon repayment of previously refunded premium contributions. 10 U.S.C. § 1450(k) (Supp. III 1979). Mrs. Hogsed repaid the $482.82 refund and her annuity was reestablished. Her payments continued until Mrs. Hogsed notified the Army Finance and Accounting Center that, as a result of her divorce on March 12, 1980, she had resumed DIC entitlement and was again receiving those benefits.

The question presented for our analysis involves the issue of refunded SBP contributions under subsection 1450(e). Specifically, now that Mrs. Hogsed has become eligible once again for DIC, is she entitled to a second refund of all or part of the member's contributions which she had repaid at the time of her second marriage in order to reactivate her eligibility for SBP annuity payments?

Neither the language of the SBP provisions nor the legislative histories of the original SBP law and its amendments provide specific guidance on the issue presented in this case. We have found no indication that Congress ever considered the question of refunds in cases involving reinstatement of DIC payments upon dissolution of the spouse's later marriage. However, it seems apparent that the purpose of the refund provision was to compensate beneficiaries for SBP deductions made from the retired pay of members who intended to provide annuities which are never realized because of concurrent entitlement to DIC. Where, as here, the beneficiary receives SBP payments for a period of time during which DIC entitlement has been terminated, the benefit of the annuity has in fact been derived. As we understand it, the refund provision was established as an equitable compensation measure and was not intended to confer refunds to spouses who have received SBP coverage. In the absence of contrary evidence of congressional intent, we conclude that the refund provision may not be invoked by a spouse who has received annuity payments under the Plan; therefore, a second refund may not be allowed in this case.

In support of this conclusion, see 56 Comp. Gen. 482, 486 (1977) where we held that where DIC is awarded at a date later than the date of the member's death, and is not retroactive to the date of death, no refund would be due for SBP contributions under subsection 1450(e). We held that unless the beneficiary was entitled to DIC at the time of death, no refund would be payable. Even though the decision did not specifically address the issue, it does provide support for the proposition that SBP refunds are to be made only when the benefit of the annuity never comes to fruition. In other words, regardless of the circumstances causing a delay or interruption of DIC benefits, if the delay or interruption results in entitlement to receive SBP annuity payments, a subsequent reinstatement of DIC and corresponding SBP reduction will not entitle the beneficiary to a refund.

In sum, Mrs. Hogsed may not be paid the $482.82 she claims based on the reinstatement of her DIC payments in March 1980. Of course, her eligibility for SBP is not permanently lost; should she later lose eligibility for DIC (due to remarriage, for example), SBP eligibility would resume.

[B-199468]

Attorneys—Fees—Civil Service Reform Act of 1978—Merit Systems Protection Board Decisions—Finality

Air Force employee was downgraded, but was later restored retroactively by Air Force following decision of Merit Systems Protection Board (MSPB) regarding personnel actions related to "unacceptable performance." Claim for attorney fees was denied by Air Force and MSPB. Our Office has no authority to review decisions of MSPB under 5 U.S.C. 7701. In addition, under regulations implementing Back Pay Act amendments, such claim for attorney fees is subject to review only if provided for by statute or regulation. Since no review by General Accounting Office of claim presented here is authorized by statute or regulation, we may not review the prior denials.

Matter of: Mary K. Hatler—Attorney Fees—Downgrading, March 9, 1982:

ISSUE

The issue in this decision is the entitlement of an employee to attorney fees incident to her appeal of a downgrading which was retroactively canceled by her employing agency. We hold that our Office has no authority in this situation to review the denial of attorney fees by the employing agency or the Merit Systems Protection Board.

BACKGROUND

This decision is in response to the appeal by Ms. Mary K. Hatler from our Claims Division settlement Z-2822004, April 15, 1980, denying her claim for attorney fees. In presenting this claim Ms. Hatler has been represented by her attorney, Mr. Shelby W. Hollin.

Ms. Hatler, an employee of the Department of the Air Force, was downgraded from grade GS-9 to grade GS-4 effective November 18, 1979, based on unacceptable performance. She appealed that action to the Merit Systems Protection Board (MSPB) on November 27, 1979. While her appeal was pending the MSPB decided *Wells* v. *Harris* (MSPB Order No. RR-80-3, December 17, 1979), holding that disciplinary actions for "unacceptable performance" may not be taken in the absence of a performance appraisal system established under 5 U.S.C. § 4302. Federal Merit Systems Reporter, para. 7005, p. XI-10 (April 1981).

In light of the decision in *Wells* the Air Force canceled the downgrading action against Ms. Hatler and retroactively restored her to her former position. However, the Air Force denied Ms. Hatler's claim for attorney fees. The MSPB dismissed Ms. Hatler's appeal as moot, and Ms. Hatler filed a motion with the MSPB for payment of attorney fees in the amount of $5,320. We have been advised that Ms. Hatler's claim for attorney fees was denied by the MSPB.

On appeal Mr. Hollin argues on behalf of Ms. Hatler that nothing in the Back Pay Act or its implementing regulations precludes our Office from considering claims for attorney fees where the agency has denied such fees. Mr. Hollin also contends that no appropriate authority will ever find that payment of attorney fees is in the "interest of justice" when that agency must admit to and correct an unjustified or unwarranted personnel action.

DISCUSSION

With the enactment of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, October 13, 1978, there now exists statutory authority to pay attorney fees in connection with employee appeals of adverse actions. Under the provisions of 5 U.S.C. § 7701(g)(1), the Merit Systems Protection Board may award attorney fees to employees who prevail on appeal where payment by the agency is deemed to be warranted "in the interest of justice." This authority in section 7701 is limited to the Board, and review or appeal of Board decisions is limited to the U.S. Court of Claims and the U.S. Courts of Appeal. See 5 U.S.C. § 7703. Our Office is without authority to review decisions of the Merit Systems Protection Board on employee appeals or requests for attorney fees.

There is additional authority for the payment of attorney fees contained in the Back Pay Act, 5 U.S.C. § 5596, as amended by the Civil Service Reform Act of 1978. Under that authority, reasonable attorney fees may be paid to employees found to have been affected by unjustified or unwarranted personnel actions. See 5 U.S.C. § 5596(b)(1)(A)(ii) (Supp. III 1979).

The final regulations for the amended Back Pay Act were recently issued by the Office of Personnel Management (OPM). 46 Fed. Reg. 58271, December 1, 1981 (to appear in 5 C.F.R. Part 550, subpart H). These regulations provide in section 550.806(a) that a request for attorney fees "may be presented only to the appropriate authority that corrected or directed correction" of the unjustified or unwarranted personnel action. Further, if the finding of an unwarranted or unjustified personnel action has been made on appeal, the request for attorney fees shall be presented to the appropriate authority (other than the employing agency) from which the appeal was taken. Finally, section 550.806(g) states that determinations concerning whether to pay attorneys fees or concerning the amount of such payment "shall be subject to review or appeal only if provided for by the statute or regulation."

In the present case, Ms. Hatler has presented her request for attorney fees to the Air Force, her employing agency, and the Merit Systems Protection Board, and her requests were denied. We know of no basis to review those determinations. The proper action would have been to appeal the MSPB decision to the Court of Claims or appropriate Court of Appeals under 5 U.S.C. § 7703. In

addition, our Office did not assume the role of an "appropriate authority" in reviewing Ms. Hatler's downgrading, so that no request for attorneys fees may be considered by our Office in this case.

[B-205775]

Allowances—Physicians Comparability Allowances—Breach of Service Agreement—Transfer to Another Agency—Recoupment of Payments—Tax, etc. Deductions

Physician who voluntarily terminated his service under a Federal Physicians Comparability Allowance Agreement prior to completing 1 year of service under that agreement is required to refund the comparability allowance payments he received pursuant to his agreement. The obligation to repay the allowance received may not be waived since the payments were proper when issued, even though the physician may have signed the agreement on the basis of the erroneous advice from a Government employee. Nor may the debt be reduced by tax or other deductions since those deductions constitute constructive payments, the refund of which is for the consideration of revenue authorities concerned.

Matter of: E. Paul Tischer, M.D., March 9, 1982:

We have for consideration a question regarding the provisions of the Federal Physicians Comparability Allowance Act of 1978, 5 U.S.C. § 5948, and a request for waiver of indebtedness to the Government under the provisions of 5 U.S.C. § 5584. These questions pertain to the Government's claim against E. Paul Tischer, M.D., for the total amount of Physicians Comparability allowance he received pursuant to a 2-year service agreement with the Department of the Army.

Because Dr. Tischer terminated his employment with the Army prior to completing 1 year of service under the agreement, the entire amount paid to him under that agreement is for recoupment. The fact that he was subsequently employed by the Veterans Administration does not alter these consequences since the statute that authorizes payment of the Comparability Allowance, as well as the service agreement Dr. Tischer executed, provides for employment agreements between the member and the employing agency only. The debt may not be waived under 5 U.S.C. § 5584 since payment of the Comparability Allowance was proper when made.

Dr. Tischer executed a Physicians Comparability Allowance Agreement in September 1979, by which he agreed to serve for 2 years as Chief Medical Officer at the Armed Forces Entrance and Examining Station, Salt Lake City, Utah. Under the provisions of 5 U.S.C. § 5948, this agreement entitled him to Federal Physicians Comparability Allowance at an annual rate of $6,000 during the period of the agreement.

However, part 3 of the agreement provided in part the following:

d. If my employment in the position shown in paragraph 2 is terminated during the period of the agreement at my request, or as a result of my misconduct, I will be required to refund the total amount received under the agreement if I have completed less than one year of the agreement * * *.

In April 1980, Dr. Tischer voluntarily terminated his employment with the Army and accepted a position on the following day as Medical Examiner for the Veterans Administration Outpatient Clinic in Evansville, Indiana. Since he terminated his employment with the Army before completing 1 year of service under the agreement, the Army Finance and Accounting Office demanded that he repay the Comparability Allowance paid to him during the period of his contracted service in the amount of $3,368.06.

Dr. Tischer has protested the recoupment action. He contends that when he asked his commanding officer, Major John Eno, about executing the agreement in view of his impending transfer to the Veterans Administration, which was in progress at that time, the commanding officer advised him to sign the agreement since, if he should transfer to a new assignment, he could retain that portion of the allowance already paid at the date of the transfer. The commanding officer's statements were apparently based upon his interpretation of part 3, paragraph e, of the agreement, which states:

> e. If, during the period of the agreement I become eligible for the comparability allowance under a newly announced category, I may terminate this agreement and execute a new agreement reflecting entitlement under the newly assigned category. If I exercise this option, I will be entitled to retain that portion of the allowance earned to the date of termination.

