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[B-166130]

Transportation—Dependents—Military Personnel—Dislocation Allowance—First Duty Station

The place where a member of the uniformed services reenlisted after discharge from his last duty station with no further assignment contemplated is the place from which he was ordered to active duty within the meaning of paragraph M9004–1, item 1. of the Joint Travel Regulations. which provides that a dislocation allowance will not be payable in connection with permanent change-of-station travel performed from home or from place from which ordered to active duty to first permanent duty station upon reenlistment; and, therefore, the member transferred on temporary duty for hospital treatment is not entitled to a dislocation allowance to relocate his household incident to his transfer to the hospital since the hospital was his first permanent assignment under the reenlistment.

Transportation—Dependents—Military Personnel—Dislocation Allowance—Hospital Transfers

Since under paragraph M7004–5 of the Joint Travel Regulations a member of the uniformed services whose dependents had moved at Government expense "as for a permanent change of station" incident to his assignment to a hospital for extended treatment would be entitled to the further transportation of his dependents upon his transfer from the hospital to a permanent duty station, he would also be entitled to a dislocation allowance upon the relocation of his household incident to the transfer from the hospital.

To C. Loftin, Department of the Navy, January 6, 1971:

By third endorsement dated September 3, 1970, the Chief of Naval Personnel transmitted your letter of June 16, 1970, and enclosures, requesting a decision whether the claim of Bobby J. Radcliff, SFP–3, United States Navy, for dislocation allowance is payable in the circumstances presented. The request has been assigned PDTATAC Control No. 70–48.

The enclosures include a copy of Standard Transfer Order issued by the Navy Recruiting Station, Philadelphia, Pennsylvania, on November 10, 1969, which directed the member who had reenlisted there that day to report not later than 0800 December 11, 1969, to the Commanding Officer, Naval Station, Philadelphia, for further assignment. Notation on the order shows that the member reported on December 10, 1969, as directed.

By orders dated January 13, 1970, the member was transferred to the U.S. Naval Hospital in the same city for temporary duty under treatment and on March 9, 1970, he was transferred to the U.S. Naval Hospital, San Diego, California, for further temporary duty under treatment. Memorandum endorsement dated April 9, 1970, certified the hospitalization would be for a prolonged period of time.

You forwarded a claim by the member for dislocation allowance incident to the travel of his dependents on May 7 and 8, 1970, from Vancouver, Washington, to San Diego, California, where he was undergoing treatment, and a copy of a voucher showing payment has

been made for the dependents' travel. You make reference to paragraph M9003–3b, Joint Travel Regulations, which authorizes payment of a dislocation allowance, as for a permanent change of station, upon the relocation of the household of a member's dependents incident to his transfer to a hospital for prolonged treatment, and to paragraph M9004–1(1) of the regulations which precludes payment of such allowance in connection with permanent change-of-station travel from home or place from which ordered to active duty to first permanent duty station upon reenlistment. You express doubt whether on the basis of our decision dated March 14, 1969, 48 Comp. Gen. 603, the provisions of paragraph M9003–3b would be applicable in the submitted claim. You therefore request a decision as to the legality of payment of the member's claim. Also, if it be determined that the claim is payable, you ask whether payment of another dislocation allowance would be authorized upon the member's transfer from the hospital to a permanent duty station, if otherwise proper.

By third endorsement dated September 3, 1970, the Chief of Naval Personnel reported that the member's personnel records show he was discharged on board the U.S.S. *Annapolis* at Philadelphia, Pennsylvania, on October 31, 1969, and that he reenlisted at the U.S. Navy Recruiting Office, Philadelphia, on November 10, 1969. It was further reported that the transfer to the U.S. Naval Hospital, San Diego, California, for prolonged treatment constituted the member's first permanent assignment subsequent to his reenlistment.

The Chief of Naval Personnel expressed the opinion that, on the basis of our ruling in 36 Comp. Gen. 71, the member is not entitled to a dislocation allowance for the movement of his dependents incident to his assignment to the Navy Hospital in San Diego, California, since it was his first permanent assignment after his reenlistment. However, it is his view that under the principles stated in 48 Comp. Gen. 603, dated March 14, 1969, the member would be entitled to a dislocation allowance upon further transfer from the hospital at which he stayed for prolonged treatment to a permanent duty station. But since the applicable Navy Travel Instructions provide that a hospital may not be considered as the permanent duty station of a member undergoing prolonged treatment, the Chief of Naval Personnel expresses doubt as to whether a dislocation allowance may be paid upon the member's next change of permanent station and he requests a determination in the matter.

On the basis of our ruling in 48 Comp. Gen. 603, chapter 9 of the Joint Travel Regulations was amended effective January 1, 1970, by adding subparagraph b to paragraph M9003–3 to provide for the payment of a dislocation allowance "as for a permanent change of station"

to a member with dependents who relocates his household incident to his transfer from inside the United States to a hospital within the United States for observation and treament, provided a statement of prolonged hospitalization has been issued by the commanding officer of the receiving hospital. However, paragraph M9004–1, item 1, of the regulations provides in pertinent part that a dislocation allowance will not be payable in connection with permanent change-of-station travel performed from home or from place from which ordered to active duty to first permanent duty station upon reenlistment.