Thus, Dr. Tischer states that he signed the agreement in good faith on the basis of the erroneous advice of his commanding officer and his own private attorney, who agreed with Major Eno's interpretation of paragraph e. Dr. Tischer expresses the view that since he transferred from a civil service position with the Army to another civil service position with the Veterans Administration, he should not be required to repay the Comparability Allowance.

The Army Staff Judge Advocate's Office has concluded, and we agree, that part 3, paragraph e, of the agreement does not pertain to transfers between Federal agencies. Rather, the provision allows a physician to terminate an agreement under which he is serving and execute a new agreement when changes within the national or local agency program create a new category or position for which the physician may be eligible.

The statute which authorizes the Federal Physicians Comparability Allowance, 5 U.S.C. § 5948, provides in pertinent part:

> (a) * * * the head of an agency * * * may enter into a service agreement with a Government physician which provides for such physician to complete a specified period of service *in such agency* in return for an allowance for the duration of such agreement * * *.
>
> * * * * * * *
>
> (d) Any agreement entered into by a physician under this section shall be for a period of one year of service *in the agency involved* unless the physician requests an agreement for a longer period of service. * * * [Italic supplied.]

Since the statute authorizes comparability allowance agreements only between the agency head and the physician for service in the

employing agency, the agreement may not extend to employment in some other Federal agency.

Therefore, neither Dr. Tischer's agreement with the Army nor the authorizing statute permits him to retain any portion of the allowance in question here, even though he transferred to the Veterans Administration, which has a different statutory authorization to pay a similar allowance. See 38 U.S.C. § 4118.

Dr. Tischer has requested waiver of his debt since he signed the agreement in good faith on the basis of the erroneous advice of his commanding officer and his attorney. The statute which authorizes waiver of the Government's claim against an employee, 5 U.S.C. § 5584, provides as follows:

> (a) A claim of the United States against a person arising out of an erroneous payment of pay and allowances * * * to an employee of an agency, the collection of which would be against equity and good conscience and not in the best interests of the United States, may be waived in whole or in part * * *

Thus, the waiver authority under this provision applies only to claims arising out of erroneous payments.

Since the comparability allowance was properly and legally paid to Dr. Tischer in accordance with the agreement he executed with the Army, the payments may not now be considered erroneous because he has become obligated to repay it due to the voluntary termination of his employment under the agreement. The fact that his superior may have given him erroneous advice concerning the meaning of his agreement does not render the payments erroneous, since he was statutorily entitled to the allowance when he received it. See B-200113, February 13, 1981. Moreover, the Government may not be bound by the erroneous advice of its agents. 56 Comp. Gen. 131 (1976); B-198804, December 31, 1980. Since the payments were valid when received, they were not erroneous and, therefore, repayment may not be waived under 5 U.S.C. § 5584.

Dr. Tischer also contests the Army's determination of the amount of his indebtedness. He says he did not receive $3,368.06 in Comparability Allowance payments as the Army claims since that amount includes withholding taxes which were deducted from the payments he received. However, the amount of pay and allowances that must be repaid by an employee in cases such as this is not reduced by taxes deducted prior to payment since deductions are constructively paid to the employee. See 26 U.S.C. § 3123. Questions concerning the refund of taxes or other adjustments to income may be submitted to the revenue authorities concerned. See B-201818, August 18, 1981; B-200327, November 13, 1980, and cases cited therein.

Therefore, if otherwise correct, the Government's claim against Dr. Tischer for the Federal Physicians Comparability Allowance paid under his agreement of September 1979 with the Army is for recoupment and is not subject to waiver under 5 U.S.C. § 5584.

[B-203242]

Statutes of Limitation—Claims—Claims Settlement by GAO—Erroneous Deductions From Salary—Payroll Adjustment—Refunds

An adjustment to an employee's pay to correct erroneously withheld deductions is a matter cognizable by the General Accounting Office and the Act of Oct. 9, 1940, 54 Stat. 1061, as amended, 31 U.S.C. 71a, bars refunds beyond 6 years.

Matter of: Refund of erroneous deductions for life insurance premiums and retirement contributions, March 17, 1982:

By letter of May 8, 1981, Mr. R. L. Sandifer, an authorized certifying officer at the Department of Agriculture's National Finance Center, requested an advance decision regarding the refund of life insurance premiums and retirement contributions erroneously withheld from the salary of certain employees of the Department of Agriculture. The certifying officer notes our decision *Matter of refund of life insurance premiums,* B-198115, October 21, 1980, in which we permitted refund of erroneously withheld life insurance premiums and requests clarification of that decision. Specifically, he inquires whether salary adjustments may be made beyond the 6-year limit imposed by the Act of October 9, 1940, 51 Stat. 1061, as amended, 31 U.S.C. 71a (1976), which bars all claims cognizable by the General Accounting Office which are not received in the General Accounting Office within 6 years of the date the claim first accrued. The certifying officer has submitted the vouchers of two employees, Roger K. Stephens and Maude L. Norris, seeking reimbursement for insurance premiums for the former, and retirement contributions for the latter, erroneously withheld from their compensation. The erroneous deductions began more than 6 years prior to the discovery of the error.

Under the Federal Group Life Insurance Act of 1954, as amended, 5 U.S.C. §§ 8701-8716, the Office of Personnel Management may issue regulations which prescribe the time at which and the conditions under which an employee is eligible for coverage. These regulations are found at 5 C.F.R. §§ 870.101-871.604, Federal Personnel Manual (FPM) Chapter 870, and FPM Supplement 870-1. Paragraph S4-7b of FPM Supplement 870-1 states that errors in withholdings involving current employees should be adjusted in a subsequent pay period. If employment has been terminated, the refund should be made in accordance with paragraph S4-7c by adjustment to an employee's final pay.

Under the Civil Service Retirement Act, as amended, 5 U.S.C. §§ 8301-8348, the Office of Personnel Management may issue regulations which are necessary to carry out the purposes of the Act. These regulations are found at 5 C.F.R. § 831.101-831.1605, Federal Personnel Manual (FPM) Chapter 831, and FPM Supplement 831-1. Paragraph S21-7a of FPM Supplement 831-1 states that errors

in deductions and contributions for current employees should be adjusted in a subsequent payroll. Paragraph S21-7b discusses procedures for adjusting errors after an employee is separated.

Thus, under the authority of the Federal Personnel Manual agencies may make adjustments for periods less than 6 years prior to the date of the adjustment. But since such adjustments may result in paying an employee an amount which should have been paid before and which the employee could have claimed, they are subject to the 6-year statute of limitations. Thus, we noted in *Nancy E. Howell*, B-203344, August 3, 1981, that life insurance premiums which were erroneously withheld from an employee's pay could not be reimbursed beyond the 6-year limit imposed by the Act of October 9, 1940, 31 U.S.C. § 71a.

Likewise, erroneous deductions for civil service retirement must be considered as any other erroneous deduction from compensation and any claim for reimbursement must be submitted within the 6-year period prescribed by 31 U.S.C. § 71a.

Accordingly, the Department of Agriculture should make adjustments for erroneous deductions in accordance with the above. In this connection we remind all agencies and departments that salary adjustments can be made whenever a payroll error is discovered, as long as the correction is made within 6 years of the error. However, if the elapsed time is approaching 6 years and a delay for any reason is anticipated in making the adjustment, the matter should be forwarded to the General Accounting Office for recording to preserve the employee's rights.

[B-203401]

Pay—Saved—Promotions—Warrant Officer to Commissioned Officer—Public Law 96-346 Applicability—Intervening Enlisted Status

Army warrant officer accepted an appointment as a commissioned officer in the Air Force following his completion of training at the Air Force Officer Training School. Under the revised language of 37 U.S.C. 907 he is entitled to saved pay as a warrant officer, notwithstanding the fact that he began officer training 6 days after he was released from active duty in the Army and the fact that he was paid as a staff sergeant while attending Officer Training School.

Matter of : Second Lieutenant John W. Sharp, USAF, March 18, 1982:

This action is in response to a request submitted by Lieutenant Colonel L. T. Howard, Director of Accounting and Finance, Eglin Air Force Base, Florida, for an advance decision concerning the entitlement of Second Lieutenant John W. Sharp to "saved pay" under the provisions of 37 U.S.C. § 907(b)(2) (1980). The request was assigned control number DO-AF-1362 by the Department of Defense Military Pay and Allowance Committee.

As is explained below, we find that Lieutenant Sharp is entitled to saved pay in accordance with the statutory provision.

Lieutenant Sharp was released from active duty in the Army Reserves on February 29, 1980, at the rank of chief warrant officer (W-3), following which he entered Officer Training School on March 7, 1980. While attending Officer Training School, Lieutenant Sharp was paid as a staff sergeant (E-5). Upon completion of his training, he accepted a commission as a second lieutenant in the Air Force effective June 6, 1980. The member has requested payment of saved pay under the provisions of 37 U.S.C. § 907(b).

Section 907(b) of title 37, as amended by section 6 of the Military Personnel and Compensation Amendments of 1980, Public Law 96-343, September 8, 1980, 94 Stat, 1123, 11226, provides in pertinent part:

> (b) A warrant officer who accepts an appointment as a commissioned officer in a pay grade above W-4 shall, for service as such a commissioned officer, be paid the greater of—
> (1) The pay and allowances to which he is entitled as such a commissioned officer;
> (2) The pay and allowances to which he would be entitled if he were in the last warrant officer grade he held before his appointment as such a commissioned officer
> * * *

Lieutenant Sharp received his commission prior to the date the amendment was enacted and prior to its effective date, September 1, 1980, as provided in subsection 6(c) of the amendments. That subsection provides that the amendments made by section 6 will be effective for pay and allowances payable for the period beginning after August 31, 1980. Under that language the new provisions have been considered applicable to officers commissioned prior to the effective date, but who would have been entitled to higher rates of pay and allowances had they remained in their former warrant officer grades. In Lieutenant Sharp's case, although he would not be entitled to saved pay from June through August 1980, he is considered entitled to such pay beginning in September if otherwise eligible.

In view of the beneficial nature of these amendments and the comparative disadvantage to members in Lieutenant Sharp's position as compared to members commissioned after the effective date if such an interpretation were not adopted, we do not question the allowance of saved pay to commissioned officers who received their commissions prior to the effective date of the amendment.

Because of the 6-day lapse between Lieutenant Sharp's release from active duty from the Army Reserves and the date he began officer training, the Air Force Accounting and Finance Center questions his entitlement to saved pay on the basis of Department of Defense Pay Manual (Pay Manual), paragraph 10221b, which implements 37 U.S.C. § 907(b). The Air Force has interpreted the regulation to require that there be no break in service between the last day the officer serves as a warrant officer and the first day of his appointment as a commissioned officer. The Air Force also

questions payment of saved pay under the authority of the regulation because Lieutenant Sharp was paid as a staff sergent (E-5), not as a warrant officer, while in officer training.

The Department's interpretation of the saved-pay provision is apparently based upon its regulation which implemented the Act of October 21, 1970, 84 Stat. 1083, 37 U.S.C. § 907, Pub. L. No. 91-484, § 1(1). That Act provided saved pay only for enlisted members who accepted appointments as officers. The statute entitled such an officer to the pay and allowances to which he was entitled in his last permanent appointment as an enlisted member "immediately prior to his appointment."

However, section 6 of Pub. L. No. 96-343 amended 37 U.S.C. § 907 to extend the saved-pay provision to warrant officers who are commissioned in grades above W-4. This amendment also eliminated the language that restricted the officer's saved pay entitlement to the member's pay and allowances "immediately prior to his appointment" as an officer. Under the 1980 amendment, the officer is entitled to the amount of pay he would be entitled to if he were in the last warrant officer grade that he held prior to his appointment as a commissioned officer. Thus, neither the fact that Lieutenant Sharp was not on active duty for 6 days prior to entering Officer Training School nor the fact that he was paid as a staff sergent while in officer training would preclude his entitlement to saved pay under the statute.

[B-203950]

Pay—Retired—Survivor Benefit Plan—Dependency and Indemnity Compensation—Offset—Children's Benefit Apportionment Effect

A Survivor Benefit Plan (SBP) participant died, leaving a widow and dependent child by a former marriage. Both widow and child became entitled to separate monthly Veterans Administration Dependency and Indemnity Compensation (DIC), but since the child was living with the former spouse, the widow's DIC was reduced below the rates set by 38 U.S.C. 411(a) because of 38 U.S.C. 3107(b), under which a portion of the DIC is paid to the child. The widow's DIC must be deducted from her monthly SBP annuity; however, in a case where a portion of the DIC is paid to the child, the annuity is to be reduced only by the actual DIC payment the widow receives.

Pay—Retired—Survivor Benefit Plan—Dependency and Indemnity Compensation—Refund Entitlement—Children's Benefit Apportionment Effect

Where a widow's Survivor Benefit Plan annuity is reduced pursuant to 10 U.S.C. 1450(c) by the award of Dependency and Indemnity Compensation (DIC), the computation of the cost of the recalculated annuity for refund of cost of participation is to be predicated on the actual monthly DIC payment the widow receives in her own right under 38 U.S.C. 411(a), as reduced by apportionment to a child under 38 U.S.C. 3107(b).

Matter of: Master Sergeant Donald A. Rea, USMC Retired (Deceased), March 19, 1982:

This action is in response to a request for decision from the Disbursing Officer, Marine Corps Finance Center, concerning the proper reduction to be made in the Survivor Benefit Plan annuity payable to Mrs. Joan Rea, as widow of the late Master Sergeant Donald A. Rea, USMC, Retired, on account of her entitlement to receive Dependency and Indemnity Compensation (DIC) from the Veterans Administration. We find that Mrs. Rea's annuity should be reduced only in the amount of the DIC payments she receives not including the portion of her DIC which is paid to Sergeant Rea's child.

This matter has been assigned Control No. DO-MC-1364 by the Department of Defense Military Pay and Allowance Committee.

Sergeant Rea was placed on the retired list of the Marine Corps on November 10, 1978, and enrolled in the Survivor Benefit Plan to provide an annuity based on his full monthly retired pay for his spouse and dependent children. He died in July 1979.

Following Sergeant Rea's death, the Marine Corps determined that Joan, as his surviving spouse, qualified as his eligible widow under the Survivor Benefit Plan and was entitled to receive a monthly annuity of $479.50, pursuant to 10 U.S.C. 1450(a)(1). In addition, she became entitled to DIC from the Veterans Administration as authorized by 38 U.S.C. 411(a), which was increased by the amount authorized by 38 U.S.C. 411(b), since the deceased member's child qualifies as his dependent.

Sergeant Rea's daughter, age 14, is a daughter by a former marriage, and does not live with the widow. As a result, the combined DIC award which would have been received by Mrs. Joan Rea was apportioned pursuant to the authority contained in 38 U.S.C. 3107(b), thereby reducing the payment to Mrs. Joan Rea to an amount below the amount otherwise authorized to be paid her under 38 U.S.C. 411(a). The monthly payments made to her have been $375 rather than $388, during the period July 21 through September 30, 1979; $412 rather than $426, from October 1, 1979, through September 30, 1980; and $471 rather than $488, from October 1, 1980.

Base on the foregoing, we were asked whether the Survivor Benefit Plan annuity payable is the amount that exceeds the DIC payment as authorized by 38 U.S.C. 411(a), or whether the amount payable is to be predicated on the widow's DIC after the apportionment authorized in 38 U.S.C. 3107(b) has been made.

If the annuity payable is reduced by the apportioned amount of DIC and part of the cost of that annuity is refunded under 10 U.S.C. 1450(e), we are asked whether the apportioned amount should be used in calculating the refund.

Section 1450 of title 10, United States Code, in requiring the reduction of the Survivor Benefit Plan annuity when the recipient also receives DIC, provides:

(c) If * * * the widow * * * is also entitled to compensation under section 411(a) of title 38, the widow * * * may be paid an annuity under this section, but only in the amount that the annuity otherwise payable under this section would exceed that compensation.

Section 411 of title 38, United States Code, provides:

(a) Dependency and indemnity compensation shall be paid to a surviving spouse * * *

(b) If there is a surviving spouse with one or more children below the age of eighteen of a deceased veteran, the dependency and indemnity compensation paid monthly to the surviving spouse shall be increased * * * for each such child.

In conjunction with the provisions of 38 U.S.C. 411, section 3107 of the same title provides:

(b) Where any of the children of a deceased veteran are not in the custody of the veteran's widow, the * * * dependency and indemnity compensation otherwise payable to the widow may be apportioned as prescribed by the Administrator [of Veterans' Affairs].

The concept of the law governing DIC payments is to provide some measure of financial support to surviving dependents of veterans who die of service-connected causes, one part for the personal maintenance of the surviving spouse and the other part for the personal maintenance of each child who qualifies as the deceased member's dependent. Under section 3107(b), it is recognized that a deceased veteran's dependent children may not reside with the surviving spouse. If any of the dependent children are residing elsewhere, the combined award of DIC otherwise payable to the surviving spouse is reduced, not by the specific amount of dependent child increase, but by a greater apportioned amount as determined under Veterans Administration regulations. As a result, the amount payable to the surviving spouse in such a case is reduced to an amount below that otherwise authorized to be paid her in her own right under 38 U.S.C. 411(a).

Payments under the Survivor Benefit Plan are not based on the same concept. Where a retired member elects spouse coverage only, she is the sole beneficiary of the annuity payments so long as she qualified as a widow under the Plan. If a member has both spouse and dependent children coverage (as was the situation in this case), so long as the surviving spouse remains qualified as the eligible widow under the Plan, the widow is entitled to the entire annuity, regardless of the number of dependent children and regardless of where they are living. During that time the children qualify only as potentially eligible beneficiaries, since their right to the annuity arises only upon the loss of eligibility by the surviving spouse. See 60 Comp. Gen. 240 (1981).

The legislative history of Public Law 92-425, September 21, 1972, 86 Stat. 706, which created the Survivor Benefit Plan, recognizes the essential difference between the composition and method of

awarding DIC benefits and payments of annuities under the plan. In S. Rept. No. 92-1089, September 6, 1972, to accompany S. 3905, which eventually became Public Law 92-425, the following observation regarding the matter was made on page 2:

> S. 3905 as introduced would permit an offset of not only the widow's DIC payments but also other DIC payment such as the aid and attendance payment and children's payment. The committee version defines precisely that the DIC payment to be offset is the widow's payment only.

On page 4 of the same report in which the principal elements of the plan are described it is stated:

> When Dependency and Indemnity Compensation (DIC) is payable to a widow it will be supplemented by a Defense payment to attain the desired 55 percent level.

And on page 28, it is stated that:

> S. 3905 requires a combination of payments under the proposed plan with those currently available under DIC from the Veteran's Administration. This provision * * * is clarified to specify that the only DIC payment considered in the combination will be the widow's or the widower's payment. Without such a change it would be possible to consider as well DIC payments for children and payments made because the spouse requires aid and attendance. The committee felt that such a result was not intended.

The overall purpose of the SBP is to provide a basis whereby retired members may provide income protection for their surviving dependents at a level which they choose, but not to exceed 55 percent of their retired pay. It is our view that in accordance with this purpose and the legislative history of the Plan when the annuity authorized to be paid under the Plan exceeds the DIC payment to the surviving spouse, that annuity is to be reduced only by the amount of the actual DIC payment to the surviving spouse in her own right, after apportionment, if so required. Therefore, in answer to the first question Mrs. Rea's monthly SBP annuity is to be reduced only by the amount of the monthly apportioned DIC payment which she receives as surviving spouse.

With regard to refund entitlement, 10 U.S.C. 1450(e) authorizes the recalculation of the annuity and its cost to the member when the annuity is reduced because of DIC payments. It also authorizes refund to the widow of the excess cost previously collected from the member's retired pay. In accordance with the answer to the basic question, the recalculation of the annuity for refund purposes is to be predicated on the amount of DIC paid to the widow in her own right, after apportionment, if so required. See in this connection 55 Comp. Gen. 1409 (1976). For the method of computing that recalculated annuity, see 56 Comp. Gen. 482 (1977).

[B-203650]

Compensation—Overtime—Fair Labor Standards Act—Standby, etc. Time—Criteria for Entitlement—Claim Denied

Employee at dam reservation claims overtime compensation for standby duty. Although he was required to live in Government-owned housing on the dam reservation the agency determined that effective Jan. 10, 1971, he would not be required to

remain at the dam reservation after the end of his regular duty hours. Under the circumstances, he is not entitled to overtime compensation under 5 U.S.C. 5544(a) since his off-duty movements and activities were not severely restricted. In addition, such off duty time is not compensable as hours of work under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*

Compensation—Overtime—Standby, etc. Time—Hours Outside Normal Tour of Duty—Occupancy of Govt. Quarters—Criteria for Entitlement

Employee is not entitled to overtime compensation under 5 U.S.C. 5544(a) during period he was restricted to dam site since he has not shown that he was in effect required to be on "ready alert" as in *Hyde* v. *United States,* 209 Ct. Cl. 746 (1976). There is nothing in the record to indicate that claimant's activities were often interrupted by an emergency or other work situation requiring prompt attention.