A member who severs all connection with his military service at his old station when discharged under orders that contemplate nothing more than that he be processed for discharge, and who thereupon reenlists and proceeds under orders issued at point of reenlistment to a new station, would not be entitled to a dislocation allowance upon the relocation of his dependents incident to such orders. 36 Comp. Gen. 71; 38 *id.* 405.

Under other circumstances, the relocation of the member's household incident to his transfer to the U.S. Naval Hospital, San Diego, California, for prolonged treatment would have entitled him to a dislocation allowance under the provisions of paragraph M9003–3b, Joint Travel Regulations. However, since the member was discharged from his last duty station with no further assignment contemplated, Philadelphia, where he reenlisted 10 days later, must be considered as the place from which he was ordered to active duty within the meaning of paragraph M9004–1, item 1, of the regulations, and he is not entitled to a dislocation allowance for the relocation of his household incident to his transfer to San Diego for prolonged hospitalization.

While an assignment to a hospital solely for prolonged medical treatment is not a permanent duty assignment, under the provisions of paragraphs M9003–3b and M9004–1, item 1, of the regulation it is to be treated the same as a permanent duty assignment for dislocation allowance purposes. Accordingly, there is no authority for the payment of the member's claim, and the submitted voucher will be retained here.

The question pertaining to the propriety of payment of a dislocation allowance upon the relocation of the member's household incident to his transfer from the hospital to a permanent duty station is not properly for consideration by our Office at this time as it does not specifically pertain to the member's claim. However, in view of the interest expressed by the Chief of Naval Personnel in the matter, it may be stated that since under paragraph M7004–5, Joint Travel Regulations, a member whose dependents had moved at Government expense as for a permanent change of station incident to his assignment to a

hospital for extended treatment would be entitled to the further transportation of his dependents upon his transfer from the hospital to a permanent duty station, we are of the opinion that, if otherwise eligible, he would also be entitled to a dislocation allowance upon the relocation of his household incident to such transfer. *Cf.* 48 Comp. Gen. 603.

[B–151107]

Officers and Employees—Severance Pay—Reassignment Refused

The refusal of a civilian employee to accept an order of reassignment to another geographical area, made for the best interests of the Government, constituting insubordination within the meaning of delinquency and misconduct as contemplated by section 550.705 of the Civil Service Regulations, the employee is not entitled to severance pay under 5 U.S.C. 5595, which is authorized for an employee separated "through no fault of his own" when he declines to accept an assignment to another commuting area in connection with a transfer of functions or a reduction in force and therefore loses his job because of technological innovations and improved efficiency, or the closing or curtailment of Federal installations.

Appointments—Applications for Employment—Conditional

The indication in a Standard Form 57, Application for Federal Employment, that the applicant would not accept employment outside his State of residence does not make him as a Federal employee immune from reassignment, as the purpose of the Form 57 is to inform appointing officers and not to embody a contract of employment; and, therefore, the condition imposed in the employment application does not entitle an employee who refuses to accept reassignment outside the initial State of employment in the interests of the Government to the severance pay authorized in 5 U.S.C. 5595 for employees involuntarily separated from the service through no fault of their own.

Officers and Employees—Severance Pay—Separation Status

The distinction between separations involving a transfer of function or reduction-in-force situation and a declination of reassignment situation is that in the first situation the primary purpose of an employee's transfer is to meet a responsibility to the employee, whereas the second situation is an ordered reassignment of an employee for the good of the service—the first situation involves a declination of an offer; the second, a refusal to follow an order. The fact that equal treatment for employment purposes is accorded to employees in both situations under the Displaced Employee Program provided by section 330.301 of the Civil Service Regulations does not negate the distinction to require equal treatment of employees in both situations for severance pay purposes.

To Clyde E. Ahrnsbrak, United States Department of Commerce, January 7, 1971:

This is in reference to your letter of October 16, 1970, and enclosures, requesting an advance decision whether Mr. Kaarlo J. Otava, a former employee of the Department of Commerce, is entitled to severance pay under 5 U.S.C. 5595, and the regulations promulgated pursuant thereto as set forth in 5 CFR 550.701 through 550.708.

The enclosures with your letter included a letter dated August 28, 1970, to you from Mr. Francis X. Helgesen, Attorney at Law, submitting a claim on behalf of Mr. Otava, and a voucher for $5,264, which represents the amount which would be due Mr. Otava for

severence pay from September 20, 1970, to October 3, 1970, inclusive, if he is determined to be entitled to such pay. The total amount to which he would be entitled (up to the date of expiration of severance pay entitlement) is stated to be $13,761.70.

The facts and circumstances relating to Mr. Otava's employment and separation are summarized in your letter as follows:

1. Mr. Otava has been employed by the Department of Commerce continuously since July 24, 1961, in the field service of the Economic Development Administration (formerly, Area Redevelopment Administration) with headquarters at Mountain Iron, Minnesota, and Duluth, Minnesota.