Matter of: Daniel W. McConnell, March 22, 1982:

This action results from the appeal by Mr. Daniel W. McConnell, personally and through his attorney, J. Michael Jones, of our Claims Division's denial of his claim for overtime compensation during the period from July 22, 1968 through September 4, 1975. This claim is the result of Mr. McConnell's contention that he was required to remain in a standby status while employed by the Department of the Army, Corps of Engineers, Buffalo District, as a maintenance mechanic (formerly dam repairer) at the Mt. Morris Dam, New York. Mr. McConnell now claims overtime compensation for the additional period to February 4, 1981, the date he was no longer required to occupy Government-owned housing at the site of the dam. While the Claims Division considered his entitlement to overtime compensation under 5 U.S.C. § 5544(a), he now claims overtime entitlement under that and the additional authority of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* The disallowance of his claim by the Claims Division is sustained since, for the reasons set forth below, he is not entitled to payment of overtime compensation under either 5 U.S.C. § 5544(a) or the Fair Labor Standards Act.

The record shows that as an applicant for the position of dam repairer, grade WB-10, Mr. McConnell was advised in a letter dated June 4, 1968, from the Chief, Personnel Office, Buffalo District, Corps of Engineers, that in addition to their regular tours of 8 hours a day, 5 days a week, it was required that either the dam foreman or the dam repairer be present at the site of the dam, on call in case of an emergency. He was further advised that he would be required to live in a Government-owned dwelling located on the Mt. Morris dam site, a 5-acre, Government-owned reservation located about 5 miles from Mt. Morris, New York. By Disposition Form dated December 22, 1970, Mr. McConnell was advised that beginning on Sunday, January 10, 1971, due to a change in work schedules it would no longer be required that either he, or the other employee concerned, be present on the reservation beyond the end of the normal workday. By that same document he was notified that

if he were present on the reservation after his normal tour of duty he would be expected to respond to any of the alarm systems and take necessary action and that any such work performed after the normal tour of duty would be paid at overtime rates. By Disposition Form dated February 4, 1981, the district engineer rescinded the requirement that Mt. Morris Dam employees live on the dam reservation in Government-owned housing.

On October 21, 1976, Mr. McConnell submitted his claim for overtime compensation for standby duty for the period July 22, 1968, through September 4, 1975. The claim was received by our Claims Division on October 29, 1976.

On August 2, 1979, the Claims Division disallowed Mr. McConnell's claim on the basis that it was barred in part by 31 U.S.C. § 71a and that the hours for which he claimed overtime were not compensable as time in a standby status under 5 U.S.C. § 5544(a).

Section 71a of title 31, United States Code, provides that every claim or demand cognizable by the General Accounting Office shall be forever barred unless received in this Office within 6 years after the date the claim accrued. We have held that the date of accrual of a claim for the purposes of the above-cited statute is to be regarded as the date the services were rendered and that the claim accrues on a daily basis. 29 Comp. Gen. 517 (1950). Thus, that portion of the claim which accrued prior to October 29, 1970, is barred from consideration. Mr. McConnell's attorney contends that the District Office of the Corps of Engineers was responsible for the delay in the claim being filed with this Office since he alleges that the District Office failed to properly advise Mr. McConnell that he could submit his claim to the General Accounting Office. While we recognize that the delay in filing his claim may not be fully attributable to Mr. McConnell, we are without authority to waive or modify the application of 31 U.S.C. § 71a. *Matter of Moore,* B-187427, June 3, 1977, and B-171774, July 2, 1971. Thus, we are unable to consider that part of his claim which accrued prior to October 29, 1970.

Overtime for Federal employees is authorized by title 5, United States Code, and also by the Fair Labor Standards Act (Act), 29 U.S.C. § 201 *et seq.,* for employees who are not exempt from the Act. As a prevailing rate employee Mr. McConnell's entitlement to overtime compensation under title 5, United States Code, is governed by subsection 5544(a). Under that subsection, a wage board employee who regularly is required to remain at or within the confines of his post of duty in a standby or on-call status in excess of 8 hours a day is entitled to overtime pay for hours of work, exclusive of eating and sleeping time, in excess of 40 hours a week.

In interpreting 5 U.S.C. § 5544(a) as it applies to time in a standby or on-call status, overtime pay has been allowed only where the employee's movements were narrowly limited and his activities severely restricted and where his status was in effect one of ready

alert. *Hyde* v. *United States,* 209 Ct. Cl. 746 (1976); 55 Comp. Gen. 1314 (1976); and *Matter of Conway,* B-176924, September 20, 1976.

In the case before us, it is clear that beginning January 10, 1971, Mr. McConnell was no longer restricted to the site of the Mt. Morris Dam after his regular duty hours. Although he was still required to reside in housing on the Government reservation, he was free to leave the site any time he wished. We have held under circumstances more restrictive than these that the employee's remaining at a reservoir site did not constitute compensable overtime duty under 5 U.S.C. § 5544(a). See *Matter of Jamison,* B-201628, May 21, 1981. As in *Jamison,* none of the documentation submitted in this case indicates that Mr. McConnell was restricted to the vicinity of his residence after January 10, 1971, and accordingly, we find that he is not entitled to overtime compensation under 5 U.S.C. § 5544(a) for the claimed standby duty during the period from January 10, 1971, to February 4, 1981.

Concerning the period from October 27, 1970, the earliest portion of his claim which is not barred, to January 9, 1971, the record shows that either Mr. McConnell or the dam foreman was required to remain at the site after normal duty hours to respond in the case of emergencies. However, the record does not establish that emergencies occurred so frequently as to substantially restrict his activities by requiring him to be on a "ready alert" status while at the site. Although Mr. McConnell states that he was on "ready alert" due to being called out a "yearly average of 253 times," several examples of the work he performed after regular duty hours do not appear to relate to emergencies or other situations which would require the prompt performance of overtime work. While in his letter of October 21, 1976, he cites as an example the opening of floodgates to substantiate his claim that he was on "ready alert" while restricted to the site, he also includes the performance of such duties as recording weather extremes for the Weather Bureau and the maintenance and upkeep of Government housing. There is nothing in the record before us which indicates that his activities were often interrupted, as in the *Hyde* and *Conway* cases, by an emergency or other work situation requiring prompt attention. We are unable to conclude that Mr. McConnell was in a state of "ready alert" while restricted to the site after his regular duty hours. Thus, the claim for overtime compensation under 5 U.S.C. § 5544(a) may not be allowed for the period prior to January 10, 1971.

We note that Mr. McConnell's attorney argues that the agency's requirement that two employees occupy Government-owned dwellings on the reservation violated 5 U.S.C. § 5911(e) which provides that an employee shall not be required to occupy quarters on a rental basis unless the head of the agency concerned determines that necessary service cannot be rendered or that Government property could not otherwise be adequately protected. Whether the agency properly applied the provisions of 5 U.S.C. § 5911(e) is in no

way relevant to a determination as to whether an employee is entitled to overtime compensation under 5 U.S.C. § 5544(a) for standby duty. However, we note that the district engineer appears to have made the required determination under 5 U.S.C. § 5911(e) and presumably such authority was delegated by the head of the agency.

The Fair Labor Standards Amendments of 1974, Public Law 93-259, approved April 8, 1974, extended FLSA coverage to certain Federal employees effective May 1, 1974. Under 29 U.S.C. § 204(f) the Office of Personnel Management is authorized to administer the Fair Labor Standards Act. Under the Act a nonexempt employee becomes entitled to overtime compensation for hours worked in excess of 40 hours a week when management "suffers or permits" work to be performed. See para. 3c of Federal Personnel Manual Letter No. 551-1, May 15, 1974.

In view of the Office of Personnel Management's authority to administer the Fair Labor Standards Act with respect to Federal employees we requested and received their views on this claim for standby duty.

In its report dated January 28, 1982, the Office of Personnel Management advised that it determined that Mr. McConnell is a nonexempt employee under the Act by virtue of his appointment to a nonsupervisory prevailing rate position. In considering his claim for overtime compensation from May 1, 1974, the effective date of the Fair Labor Standards Amendments of 1974, that Office stated that the mere fact that Mr. McConnell was required to reside in Government-owned housing at the worksite does not itself qualify the employee's time at the worksite as standby duty under the Act.

In its advisory letter the Office of Personnel Management cited the following conditions set forth in FPM Letter 551-14, May 15, 1978, under which an employee is considered to be working for purposes of the Fair Labor Standards Act.

—The employee's whereabouts is narrowly limited;
—The employee's activities are substantially restricted;
—The employee is required to remain at his or her living quarters; and
—The employee is required to remain in a state of readiness to answer calls for his or her services.

See 5 C.F.R. § 551.431(a)(2) (1981) which sets forth substantially the same criteria.

The Office of Personnel Management determined as follows with regard to the present claim.

In the instant case Mr. McConnell was informed, in writing, that effective January 10, 1971, he would no longer be required to be present on the dam reservation beyond his normal workday. Furthermore, he was informed that he would be compensated for actual work performed in emergency situations that occurred during his off duty hours or when required to "stand by" due to weather or flood conditions. He was actually compensated for such hours. Although he was required to live in government owned housing on the Mt. Morris Dam until February 4, 1981, the conditions surrounding Mr. McConnell's residency requirement fail to meet the strict requirements of the OPM FPM Letter * * *. For these reasons, we find that Mr. McConnell does not have a valid claim for overtime pay under the FLSA.

In view of the criteria applicable under the Fair Labor Standards Act, regarding payment of compensation for time spent on standby duty, and in view of the facts of this case we have reached the same conclusion as the Office of Personnel Management. Accordingly, we hold that Mr. McConnell is not entitled to overtime compensation under the Fair Labor Standards Act.

Mr. McConnell is not entitled to the payment of claimed overtime compensation under either title 5, United States Code, or the Fair Labor Standards Act, and accordingly, we uphold the action by the Claims Division which denied his claim.

We note that in addition to his appeal of the Claims Division's Certificate of Settlement, Mr. McConnell claims overtime compensation for the period from September 1975 to August 1977 for the performance of uncompensated pre-shift duties. This claim will be duly considered by our Claims Group.