2. In connection with his original appointment, Mr. Otava executed SF-57, Application for Federal Employment, on June 9, 1961. Question 14, "Availability Information," contained a question, "F. If you will accept appointment only in certain locations, list them:" In response to this question, Mr. Otava entered the following notation: "Anywhere in Minnesota."

3. In March 1970, the Economic Development Administration (a) initiated an extensive reorganization of its field service and (b) adopted a program the objectives of which were to improve the field service through rotational assignments and formal training. This program was announced in EDA Bulletin No. 15-70, a copy of which is enclosed.

Insofar as is pertinent to this case, the reorganization involved a transfer of the EDA Area Office from Duluth, Minnesota, to Chicago. This transfer included all positions (approximately 50 positions) in the Area Office in Duluth, except the claimant's position of Economic Development Representative and two other positions, a Construction Manager position and a secretarial position.

4. On March 20, 1970, Mr. Otava was notified that in line with the provisions of the program, the Deputy Assistant Secretary for Economic Development had decided that it would be in the best interests of the EDA to reassign him to Jackson, Mississippi, and he was instructed to report there May 11, 1970.

5. On April 8, Mr. Otava accepted the reassignment, reserving his rights of appeal and of legal recourse. Subsequently, however, he notified the personnel officer that "after further consideration of said reassignment and because of my family's unwillingness to move and because of the further complication of the problem caused by the death of my mother," he would not be able to accept the reassignment.

6. On May 18, 1970, a notice of proposed removal was issued to Mr. Otava for failure to accept reassignment in compliance with EDA Bulletin No. 15-70.

7. Mr. Otava replied in writing to the notice of proposed removal, stating the following reasons for his failure to accept reassignment:

> "1. *AGE:* The undersigned is 60 years of age (born November 29, 1909) and that he will reach the age of retirement on November 29, 1971 when he reaches his 62nd birthday.
>
> "2. *HARDSHIP:* The undersigned owns his home in Mt. Iron, Minnesota; that his wife resides therein with a dependent nephew (age 16) and for which he is the sole source of support; that said nephew is a junior in High School in Mt. Iron; that it is neither economically practical or feasible to remove the family from Mt. Iron; that the real estate market is such in Mt. Iron that the undersigned would suffer great economic loss if he is forced to sell his home.
>
> "3. Recent death of the undersigned's mother on April 11, 1970 left him with an estate to settle.
>
> "4. Also, the undersigned will have twelve years of Government Service by July 24, 1971, and will then be able to continue his A.F.G.E. Hospitalization and Government Life Insurance at present group rates; but if separated from the service at this time he will lose these rights.
>
> "5. The Agency's present authority expires as of July 1, 1970 and proposed legislation to extend the life of the Agency is for a one-year extension and he cannot economically or practically accept an assignment which will be for one year and then have the expense of moving back to Minnesota where he expects to retire.

"6. *NO MOBILITY AGREEMENT:* The undersigned did not sign a mobility agreement in his Form 57 when he went to work for the Department of Commerce in 1961, nor was such mobility agreement requested.

"7. *SUCH ASSIGNMENT IS NOT FOR THE GOOD OF THE SERVICE:* The undersigned has spent his entire adult life in the Northeast Minnesota area, and is well acquainted with the business community and local public officials, and is therefore able to carry on his duties as an Economic Development Representative much more effectively than he could in Jackson, Mississippi, an area about which he knows little."

8. After consideration of Mr. Otava's reply, and consideration of the reasons on which EDA relied as a basis for the proposed separation, a notice of final decision to remove Mr. Otava was issued to him June 5, 1970, separating him effective June 26, 1970.

9. Since June 26, the position from which Mr. Otava was separated has been vacant. The work has been conducted by employees working out of the Area Office in Chicago. It is expected, however, that in due course a suitable replacement will be located and assigned or appointed to the position.

You raise the following questions for our consideration:

(1) Is the claimant excluded by regulations prescribed by the President or such officer or agency as he may designate?

(2) Is the claimant excluded by the conclusion that his removal was removal for cause on charges of misconduct, delinquency, or inefficiency within the meaning of the statute?

The claimant's separation was for the reason that he would not accept an assignment in another geographical area. This assignment does not appear to have been made in connection with a transfer of function or a reduction-in-force situation so as to qualify for severance pay under section 550.705 of the Civil Service Regulations which provides:

§ 550.705 *Failure to accept assignment.* When an employee is separated because he declines to accept assignment to another commuting area and the proposed assignment is the result of, or in connection with, a transfer of function or a reduction in force situation, the separation is an involuntary separation not by removal for cause on charges of misconduct, delinquency, or inefficiency for purposes of entitlement to severance pay.

The above-quoted regulation sets forth the situations under which severance pay may be allowed to employees who would otherwise be excluded from such entitlement by reason of failure to accept assignment to another commuting area. In this regard, an agency has authority to promote, demote, or reassign an employee. 5 CFR 335.102; *Madison* v. *United States*, 174 Ct. Cl. 985 (1966), cert. denied, 386 U.S. 1037 (1967). The failure of an employee to comply with an order, made in the best interests of the Government, in this case the reassignment of Mr. Otava to Jackson, Mississippi, amounts to insubordination, a cause to justify discharge of an employee. *Schmidt* v. *United States*, 153 Ct. Cl. 407 (1961). See also *Studemeyer* v. *Macy*, 321 F. 2d 386 (1963); *Erenreich* v. *United States*, 164 Ct. Cl. 214 (1964); *May* v. *United States*, 230 F. Supp. 659 (1963); and Federal Personnel Manual, chapter 751, subchapter 2. Therefore, our view is that Mr. Otava's removal was for cause under the general heading of "misconduct, delinquency, or inefficiency." See 45 Comp. Gen. 811 (1966).