[B-198557]

Military Personnel—Acceptance of Foreign Presents, Emoluments, etc.—Foreign Government Employment—Retired Pay Adjustment—Pub. L. 95-105 Effect—Final Approval of Employment Delay

Congress has authorized retired Regular officers of uniformed services to accept compensation for employment by a foreign government if Secretary concerned and Secretary of State approve. In decision B-198557, July 17, 1980, we held that a retiree who accepts foreign employment after receiving Secretary of the Air Force's approval, but before Secretary of State's, is subject to the rule in B-178538, Oct. 13, 1977, that he must repay the United States an amount equal to compensation received from foreign government. However, we also held that when final approval is given, withholding of retired pay is to be discontinued except to the extent that retired pay was paid for the period of unauthorized employment by a foreign government. B-193562, Dec. 4, 1979, is overruled to the extent it is inconsistent with these decisions; B-198557, July 17, 1980, is clarified.

Matter of: Major Marvin L. Friedman, USAF, Retired, March 25, 1982:

This decision is in response to a request for clarification of our decision in the *Matter of Friedman,* B-198557, dated July 17, 1980. The initial request for decision was presented by the Deputy Assistant Comptroller for Accounting and Finance, USAF, and was assigned submission number DO-AF-1342 by the Department of Defense Military Pay and Allowance Committee. This request for clarification is made by the Deputy for Accounting and Internal Audit, Department of the Air Force.

The issue presented in the initial decision concerned whether a retired Regular Air Force officer was entitled to retired pay when he accepted employment and compensation therefor from a foreign government after receiving appproval from the Secretary of the Air Force but prior to the granting of approval by the Secretary of State, as required by section 509 of the Foreign Relations Authori-

zation Act, Fiscal Year 1978, Public Law 95-105, August 17, 1977, 91 Stat. 844, 859-860, 37 U.S. Code 801 note. The decision in *Friedman* is affirmed and our reasons for that holding are explained below.

In summary the facts involved are that following his retirement as a Regular officer in the United States Air Force, Major Friedman received an offer of employment with El Al Airlines, an entity of the government of Israel. In accordance with section 509 of the Foreign Relations Authorization Act, Major Friedman requested approval of the employment from the Secretary of the Air Force on December 25, 1977. On February 7, 1978, the approval was granted with instructions to obtain the Secretary of State's approval prior to accepting the employment. Although he did not request this approval until March 5, 1978, he began work in the El Al position on February 19, 1978. By letter dated March 31, 1978, the Secretary of State's approval was granted. The Department of State's letter indicated that the approval was made retroactively effective to December 25, 1977, the date of Major Friedman's initial application. We held in *Friedman* that the approval was effective on the date it was granted—March 31, 1978. This holding was supported by prior holdings in 58 Comp. Gen. 487 (1979) and B-175166, April 7, 1978. With respect to Major Friedman's entitlement to retired pay we held, in effect, that the retired pay withheld should not exceed the amount of retired pay accrued during the period of unauthorized employment—February 19 to March 31, 1978.

In the submission it is stated that an apparent inconsistency exists between the holding in this case and our decision B-178538, October 13, 1977. There we held that the amount of retired pay withheld from retirees employed by foreign governments without approval as provided for by Congress is an amount equal to the compensation received from the foreign government. In view of the foregoing, clarification is requested concerning the proper amount of retired pay to be withheld where the amount of compensation earned during the period of unauthorized employment exceeds the amount of retired pay accrued during the same period.

Article I, section 9, clause 8, of the Constitution of the United States prohibits the acceptance, by any person holding an office of profit or trust under the United States, of any present, emolument, title or office from a foreign government without the consent of the Congress. Retired Regular officers are members of the military service of the United States and are considered subject to this constitutional prohibition.

Although no specific sanction is provided for in the constitutional prohibition concerning those who accept foreign compensation without congressional approval, in order to give substantial effect to this provision we have adopted and consistently applied the principle enunciated in our October 13, 1977 decision. See 44 Comp. Gen. 130 (1964). Thus, the basis for liability of individuals who

accept employment with a foreign government without the required approval is that they may not retain the pay earned from that employment. When approval of the employment is obtained from both of the Secretaries concerned as provided in section 509, future employment and earnings are authorized and further collection of amounts due for unauthorized employment is not required. However, to the extent that retired pay was paid during the period of unauthorized employment it must be collected from the individual.

The reason for that rule is that retired pay should not be paid during a period of unauthorized employment except to the extent that pay from employment by a foreign government is less than retired pay. If retired pay was erroneously paid during this period, it must be collected even though the foreign employment is subsequently approved because approval generally may not be retroactive. An exception to the rule against retroactivity was an issue in *Friedman.* It was determined that the exception was not applicable in major Friedman's situation.

In *Matter of Kammerer,* B-193562, December 4, 1979, termination of collection upon receipt of approval from both Secretaries was allowed even though the full amount received from the foreign government had not been collected. That rule was limited to cases of individuals who were employed by a foreign government at the time section 509 of Public Law 95-105 was enacted. In *Friedman* termination of collection action was allowed for an individual who was not employed by a foreign government at the time of enactment but was employed at a later date before receipt of approval from both Secretaries. This action modified the holding in *Kammerer* but that fact was not specifically stated. To clarify the matter we now overrule *Matter of Kammerer,* B-193562, December 4, 1979, to the extent it is inconsistent with the holding in *Matter of Friedman,* July 17, 1980. Thus, after approval of employment by a foreign government by both Secretaries, no further withholding of retired pay will be required except to the extent necessary to recoup retired pay paid during a period of unauthorized employment by a foreign government.

The holding in *Matter of Friedman* is affirmed in keeping with the above clarification.

[B-203904]

Housing and Urban Development Department—Title I Insured Loans—Leader's Loss Reserve Account—Annual Adjustment—Commencement Date

Regulation in 24 CFR 201.12(c) which provides that annual downward adjustments in a lender's loss reserve account, out of which all insured loan claims are paid, should begin 5 years after an insurance contract is issued to the lender is based on assumption that during initial 5-year period the lender will be actively engaged in making title I insured loans. Since the insurance reserve does not even come into

existence until the insured lender actually begins to make loans and report then to Housing and Urban Development (HUD) for insurance, HUD should not interpret the regulations as requiring adjustments in the reserve of a lender to commence until 5 years after the lender begins to make insured loans.

Housing and Urban Development Department—Title I Insured Loans—Leader's Loss Reserve Account—Annual Adjustment—Commencement Date—Waiver of Regulations

Even if regulation in 24 C.F.R. 201.12(c) is interpreted as requiring the annual adjustments in a lender's loss reserve account to commence 5 years after the contract of insurance is approved, whether or not the lender has actually been making insured loans during that period, HUD is authorized under 12 U.S.C. 1703(e) to waive that regulatory provision where, as here, such an interpretation would be unfair to a lender that has substantially complied with the regulation Would be unfair to a lender that has substantially complied with the regulations in good faith.

Matter of: Insurance Reserve-Insured Loan Program of National Housing Act, March 30, 1982:

This decision is in reponse to a request from the Assistant Secretary for Housing, Department of Housing and Urban Development (HUD), for our legal opinion on the proper interpretation of a provision in HUD's Title I insured loan regulations. If the regulations are read to require an annual adjustment to be made in a lending institution's total insurance reserve 5 years from the date it entered into a contract of insurance with HUD rather than 5 years from the date it began to make insured loans, it would result in an injustice to one of the major participants in the Title I insured loan program, the General Electric Credit Corporation (GECC). As explained below, GAO has no objection to the latter interpretation which would give GECC a grace period of 5 years from the time it began to make insured loans before the annual reductions to its insurance reserve commence.

Under section 2(a) of the National Housing Act, 12 U.S.C. § 1703, the Secretary of HUD is authorized to insure property improvement and mobile home loans made by participating lending institutions. The statute limits HUD's liability on a particular loan to a maximum of 90 percent of the loss suffered by the lender. The statute also provides as follows:

> * * * In no case shall the insurance granted by the Secretary under this section to any such financial institution on loans, advances of credit, and purchases made by such financial institution for such purposes on and after July 1, 1939, exceed 10 per centum of the total amount of such loans, advances of credit, and purchases * * *.

The effect of this statutory provision is to limit the Government's liability to a particular lender to a maximum of 10 percent of the total outstanding balance of all loans made by that lender which qualified for Federal insurance under the program.

In order to implement this 10 percent statutory limitation, HUD has adopted a regulation set forth at 24 C.F.R. § 201.12 which provides as follows:

(a) *Legal limit.* Subject to the limitation on the Commissioner's authority to insure as stipulated in section 2 of Title I of the Act, the Commissioner, pursuant to the provisions of § 201.11, will reimburse any insured for losses sustained by it in accordance with the general insurance reserve provisions of paragraph (b) of this section.

(b) There shall be maintained for each insured a general insurance reserve which shall equal 10 percent of the aggregate amount advanced on all eligible loans originated by such insured pursuant to the provisions of the regulations * * * less the amount of all claims approved for payment in connection with such loans and less the amount of any adjustment made pursuant to paragraph (c) of this section.

(c) *Adjustment of general reserve.* The amount of the general insurance reserve to the credit of each insured shall be adjusted on October 1 of each year by deducting therefrom an amount equivalent to 10 percent of the amount of such insurance reserve on the records of the Commissioner as of the date of such adjustment: *Provided,* That no such adjustment shall reduce the insurance reserve of any insured to an amount less that $15,000: However, *no such adjustment shall be made in the insurance reserve of any financial institution until the first day of October next following the expiration of a period of 60 months after the issuance of a contract of insurance to such institution by the Commissioner.* * * * [Italic supplied.]

This regulation is designed to maintain each lender's insurance reserve, known as a "loss reserve account," out of which all claims are paid, at 10 percent of its outstanding insured loan balance, less claims approved for payment. See 55 Comp. Gen. 658 (1976), as modified by 56 Comp. Gen. 279 (1977). The 10 percent annual adjustment mandated by subsection (c) of the regulations is necessary because the insurance reserve is not reduced as individual loans are paid off, either in accordance with the loan schedule or as a result of prepayment by the borrower. As the Assistant Secretary points out, without some type of mechanism such as the annual adjustment procedure, "a lender's reserve could grow out of proportion," resulting in claims being paid by HUD in excess of the 10 percent statutory limitation. The regulations also provide that the first 10 percent annual adjustment to the insurance reserve shall not be made until 5 years "after the issuance of a contract of insurance to such institution."