Section 5595 of Title 5, United States Code, provides, in this respect, as follows:

> (b) Under regulations prescribed by the President or such officer or agency as he may designate, an employee who—
>
> (1) has been employed currently for a continuous period of at least 12 months; and
>
> (2) is involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency; is entitled to be paid severance pay in regular pay periods by the agency from which separated.

By reason of the foregoing both questions submitted by you require an affirmative answer which negates any allowance of severance pay in the instant case.

The following is a discussion of the points raised in Mr. Helgesen's letter and in your letter. Mr. Helgesen quotes the following paragraph from Economic Development Administration Bulletin 15–70:

> Since rotational assignments are expected to be in the best interests of the Economic Development Administration, the success of Representatives will, in large measure, be dependent upon their willingness to accept these assignments. In this respect, all new Representatives will be required to sign a mobility agreement as a condition of employment.

In regard thereto, he contends that since Mr. Otava at the time of his appointment was asked and declined to sign a mobility agreement and advised the Department that he would not accept employment away from the State of Minnesota, willingness to accept employment outside the State was not initially and never has been a condition of his employment. Mr. Helgesen further contends that under these circumstances it is contrary to law and in violation of the "severance pay" provisions to equate a refusal to accept reassignment with misconduct, delinquency, or inefficiency.

As hereinabove indicated, Mr. Otava executed Standard Form 57, Application for Federal Employment, on June 9, 1961, and stated thereon that he would accept employment "Anywhere in Minnesota." However, it has been stated by the Court of Claims that it is well known that Form 57 is to inform appointing officers, not to embody a contract of employment, and does not make an employee legally immune from reassignment. See *Burton* v. *United States*, 186 Ct. Cl. 172 (1968). Accordingly, and since refusal to accept an order of reassignment constitutes insubordination, and as such is within the general heading of delinquency and misconduct, we cannot agree with Mr. Helgesen's contentions.

In your letter, you refer to the legislative history of the basic act, the Federal Employees Salary Act of 1965, Public Law 89–301, approved October 29, 1965, 79 Stat. 1118, 5 U.S.C. 5595, which contained the severance pay provisions and, as you point out, it is clear that the program was designed to benefit the employee who is involuntarily

separated from Federal service *through no fault of his own*. In this connection, you say:

> The language "through no fault of his own" is not further specifically amplified in the debates, but light is shed on the meaning of the phrase by the remarks of several Members of the Congress. While it appears that involuntary separations due to, or in connection with, the closing or curtailment of Federal installations were uppermost in their minds, it appears that involuntary separations because of dislocations resulting from technical innovations and improved governmental efficiency were also of concern.

The references in the legislative history, as quoted by you from the Congressional Record, September 30, 1965, p. 25673, and Congressional Record, October 22, 1965, p. 28154, indicate that the employees to be benefited are those who have "lost their jobs" because of technological innovations and improved efficiency. In the instant case, Mr. Otava lost his job because of his refusal to accept a reassignment. In such circumstances, it would be inappropriate to say that it was through no fault of his own.

In reference to the discussion in your letter concerning the alleged anomalous and inequitable distinction between separations involving a transfer of function or reduction-in-force situation and a declination of reassignment situation, the distinction as pointed out in our decision 47 Comp. Gen. 56 is that in the first situation the primary purpose of an employee's transfer would be to meet a responsibility to the employee rather than the agency concerned, whereas the second situation is an ordered reassignment of an employee for the good of the service. In the first instance there is involved a declination of an offer—in the second a refusal to follow an order.

Concerning your reference to equal treatment of the above two situations under the Displaced Employee Program, as provided by section 330.301 of the Civil Service Regulations, as being virtually a negation of the significance of the distinction insofar as severance pay is concerned, it suffices to say that the decision of the Civil Service Commission to include such former employees within the priority benefits of the Displaced Employees Program for reemployment purposes does not require that the employees be equally treated for severance pay purposes.

The voucher, forwarded with your submission, is returned herewith and may not be certified for payment. Mr. Helgesen's letter to you, with enclosures, is also returned herewith.

[B–170962]

Compensation—Double—Exemptions—Dual Compensation Act—Disability "As a Direct Result of Armed Conflict," Etc.

The conclusion that the exemption provision in the Dual Compensation Act (5 U.S.C. 5532(c)) to the requirement that the retired pay of a Regular officer

must be reduced when employed as a civilian by the Federal Government (5 U.S.C. 5532(b)) applies only if the retirement was the direct result of armed conflict or was caused by an instrumentality of war in wartime is justified on the basis of the legislative history of the provision and its longstanding administrative interpretation; and, therefore, *Mross* v. *United States*, 186 Ct. Cl. 165, holding that a disability—a perforated eardrum—that was war-incurred but was not disabling and did not constitute a significant factor in the officer's retirement met the requirements of the exception to the dual compensation restriction will not be followed as the case is based on the particular facts involved.