As explained in the submission, in 1972 the GECC entered into a contract of insurance with HUD authorizing it to make insured loans. However, for various reasons, GECC did not elect to begin its active participation in the program until 1977. Consequently, GECC's reserve account was adjusted downward by 10 percent in its first year of actual participation in the insured loan program and in every year since then. The total of all of these annual adjustments during the 5-year period from 1977 through 1982 will amount to several million dollars.

The specific question raised by the Assistant Secretary in his letter to us is whether the waiver authority granted HUD in section 2(b) of the National Housing Act, 12 U.S.C. § 1703(e), might give HUD a basis for relieving GECC from the "injustice" that would otherwise be imposed on it by a literal interpretation of the regulation. Presumably, such a waiver, if granted, would restore to GECC's loss reserve account the total of all of the annual downward adjustments made since 1977 and would further provide that

future adjustments in its reserve account should not be made until 1982—5 years after GECC actually began to make insured loans.

For the reasons set forth below, we would have no objection if HUD restores the monies in question to GECC's loss reserve account, waiting until 1982 before initiating the annual adjustment process.

In our view, it is not even necessary for the Secretary to exercise his waiver authority under 12 U.S.C. § 1703(e) in order to achieve the result HUD desires. Although the literal language in 24 C.F.R. § 201.12(c) might be subject to a different interpretation, we believe that this regulation was clearly intended to grant a participating lender a 5-year grace period from the date on which it actually begins to make insured loans before the annual downward adjustments of the insurance reserve must commence. Until that time, no insurance reserve can possibly exist, since subsection (b) of section 201.12 of the regulations defines "general insurance reserve" as "10 percent of the aggregate amount advanced on all eligible loans originated by such insured * * *." It is not logical to require the downward adjustment process to begin whether or not there are any funds in the reserve to adjust. Accordingly, we believe that under the circumstances involved here, the regulation in question can and should be interpreted so as not to require the 10 percent annual adjustment to be made in a lender's loss reserve account until 5 years after the lender actually begins to make insured loans and report them to HUD.

Consideration of the underlying rational behind the annual adjustment process and the 5-year grace period provided for in the regulations further supports our interpretation. The apparent justification of providing for a 5-year grace period before beginning the annual downward adjustments is the fact that in any long term loan interest payments are heavily front loaded with relatively little reduction of the principal in the initial years of loan repayment. Therefore, since the purpose of the regulatory provision providing for a 10 percent annual reduction in a lender's insurance reserve is to maintain the reserve at 10 percent of the lender's outstanding insured loan balance as loans are paid off, in accordance with the 10 percent limitation on HUD's maximum liability imposed by 12 U.S.C. § 1703, HUD adopted this delay in beginning the annual adjustment process so that a lender's insurance reserve could not decline at a faster rate than the lender's outstanding loan balance. In this respect, we note that in 1972 when the grace period was increased from 3 to 5 years and the amount of the annual adjustment was lowered from 15 to 10 percent, HUD explained that the changes were necessary because of the longer maturity of new Title I loans. See 37 Fed. Reg. 10665, May 26, 1972.

It is clear that the establishment of a 5-year grace period before the annual 10 percent downward adjustments commence is premised on the assumption that during that period the lender will be

actively engaged in making Title I insured loans. As a result, during this initial 5-year period, the insurance reserve of the lender will continue to increase in magnitude and no downward adjustments will be made. However, that did not happen in this case. Although GECC entered into a contract of insurance with HUD in 1972, it did not report any loans to HUD for insurance until 1977 when it began to actively participate in the program. Until that time, its insurance reserve was nonexistent. Interpreting the regulations so as to require the 5-year grace period to begin to run once the contract of insurance is issued would, in our view, frustrate the intended purpose of the regulation where, as here, no insured loans were made by a lender during that period.

In analogous situations involving questions of statutory interpretation, our Office and the courts have recognized that when giving effect to the plain meaning of the words in the statute leads to an absurd or unreasonable result, clearly at variance with the policy of the legislation as a whole, the purpose of the statute rather than its literal words will be followed. See 50 Comp. Gen. 604, 605 (1971) and cases cited therein. In light of the even greater discretion generally accorded agencies in the interpretation of their own regulations, a strong argument can be made to support HUD's interpretation of 24 C.F.R. § 201.12(c) in a manner that would allow the 5-year grace period to begin from the date on which a lender actually began to make insured loans and report them to HUD. We believe that this interpretation would accomplish the inherent purpose of the regulation and would be consistent with the 10 percent statutory limitation.

Even if we concluded that the regulation in question was not amenable to the foregoing interpretation, it is our view that the same result could be reached pursuant to the waiver authority granted the Secretary of HUD in the National Housing Act. In this regard, 12 U.S.C. § 1703(e) provides as follows:

> The Secretary is authorized to waive compliance with regulations heretofore or hereafter prescribed by him with respect to the interest and maturity of and the terms, conditions, and restrictions under which loans, advances of credit, and purchases may be insured under this section * * *, if in his judgment the enforcement of such regulations would impose an injustice upon an insured institution which has substantially complied with such regulations in good faith and refunded or credited any excess charge made, and where such waiver does not involve an increase of the obligation of the Secretary beyond the obligation which would have been involved if the regulations had been fully complied with.

As noted by HUD in its submission, historically, this authority has only been used when a particular claim involving a regulatory violation was submitted for insurance benefits. However, the statutory language granting the Secretary of HUD authority to waive its regulations is quite broad. We do not believe it would be unreasonable to conclude that the Secretary's authority to waive any regulation in connection with the "terms, conditions, and restrictions under which loans * * * may be insured under this section

* * *" includes the provision in 24 C.F.R. § 201.12 which governs the basic question of how much money is available to pay claims on any insured loan.

The other necessary statutory requirements that must be satisfied before a waiver can be granted appear to be present here as well. As stated in the submission, GECC's record as an insured lender has been excellent. In its first 3 years of loan activity GECC has been paid only $337,957 in insurance benefits for a loan loss ratio of .2 percent compared to an average of 1.8 percent of all other Title I mobile home lenders. Considering GECC's loan record, we believe that failure to relieve it from the effects of an overly restrictive interpretation of the regulations would "impose an injustice upon an insured institution which has substantially complied with such regulations in good faith." Moreover, a waiver would not increase HUD's liability beyond that which it would have had if the regulations had been fully complied with since the waiver would merely allow the lender to receive the full benefits of the 5-year grace period enjoyed by all other lenders under the regulations.

In accordance with the foregoing, we would have no objection if HUD restores the monies already deducted from GECC's loss reserve account and, before commencing the annual adjustment process, grants GECC a grace period of 5 years from the date on which it actually began to participate in the program by making Title I loans and reporting them to HUD for insurance.

[B-204908]

General Accounting Office—Jurisdiction—Relief Authority—Accountable Officers—Drug Enforcement Cases

Drug Enforcement Administration is not required to seek relief under 31 U.S.C. 82a-1 for special agents who lose funds advanced to purchase controlled substances when potential seller absconds with Government's money. General Accounting Office's view that relief for such agents must be sought under the relief statute because they have custody of funds at time of the loss is modified. Although agents are accountable for funds advanced to them for controlled substance purchase, Administration may record loss occurring while funds were being used for purpose for which they were entrusted—investigation of sale of controlled substances—as investigative expense under authority of 21 U.S.C. 886, provided that the loss is not attributable to officer's negligence. Moreover, agency must still seek relief under 31 U.S.C. 82a-1 for funds lost under circumstances unrelated to purposes for which funds were entrusted. Modifies 59 Comp. Gen. 113; B-188894, Sept. 29, 1977; B-192010, Aug. 14, 1978; B-191891, June 16, 1980.

To The Honorable Kevin D. Rooney, Department of Justice, March 31, 1982:

You requested our decision on whether a loss of funds advanced to buy controlled substances is the kind of loss for which relief must be sought from GAO as contemplated by the relief statute, 31 U.S.C. § 82a-1, or whether the loss may be cleared by recording it as an administrative expense under the authority of 21 U.S.C.

§ 866. You stated that Drug Enforcement Administration (DEA) Special Agents who are given appropriated funds to use to buy controlled substances often fail to obtain anything of evidentiary value because the potential seller absconds with the Government's money. The agents attempt to buy the controlled substances as part of investigative activities authorized by the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended, 21 U.S.C. § 801 *et seq.* (1976). As discussed below, we agree that accountable officer relief for funds lost in connection with attempts to buy controlled substances need not be submitted to our Office under the relief statute.

The Administration's current practice is to convene a Board of Investigation to review the facts surrounding the loss. Then, if DEA's Controller is satisfied that the agent was acting without negligence, and in the performance of his or her official duties, the expenditure is recorded as an investigation expense under the authority of 21 U.S.C. § 886 (1976).

The following actual case is provided for illustrative purposes:

A Drug Enforcement Administration Special Agent was advanced $1,250.00 from the DEA Imprest Fund to be used to purchase drugs from a suspected dealer. The agent gave the $1,250.00 to a local police officer with instructions not to advance the funds, i.e., not to pay for the drugs in advance of delivery. Later, the police officer gave the funds to a cooperating individual with instructions not to front the funds to the suspected dealer. (A cooperating individual is a person, not a law enforcement officer, who is willing to provide information and serve as an intermediary between the law enforcement officer and a person suspected of illegal drug trafficking.) Despite these instructions, the cooperating individual fronted the funds to the suspected dealer who agreed to deliver 50 dilaudid tablets at a later time. The drugs were not delivered, and subsequent contact with the suspected dealer regarding the delivery of the drugs or return of the funds was unsuccessful.

This Office is authorized under 31 U.S.C. § 82a-1 to relieve an accountable officer or agent of liablity on account of a physical loss of Government funds if it concurs in the determinations by the head of the officer's agency that the loss occurred while the officer was acting in the discharge of his official duties, and without fault or negligence. In general, any Government officer or employee who by reason of his or her employment is responsible for or has custody of Government funds is an accountable officer. 59 Comp. Gen. 113, 114 (1979); B-188894, September 29, 1977.

We have consistently treated law enforcement personnel with custody of Government funds as accountable officers. For example, we held that a Special Agent of the Bureau of Alcohol, Tobacco and Firearms who had been advanced funds by a Department of Treasury Cashier for the purpose of purchasing handguns in an undercover operation was an accountable officer. *See* B-192010, August 14, 1978. We also held that DEA investigators who were given custody of Imprest Fund money to use as a "flash roll" were accountable officers. B-191891, June 16, 1980. For the same reason, a DEA agent who has been provided funds to purchase drugs from a suspected dealer is also an accountable officer.