To the Secretary of the Army, January 11, 1971:

Further reference is made to letter of October 2, 1970, from the Assistant Secretary of the Army (Manpower and Reserve Affairs) requesting a decision on several questions concerning the application of certain provisions of the Dual Compensation Act, 5 U.S.C. 5532(c), in the case of officers of a Regular component of a uniformed service who retire for disability under the circumstances stated.

Section 201(a) of the Dual Compensation Act, Public Law 88–448, approved August 19, 1964, codified in 5 U.S.C. 5532(b), provides that a retired officer of a Regular component of a uniformed service, who holds a civilian position under the United States, is entitled to receive the full pay of that position, but that during the period for which he receives such pay, his military retired pay is required to be reduced under the formula there prescribed.

Section 201(b) of the same act, 5 U.S.C. 5532(c), provides, in pertinent part, that such reduction in retired pay does not apply to a retired officer of a Regular component of a uniformed service—

> (1) whose retirement was based on disability—
> (A) resulting from injury or disease received in line of duty as a direct result of armed conflict; or
> (B) caused by an instrumentality of war and incurred in line of duty during a period of war * * *.

Section 202 of the Dual Compensation Act, now 5 U.S.C. 3501, includes among preference eligible employees a retired member of the uniformed service retired for disability for the reasons stated above; and section 203 of that act, now 5 U.S.C. 6303, allows credit to such a member for active military service for the purpose of annual leave as a civilian employee.

The Assistant Secretary states that paragraph 4–32, Army Regulation 635–40, implements 5 U.S.C. 5532, and that that paragraph provides for a determination that a disability resulted from armed conflict or instrumentality of war "only when it is also determined that the disability so incurred in itself renders the member physically unfit." He says that where a member is retired because of physical disability and a contributory disability resulting from armed conflict or instrumentality of war is present, but not, *per se*, unfitting, he is denied the special advantages of 5 U.S.C. 5532 and other sections.

The Assistant Secretary further states that the cited Army regulation is based on the consistent position of the Army Judge Advocate General that, for a member to be considered as having been retired for disability incurred in combat, there must be a direct causal connection between the disability for which retired and combat. In this connection, it is stated that the regulation is in accord with our decisions of October 13, 1964, B–155090, and November 19, 1968, B–165515.

The Assistant Secretary refers to the decision of the Court of Claims in the case of *Mross* v. *United States*, 186 Ct. Cl. 165 (1968), involving the dual compensation provisions of section 212 of the Economy Act of 1932, as amended, 5 U.S.C. 59a (1958 ed.)—this section has been repealed by section 402(a)(20) of the above-mentioned act of August 19, 1964, Public Law 88–448. Since the holding in the *Mross* case is contrary to our decision of October 13, 1964, B–155090, involving the same case, the following questions are asked:

a. Does the Court of Claims' decision in *Joseph W. Mross* vs. *The United States* alter the decisions of the Comptroller General that only the disability for which a member is actually retired may be considered as entitling him to be benefits of Section 5532(c), Title 5, United States Code, and related sections?

b. If the reply to *a* is affirmative, may a member who is retired because of a disability not the direct result of armed conflict or instrumentality of war be entitled to the benefits of Section 5532(c), Title 5, United States Code, and related sections if he also has a disability directly the result of armed conflict or instrumentality of war but which alone would not cause his retirement because of physical disability?

c. If the reply to *a* is affirmative, may a member who is retired because of the combined effects of more than one disability, no one of which, per se, would cause his retirement, be considered to be entitled to the benefits of Section 5532(c), Title 5, United States Code, and related sections if one or more of the disabilities which combine to cause his retirement was directly the result of armed conflict or instrumentality of war?

The *Mross* case was the subject of our decision of October 13, 1964, B–155090. Briefly, the facts as there related show that Commander Mross, U.S. Navy, was placed on the Temporary Disability Retired List under the provisions of 10 U.S.C. 1202 on August 1, 1959, solely by reason of arteriosclerotic heart disease, which was rated at zero-percent disabling. Pursuant to 10 U.S.C. 1210, the Secretary of the Navy determined that the disability for which he was placed on the Temporary Disability Retired List had changed, that this disability had become permanent, and that such permanent disability was 40-percent disabling. He was transferred to the Permanent Disability Retired List effective July 1, 1964.

The disabilities for which he was transferred to the permanent list, in addition to his heart disease, for which he was temporarily retired, included arthritis of the cervical, dorsal, and lumbar spine, and perforation of the left ear drum. Only the latter condition had been administratively determined to have been incurred in combat with an enemy of the United States or caused by an instrumentality of war

during a period of war. Commander Mross' medical service record showed that his left ear drum was ruptured on December 7, 1941, during the Japanese attack on Pearl Harbor while serving No. 7 gun on the U.S.S. *Raleigh.*

On October 14, 1961, Commander Mross became a civilian employee of the Government, and his retired pay had been reduced because of the limitation on dual compensation in the 1932 act.