You have raised a different question, however, which we have not previously considered. Although not phrased in exactly these terms, your letter suggests that a "loss" of funds under the circumstances described in your illustrative example is not really a physical loss within the meaning of 32 U.S.C. § 82a-1. It is apparently necessary to put certain funds at risk in the course of obtaining evidence of violations of controlled substances laws. Because of the nature of the parties being investigated, there is always the possibility that the funds will be appropriated by the investigative subject or an agent who then refuses to deliver the drugs paid for with the Government funds. We do not know the frequency with which such events occur in the course of DEA's investigative operations. Nevertheless, your letter suggests that it happens often enough to warrant the establishment of special procedures—i.e., the convening of a Board of Investigation—to determine whether the loss of investigative funds is attributable to the accountable officer's negligence or whether he performed his duties properly in every respect but the calculated risk of loss materialized anyway. In the latter case, we think it is quite appropriate to record the lost funds as a necessary investigative expense of the agency and thus clear the account. There is no need to seek relief from this Office under 31 U.S.C. § 82a-1 in these circumstances.

On the other hand, an agency may not record all losses by law enforcement officials of funds for which they are accountable as administrative expenses. If the Board finds the officer to have acted negligently, he must be held liable for all the funds lost, even though the loss took place in the course of a drug investigation. The DEA should take immediate steps to collect the amounts missing from the imprest fund which are attributable to his negligence in accordance with established claims collection procedures.

Moreover, an agency must still seek relief under 31 U.S.C. § 82a-1 when an officer or employee loses funds under circumstances which are unrelated to carrying out the purposes for which the funds were entrusted. For example, a loss in which an agent loses funds because he left them unattended in a public place while on his way to make a drug purchase should still be referred to our Office under the relief statute if the agency wishes to recommend relief.

Our previous decisions are modified insofar as they are inconsistent.

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It is improper for an agency to depart in any material way from the evaluation plan described in the solicitation without informing the offerors and giving them an opportunity to restructure their proposals. However, while agencies are required to identify the major evaluation factors applicable to a procurement, they need not explicitly identify aspects that are logically and reasonably re-

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DEFENSE ACQUISITION REGULATION
Cancellation of invitation after bid opening
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Stipulation in DAR 2-404.1(a) that an IFB should not be canceled after opening solely because of increased requirements for items being procured does not apply where the agency is unable to award a contract for the stated quantity because of insufficient funds. Rather, the stipulation applies where the stated quantity can be awarded in its entirety and additional quantities can be obtained separately under a new procurement 281

DONATIONS
Private funds
Usage
Conferences, entertainment, etc.
Official agency purpose requirement
Funds donated to the Cooperating Association Fund of the National Park Service may be used to fund a breakfast given by the wife of the Secretary of the Interior for the wives of high-level Government officials and a Christmas party given by the Secretary of the Interior for high-level Government officials and their guests only if the Secretary sustains the burden of showing that the receptions were given in connection with or to further official Park Service purposes. In this instance, from the information provided, the parties appear to be primarily social in nature 260

ENTERTAINMENT
Appropriation availability
Specific statutory authorization requirement
Funds appropriated to the Dept. of the Interior for salaries and expenses may not be used to pay for any portion of the expenses of a breakfast given by the wife of the Secretary of the Interior for the wives of high-level Government officials, or for a Christmas party given by the Secretary of the Interior for high-level Government officials and their guests. Entertainment expenses, unless specifically authorized by statute, are not properly chargeable to appropriated funds. 43 Comp. Gen. 305 and 47 *id.* 657 260

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FAIR LABOR STANDARDS ACT
Applicability
Employees of United States. (*See* OFFICE OF PERSONNEL MANAGEMENT, Jurisdiction, Fair Labor Standards Act)
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Office of Personnel Management role. (*See* OFFICE OF PERSONNEL MANAGEMENT, Jurisdiction, Fair Labor Standards Act)
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FEDERAL AID, GRANTS, ETC.
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FEDERAL GRANTS, ETC.
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FEES
Attorneys. (*See* ATTORNEYS, Fees)
Services to the public
Charges
Collection and disposition
Agency record duplication, etc.
Federal Election Commission
Federal Election Commission (FEC) proposal to have members of public who request microfilm copies of reports and statements filed with FEC pay firms which make copies is not legally objectionable. Procedure whereby FEC specifies schedule of fees in contract with duplicating firm, rather than reviewing each bill individually, would also be acceptable 285

FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES
Cost-of-living allowances
Nonforeign areas
Computation
Federal housing category
Applicability
Air traffic controllers request that cost-of-living allowance (COLA) in Molokai, Hawaii, be computed under private housing category, since, although they occupy Federal housing, they do not do so as a condition of their civilian employment. Even though Federal Personnel Manual (FPM) Letter 591-29, Oct. 30, 1978, defines Federal housing category as applying only to those who occupy Federal housing as a condition of their employment, the FPM Letter's interpretation is erroneous since it misinterprets Executive Order 12070, as amended, which refers to Federal housing as that occupied as a result of civilian employment. Therefore, the manner in which the Federal Aviation Administration has been computing the COLA is correct 266

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FOREIGN GOVERNMENTS

Defense articles and services

Foreign military sales

Bid evaluation. (*See* BIDS, Evaluation, Foreign military sales items)

GENERAL ACCOUNTING OFFICE

Jurisdiction

Civil service matters

Erroneous deductions from compensation

Time limitation on claims. (*See* STATUTES OF LIMITATION, Claims, Claims settlement by GAO, Erroneous deductions from salary)

Civil Service Reform Act of 1978

Attorney fees. (*See* ATTORNEYS, Fees, Civil Service Reform Act of 1978)

Contracts

In-house performance *v.* contracting out

Cost comparison *v.* contractor selection

Exhaustion of administrative remedies

Protester may protest directly to General Accounting Office without first exhausting administrative appeals process under OMB Circular A-76 in cases where question does not concern determination between contract and in-house performance 205

Issues not raised in protest

In resolving a bid protest, General Accounting Office (GAO) is not confined to address only those issues or arguments raised by the parties to the protest. The purpose of GAO's bid protest function is to insure compliance with the rules and regulations governing the expenditure of public funds. Accordingly, where GAO is aware of a regulation that is relevant to a particular situation, GAO will apply it appropriately, whether or not the parties have taken notice of it 238

Performance

Contract administration matter

Whether bidder will use more Government property to perform contract than it listed in its bid goes to contract compliance and is a matter for the contracting agency in the administration of the contract and does not affect the validity of the award 247

Labor-management relations

Civil Service Reform Act effect

Grievance *v.* Claims' settlement

Claims jointly submitted

Claims involving matters of mutual concern to agencies and labor organizations submitted under 4 C.F.R. Part 31 are considered joint submissions where both parties to the agreement have notice of the submission to GAO and neither party objects to our consideration of the claim. See also 4 C.F.R. 22.7(b) (1981) 247

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction—Continued
Labor-management relations—Continued
Collective bargaining agreements
Interpretation. (*See* UNIONS, Federal service, Collective bargaining agreements, Interpretation)
Relief authority
Accountable officers
Drug enforcement cases
Drug Enforcement Administration is not required to seek relief under 31 U.S.C. 82a-1 for special agents who lose funds advanced to purchase controlled substances when potential seller absconds with Government's money. General Accounting Office's view that relief for such agents must be sought under the relief statute because they have custody of funds at time of the loss is modified. Although agents are accountable for funds advanced to them for controlled substance purchase, Administration may record loss occurring while funds were being used for purpose for which they were entrusted—investigation of sale of controlled substances—as investigative expense under authority of 21 U.S.C. 886, provided that the loss is not attributable to officer's negligence. Moreover, agency must still seek relief under 31 U.S.C. 82a-1 for funds lost under circumstances unrelated to purposes for which funds were entrusted. Modifies 59 Comp. Gen. 113; B-188894, Sept. 29, 1977; B-192010, Aug. 14, 1978; B-191891, June 16, 1980 313

GRANTS
Comprehensive Employment and Training Act (CETA)
Participating agencies
Appropriation availability
Retirement contributions for CETA-assigned employees
Reimbursement
General Services Administration does not have authority to pay retirement contributions to state retirement system for Comprehensive Employment and Training Act (CETA) employee assigned to it by the Metropolitan Community Colleges District, Kansas City, Missouri, a CETA subgrantee. 46 Comp. Gen. 115, distinguished 242
Grant-funded procurements. (*See* CONTRACTS, Grant-funded procurements)

HOUSING AND URBAN DEVELOPMENT DEPARTMENT
Title I insured loans
Lender's loss reserve account
Annual adjustment
Commencement date
Regulation in 24 C.F.R. 201.12(c) which provides that annual downward adjustments in a lender's loss reserve account, out of which all insured loan claims are paid, should begin 5 years after an insurance contract is issued to the lender is based on assumption that during initial 5-year period the lender will be actively engaged in making title I insured loans. Since the insurance reserve does not even come into existence until the insured lender actually begins to make loans and report them to Housing and Urban De-

HOUSING AND URBAN DEVELOPMENT DEPARTMENT—Continued Page
Title I insured loans—Continued
Lender's loss reserve account—Continued
Annual adjustment—Continued
Commencement date—Continued
velopment (HUD) for insurance, HUD should not interpret the regulations as requiring adjustments in the reserve of a lender to commence until 5 years after the lender begins to make insured loans .. 308
Waiver of regulations
Even if regulation in 24 C.F.R. 201.12(c) is interpreted as requiring the annual adjustments in a lender's loss reserve account to commence 5 years after the contract of insurance is approved, whether or not the lender has actually been making insured loans during that period, HUD is authorized under 12 U.S.C. 1703(e) to waive that regulatory provision where, as here, such an interpretation would be unfair to a lender that has substantially complied with the regulations in good faith 308

INTERIOR DEPARTMENT
Appropriations. (*See* APPROPRIATIONS, Interior Department)

LEAVES OF ABSENCE
Annual
Accrual
Credit basis
Service creditable under Civil Service Retirement Act
Radio Free Europe employees
Effective Feb. 15, 1981, section 2313 of the Foreign Service Act of 1980 amended 5 U.S.C. 8332 to allow civil service retirement credit for employment with Radio Free Europe. Since 5 U.S.C. 6303(a) provides that service creditable under section 8332 shall be used in determining annual leave earning category, employee's leave accrual category should be adjusted effective Feb. 15, 1981, to credit service with Radio Free Europe. Enactment of section 2313 does not entitle employee to annual leave benefits under 5 U.S.C. 6301, *et seq.*, for period of non-Federal service with Radio Free Europe or to additional leave for periods of covered service prior to Feb. 15, 1981 279