In our decision of October 13, 1964, we said that "It is only the disability for which a member is actually retired that may be considered in determining whether he retired because of disability incurred in combat with an enemy of the United States or caused by an instrumentality of war within the meaning of the 1932 act." We pointed out that the officer continued on active duty and performed satisfactory service for almost 18 years after suffering damage to his left ear drum. The Navy did not regard that injury, standing alone, as entitling him to disability retirement, and it was not considered when he was temporarily retired. We concluded that we did not regard the listing of that injury as one of the conditions for which he was permanently retired as furnishing sufficient basis for a conclusion that he was retired for disability under circumstances contemplated by section 212(b) of the Economy Act.

In the light of a correction of Commander Mross' records in January 1965 by the Board for the Correction of Naval Records, the matter was further considered by us in decision of February 10, 1965, B-155090. For the reasons there stated, we found no basis for a conclusion that the correction of his record brought him within the exemption from the limitations of section 212 of the Economy Act or the 1964 Dual Compensation Act.

In holding that the officer met the requirements of the exception to the dual compensation restriction, the Court of Claims in the *Mross* case (186 Ct. Cl. 165), after referring to the temporary and permanent disability retirement provisions of 10 U.S.C. 1201 and 1202, including the correction action, stated on pages 171 and 172 that:

* * * Since plaintiff had 20 years of active military service at the time of his temporary retirement and was suffering from three disabilities which were considered in the determination that he was unfit for duty, his name was placed on the Temporary Disability Retired List. We therefore conclude that plaintiff's ear injury was a basis for his temporary retirement, just as it was for his permanent retirement.

For the reasons stated we find that plaintiff's ear injury was a disability for which he was placed on the Temporary Disability Retired List and later permanently retired; that his disability meets the requirements of the exception to the Dual Compensation Act, and that he is entitled to recover the retirement pay withheld by defendant since October 1961. * * *

For the reasons stated below, we do not view the court's decision in the *Mross* case, which was based on the particular facts in that case, as constituting a precedent to be followed in similar type cases.

Section 212(b) of the Economy Act of 1932, Ch. 314, 47 Stat. 406, as amended, 5 U.S.C. 59a(b) (1958 ed.), provided that the dual compensation provisions of section 212(a) of that act did not apply to any "regular or emergency commissioned officer retired for disability (1) incurred in combat with an enemy of the United States, or (2) caused by an instrumentality of war and incurred in line of duty during a period of war."

The so-called Economy Act of 1932 was a part of the act making appropriations for the Legislative Branch of the Government for the fiscal year ending June 30, 1933; and the legislative history of part II, title II, of that act shows that its primary purpose was "To Effect Economies in the National Government." See House Report No. 1126 (on H.R. 11597) dated April 25, 1932, and Senate Report No. 756 (on H.R. 11267) dated May 9, 1932. It would seem from the legislative history that the mood of the Congress at that time was to limit certain exemptions such as that contained in section 212(b) rather than to broaden its scope.

The legislative history of the exemption to the dual compensation restriction of the 1932 act shows, in our opinion, that Congress intended to exempt from the restriction only those "regular or emergency commissioned officers retired for disability incurred in combat with an enemy of the United States," where disability directly resulted in rendering the member physically unfit for duty and for which he was actually retired. In support of this view, the following excerpts are taken from the debate on the exemption provision on the Senate floor which appears in 75 Cong. Rec. at pages 12146 and 12178:

> Mr. FLETCHER. * * * I think this ought not to apply to a retired officer who is retired for injury received in battle. I offer the amendment because I think that an officer who has been actually wounded in battle ought not to be deprived of his retired pay.
>
> Mr. GEORGE. * * * I concede that in some instances there might be an officer of minor rank who was wounded and retired on account of disability actually incurred in battle who should have an opportunity to come into the employment of the Government * * *.
>
> Mr. REED. * * * we ought not to make it impossible for them to get the pay for the work they do if they are retired for wounds received in action or disability incurred in line of duty.

We find nothing in the amendments to the 1932 act nor its legislative history to support the view that Congress intended to enlarge the scope of the exemption provision. For a further discussion of the legislative history of section 212(b) of the 1932 act concerning a related matter, see 48 Comp. Gen. 219 (1968).

Moreover, we find nothing in the Dual Compensation Act of 1964 nor in its legislative history which would indicate that Congress

intended to broaden the scope of the exemption restriction in 5 U.S.C. 5532(c) so as to make it apply to those officers where there is no direct causal relationship between the disability incurred because of either armed conflict or instrumentality of war and the disability which renders him physically unfit for duty and for which he is actually retired. *Cf.* B-165515, November 18, 1968. In this connection, it is stated on page 16 of Senate Report No. 935 dated March 4, 1964, to accompany H.R. 7381, which became the Dual Compensation Act, that:

> The proposed law would continue the principle of treating separately those retired military personnel whose retirement was based on disability resulting from an injury or disease received in line of duty as a direct result of armed conflict, or caused by an instrumentality of war and incurred in line of duty during a period of war.

Regulations implementing the provisions of the Dual Compensation Act are contained in paragraph 4-33, Army Regulation 635-40 and provide in pertinent part as follows:

> * * * A determination that a disability resulted from injury or disease received in line of duty as a direct result of armed conflict will be appropriate only when it is also determined that the disability so incurred in itself renders the member physically unfit.
>
> b. *Instrumentality of war.* A determination that a disability was caused by an instrumentality of war and incurred in line of duty will be appropriate only when it is also determined that the disability so incurred in itself renders the member physically unfit and was incurred during one of the periods of war as defined by law.

We believe the above regulations correctly interpret the law.

It has been the uniform interpretation of the statute by the Judge Advocate General of the Army and by this Office that the exemption provision in the dual compensation acts applies only where the disability for which a Regular officer is retired was the direct result of armed conflict or was caused by an instrumentality of war in time of war.

The record in the *Mross* case clearly establishes that his war-incurred (perforated ear drum) was not disabling and that he subsequently served on active duty for 18 years satisfactorily with such condition and was actually appointed a commissioned officer and promoted several times after such injury was incurred. That record also clearly establishes that the disability for which he was actually retired was a heart condition and that his war-incurred injury did not constitute a significant factor in his disability retirement.

The Court of Claims seems to have taken the position that any war-incurred injury—no matter how minor or insignificant the disability resulting therefrom may be at the time of retirement—entitles a Regular officer to the benefits that flow from the provisions of 5 U.S.C. 5532(c). In that view of the law, a Regular officer retired because of

some peacetime disability wholly unrelated to wartime service is exempt from the dual compensation act restrictions and entitled to the other benefits that flow from 5 U.S.C. 5532(c) simply because he has a minor additional disability resulting from armed conflict which would not in itself entitle him to disability retirement.

That application of the law represents a broad departure from the longstanding administrative interpretation of section 212(b) of the Economy Act of 1932, which is supported by its legislative history and the stated intent to continue the principle of that section in the Dual Compensation Act of 1964. It is our view, therefore, that until the courts have had an opportunity to reconsider this matter in other cases, with specific reference to the above-mentioned legislative history of the exemption provision and its longstanding administrative interpretation, any change in the conclusions reached in our prior decision in the *Mross* case would not be justified.

Accordingly, question "a" is answered in the negative. Since question "a" is answered in the negative, no answer is required for questions "b" and "c."

[B–159429]

Military Personnel—Reserve Officers' Training Corps—Prior Military Training—Excused Service

Students enrolled in the Reserve Officers' Training Corps (ROTC) under 10 U.S.C. 2107, which authorizes scholarship benefits, may on the basis of the conclusion in 46 Comp. Gen. 15 be considered to be within the purview of 10 U.S.C. 2108(c), and the Secretary concerned may excuse them from all or part of the General Military Course (GMC) requirements, and the students are eligible to receive the financial benefits of a scholarship award. Therefore, a scholarship may be offered and all or part of the GMC waived for an incoming college freshman designated to receive a 4-year ROTC college scholarship; a college student enrolled as a transfer from another institution during his freshman or sophomore year; and a student currently enrolled at the institution but in an ROTC program during his freshman or sophomore year.

Military Personnel—Reserve Officers' Training Corps—Scholarship Benefits—Military Training

If a student successfully completes the first 2 years of a 4-year Senior Reserve Officers' Training Corps course for admission to the advanced training prescribed in 10 U.S.C. 2104(b)(6) by reason of prior military education and training, the 6 weeks' field training or practice cruise provision of the section is not a preliminary requirement for admission to the "advanced course"—the last 2 years of college—where the student qualifies for excusal of the General Military Course under 10 U.S.C. 2108(c).

Military Personnel—Reserve Officers' Training Corps—Scholarship Benefits—Military Training

The application of 10 U.S.C. 2108(c), providing for the Secretary concerned to excuse all or part of the General Military Course requirements for students enrolled in the Reserve Officers' Training Corps, is not limited to the scholarship program provided in 10 U.S.C. 2107, but the excusal authority extends as well to the advanced training program prescribed in 10 U.S.C. 2104. A student who is

eligible for excusal on the basis of his previous education, military experience, or both, insofar as the Reserve Officers' Training Corps Vitalization Act of 1964 (10 U.S.C. 2101–2111) is concerned, is eligible for the financial benefits provided in either 10 U.S.C. 2104 or 10 U.S.C. 2107, if he otherwise qualifies.

To the Secretary of Defense, January 13, 1971:

By letter of December 2, 1970, the Assistant Secretary of Defense (Comptroller) has requested a decision on certain questions concerning the right of students enrolled in the Reserve Officers' Training Corps under 10 U.S.C. 2107 (which authorizes scholarship benefits) to be excused from all or part of the General Military Course under 10 U.S.C. 2108(c) and receive the financial benefits of the scholarship. The questions, together with a discussion pertaining thereto, are contained in Department of Defense Military Pay and Allowance Committee Action No. 447.