LOANS
Government insured
Property improvement and mobile home loans
Title I of the National Housing Act. (*See* HOUSING AND URBAN DEVELOPMENT DEPARTMENT, Title I insured loans)

MILITARY PERSONNEL
Acceptance of foreign presents, emoluments, etc.
Foreign government employment
Retired pay adjustment
Pub. L. 95-105 effect
Final approval of employment delay
Congress has authorized retired Regular officers of uniformed services to accept compensation for employment by a foreign government if Secretary concerned and Secretary of State approve. In

MILITARY PERSONNEL—Continued Page
Acceptance of foreign presents, emoluments, etc.—Continued
Foreign government employment—Continued
Retired pay adjustment—Continued
Pub. L. 95-105 effect—Continued
Final approval of employment delay—Continued
decision B-198557, July 17, 1980, we held that a retiree who accepts foreign employment after receiving Secretary of the Air Force's approval, but before Secretary of State's, is subject to the rule in B-178538, Oct. 13, 1977, that he must repay the United States an amount equal to compensation received from foreign government. However, we also held that when final approval is given, withholding of retired pay is to be discontinued except to the extent that retired pay was paid for the period of unauthorized employment by a foreign government. B-193562, Dec. 4, 1979, is overruled to the extent it is inconsistent with these decisions; B-198557, July 17, 1980, is clarified 306
Pay. (*See* **PAY**)
Saved pay
Promotions. (*See* **PAY, Saved, Promotions**)
Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)

OFFICE OF PERSONNEL MANAGEMENT
Jurisdiction
Fair Labor Standards Act
Exemption status determination
National Federation of Federal Employees requests a determination from this Office on the exempt/nonexempt status under the Fair Labor Standards Act of civilian aircraft pilots. Under 29 U.S.C. 204, the Office of Personnel Management is authorized to administer FLSA with respect to Federal employees. In B-51325, Oct. 7, 1976, we stated that the role granted to OPM in administering FLSA necessarily carries with it the authority to make final determinations as to whether employees are covered by its various provisions. Accordingly, since OPM has in fact reviewed the claims of the employees and has determined them to be exempt from FLSA as administrative employees, this Office will not consider the claims 191

OFFICERS AND EMPLOYEES Page

Allowances

Cost-of-living

Nonforeign areas. (*See* **FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES, Cost-of-living allowances, Nonforeign areas)**

Physicians Comparability Allowances. (*See* **ALLOWANCES, Physicians Comparability Allowances)**

Dual compensation

Concurrent military retired and civilian service pay. (*See* **COMPENSATION, Double, Concurrent military retired and civilian service pay)**

Leaves of absence. (*See* **LEAVES OF ABSENCE)**

Overtime. (*See* **COMPENSATION, Overtime)**

Transfers

Temporary quarters

Sharing commercial lodging quarters

Pro rata reimbursement

Propriety

Transferred employee reclaims amount of temporary quarters subsistence expenses administratively reduced to 50 percent pro-rata share based solely on the fact that the quarters were shared by another employee during period of TQSE claim. Since employee actually incurred the expense, and in the absence of any evidence that occupancy by a second person increased the rental cost or that the amount claimed was otherwise unreasonable, the full amount of the claim is allowable 274

Step-increases in compensation

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

PAY

Promotions

Saved pay. (*See* **PAY, Saved, Promotions)**

Retired

Survivor Benefit Plan

Beneficiary payments

Bankruptcy court orders. (*See* **BANKRUPTCY, Chapter 13 proceeding, Bankrupt annuitants, etc., Survivor Benefit Plan)**

Dependency and Indemnity compensation

Offset

Children's benefit apportionment effect

A Survivor Benefit Plan (SBP) participant died, leaving a widow and dependent child by a former marriage. Both widow and child became entitled to separate monthly Veterans Administration Dependency and Indemnity Compensation (DIC), but since the child was living with the former spouse, the widow's DIC was reduced below the rates set by 38 U.S.C. 411(a) because of 38 U.S.C. 3107(b), under which a portion of the DIC is paid to the child. The widow's DIC must be deducted from her monthly SBP annuity; however, in a case where a portion of the DIC is paid to the child, the annuity is to be reduced only by the actual DIC payment the widow receives 298

PAY—Continued Page
Retired—Continued
Survivor Benefit Plan—Continued
Dependency and Indemnity compensation—Continued
Offset—Continued
Refund of contributions
When upon a service member's death the surviving spouse is eligible for both a Survivor Benefit Plan (SBP) annuity and Veterans Administration Dependency and Indemnity Compensation (DIC), the amount of the SBP payment is reduced by the amount of the DIC and a corresponding refund of the member's SBP contributions is due the spouse. If DIC entitlement is subsequently lost due to remarriage of the spouse, SBP may be reinstated provided the refund is returned. However, no refund is payable once the benefit of the plan has been derived. Accordingly, when a refund is repaid and SBP payments are thereafter made, no additional refund is authorized should the spouse again become eligible for DIC 287
Refund entitlement
Children's benefit apportionment effect
Where a widow's Survivor Benefit Plan annuity is reduced pursuant to 10 U.S.C. 1450(c) by the award of Dependency and Indemnity Compensation (DIC), the computation of the cost of the recalculated annuity for refund of cost of participation is to be predicated on the actual monthly DIC payment the widow receives in her own right under 38 U.S.C. 411(a), as reduced by apportionment to a child under 38 U.S.C. 3107(b) 298
Saved
Promotions
Warrant officer to commissioned officer
Public Law 96-343 applicability
Intervening enlisted status
Army warrant officer accepted an appointment as a commissioned officer in the Air Force following his completion of training at the Air Force Officer Training School. Under the revised language of 37 U.S.C. 907 he is entitled to saved pay as a warrant officer, notwithstanding the fact that he began officer training 6 days after he was released from active duty in the Army and the fact that he was paid as a staff sergeant while attending Officer Training School 296
Withholding
Debt collection
Alimony and child support
Garnishment order overturned
Reclaim denied
The Air Force, which had been complying with a Florida state court order garnishing the pay of one of its members from June 1976 through May 1980 for child support, incurred no obligation to reimburse the member when the garnishment was later set aside by the court. The original court order was reviewed by the Air Force which found it appeared valid on its face. Therefore, pursuant to 42 U.S.C. 659, the Air Force was required to comply with it, and by doing so incurred no liability. Also, 42 U.S.C. 659(f) (Supp. III, 1979) currently provides that no agency or disbursing officer

PAY—Continued Page
Withholding—Continued
Debt collection—Continued
Alimony and child support—Continued
Garnishment order overturned—Continued
Reclaim denied—Continued
will be held liable for making payments when the legal process appears valid on its face 229

SMALL BUSINESS ADMINISTRATION
Small Business Act
Amendment
Public Law 95-507
Section 211
Subcontracting plans in negotiated procurements
Provision of Pub. L. 95-507 (95th Cong., 2nd sess.), requiring the negotiation with awardee of a small business subcontracting plan prior to award, is not applicable to protested procurement because contract offered no subcontracting possibilities. Record shows that awardee maintained an in-house capability to perform the contract work 194

STATUTES OF LIMITATION
Claims settlement by GAO
Erroneous deductions from salary
Payroll adjustment
Refunds
An adjustment to an employee's pay to correct erroneously withheld deductions is a matter cognizable by the General Accounting Office and the Act of Oct. 9, 1940, 54 Stat. 1061, as amended, 31 U.S.C. 71a, bars refunds beyond 6 years 295

TAXES
State
Government immunity
Incidence of tax on vendor
Public utility license
Commission order to bill customers effect
Veterans Administration Medical Centers are not constitutionally immune from paying Alabama public utility license tax which was added to their bills by Alabama Power Company. Legal incidence of state tax, which is levied on vendor of services to United States, and which is not required by taxing statute to be passed through to consumer, is on vendor, not the United States. United States is not constitutionally immune from such vendor tax. Utility commission order requiring utility to bill customers for tax does not transfer legal incidence of tax to customers 257

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TELEPHONES
Private residences
Prohibition
Exceptions
Federal Secure Telephone Service (FSTS) installation
National security justification
General Services Administration proposal to install Federal Secure Telephone Service (FSTS) telephones in private residences for official Government business of a sensitive nature subject to National Security Agency (NSA) guidelines does not violate 31 U.S.C. 679, which prohibits the expenditure of appropriated funds for telephone service installed in private residences. FSTS system has sufficient safeguards built in to reduce danger of abuses this statute was intended to address 214

UNIONS
Federal service
Collective bargaining agreements
Interpretation
Not for GAO consideration
Grievance procedures applicability
The question of whether the temporary promotion provisions in a collective bargaining agreement apply to unit employees temporarily serving in nonunit positions is an issue of contract interpretation which is customarily adjudicated solely under grievance-arbitration provisions, and is therefore not appropriate for resolution by General Accounting Office (GAO). Accordingly, this Office will defer to labor-management procedures established under 5 U.S.C. Chapter 71 274
Dues
Overpayment
Government's right to recover
Waiver
Agency erroneously continued to deduct union dues from three employees who were promoted out of bargaining unit and remitted amounts to union. Upon discovering the error, the agency refunded the deductions to the employees and collected the amounts erroneously paid from the union. Since the record shows that the union was not at fault in receiving these payments, repayment is waived pursuant to 5 U.S.C. 5584 218

WORDS AND PHRASES
"Legal incidence of tax"
Veterans Administration Medical Centers are not constitutionally immune from paying Alabama public utility license tax which was added to their bills by Alabama Power Company. Legal incidence of state tax which is levied on vendor of services to United States, and which is not required by taxing statute to be passed through to consumer, is on vendor, not the United States. United States is not constitutionally immune from such vendor tax. Utility commission order requiring utility to bill customers for tax does not transfer legal incidence of tax to customers 257

WORDS AND PHRASES—Continued Page

"Physicians Comparability Allowances"

Physician who voluntarily terminated his service under a Federal Physicians Comparability Allowance Agreement prior to completing 1 year of service under that agreement is required to refund the comparability allowance payments he received pursuant to his agreement. The obligation to repay the allowance received may not be waived since the payments were proper when issued, even though the physician may have signed the agreement on the basis of the erroneous advice from a Government employee. Nor may the debt be reduced by tax or other deductions since those deductions constitute constructive payments, the refund of which is for the consideration of revenue authorities concerned 292