The questions are as follows:

1. Do the provisions of 10 U.S.C. 2108(c) apply to ROTC appointments under 10 U.S.C. 2107?
2. If the answer to question 1 is affirmative:
   a. May an incoming college freshman, designated to receive a 4-year ROTC college scholarship under 10 U.S.C. 2107 be excused from the entire General Military Course (GMC) under the provisions of 10 U.S.C. 2108(c) and receive the benefits of the scholarship?
   b. May an incoming college student be selected for a scholarship under 10 U.S.C. 2107 if he possesses the same prerequisites for excused GMC, but is enrolled as a transfer from another institution during his freshman or sophomore year?
   c. May a student currently enrolled at the institution but in an ROTC program during his freshman or sophomore year be selected for a scholarship under 10 U.S.C. 2107 if he possesses the same prerequisites for excused GMC under 10 U.S.C. 2108(c) and receive the benefits of the scholarship?

The Reserve Officers' Training Corps Vitalization Act of 1964, Public Law 88–647, 78 Stat. 1063, 10 U.S.C. 2101–2111, provides for two types of programs for the Senior ROTC training in civilian colleges and other educational institutions of higher learning: (1) a 4-year Senior ROTC program divided into the basic course for the first 2 years of college and the "advanced training" course (10 U.S.C. 2101(3), 2104) for the third and fourth years of college, with a subsistence allowance of $40 to $50 a month during the "advanced training" course and (2) a 4-year program under 10 U.S.C. 2107 where students are appointed cadets or midshipmen, as appropriate, and receive scholarship assistance for tuition, fees, books, and laboratory expenses then estimated to be about $800 to $850 a year and a subsistence allowance of $50 a month.

Under both programs the students must become members of the armed services with an obligation to accept appointments as commissioned officers (usually upon graduation) and to serve on active duty in such capacity for a period prescribed by law. The purpose of the Reserve Officers' Training Corps programs is to provide a source and

steady flow of selected, high quality junior officers to the armed services.

The 1964 law prescribes certain conditions to appointment as a cadet or midshipman and in 10 U.S.C. 2107(a) provides that—

> * * * a member whose enrollment in the Senior Reserve Officers' Training Corps program contemplates less than four years of participation in the program may not be appointed a cadet or midshipman under this section, or receive any financial assistance authorized by this section.

However, subsection (a) of 10 U.S.C. 2108 authorizes the Secretary of a military department to give any person who has served on active duty in any armed service such advanced standing in the program as may be justified by his education and training, and subsection (b) thereof provides that, in determining a member's eligibility for advanced training, credit may be given for any military training that is substantially equivalent in kind to that prescribed for admission to advanced training. Subsection (c) of 10 U.S.C. 2108 provides:

> The Secretary of the military department concerned may excuse from a portion of the prescribed course of military instruction, including field training and practice cruises, any person found qualified on the basis of his previous education, military experience, or both.

Subsection (b)(6) of 10 U.S.C. 2104 provides that to be eligible for continuation or initial enrollment in the program for advanced training a person must, among other things, complete successfully—

> (A) the first two years of a four-year Senior Reserve Officers' Training course; or
>
> (B) field training or a practice cruise of not less than six weeks' duration which is prescribed by the Secretary concerned as a preliminary requirement for admission to the advanced course.

Department of Defense Military Pay and Allowance Committee Action No. 378 stated that the above-quoted provision of 10 U.S.C. 2107(a) might possibly be viewed as precluding appointment of a student to the scholarship program provided in 10 U.S.C. 2107 if he contemplates less than 4 years of participation in the (military training) program and regulations were promulgated that would permit excusing or waiving any of the military training portion of the (4-year) program because he had already had such training or experience. As a result, it was stated that one military department did not excuse any ROTC military training by scholarship students, regardless of prior training or experience, even though nonscholarship students may not be required to take military training which the Department had concluded would only be repetitive and not contributory to the best interests of the student or the military service.

In decision of July 7, 1966, 46 Comp. Gen. 15, in response to the question presented in Committee Action No. 378, this Office held that a person who is awarded an ROTC scholarship under 10 U.S.C. 2107 would not lose his right to continue to receive the financial assistance

authorized under that program merely because he was excused by the appropriate Secretary from a portion of the prescribed program of military instruction under authority contained in 10 U.S.C. 2108(c).

Committee Action No. 447 states that AFROTC has opportunities to select outstanding students who possess acceptable prerequisite education and experience for excused GMC (General Military Course) under 10 U.S.C. 2108(c). Apparently the term "GMC" relates to the "basic course" of military instruction prescribed for the first 2 years of college, as distinguished from the "advanced training" defined in 10 U.S.C. 2101 as the military training offered to students in the third and fourth year of a 4-year Senior ROTC course, or the equivalent period of training in an approved 2-year Senior ROTC course. See paragraphs 2 and 7 of AFR 45–48, April 30, 1970, and 32 CFR 870.2(r), 870.7, 870.8, and 870.20.

Committee Action No. 447 suggests that the specific difference between the students here involved and those whose rights were considered in our decision of July 7, 1966, 46 Comp. Gen. 15, appears to be in the designations of the type of enrollment, the 2-year program or 4-year program. Two possible points of view are stated as follows:

a. Those students obtaining an excused GMC (accreditation), do not meet or have to comply with the requirements for entry into the 2-year program; they should be considered as in the 4-year program and thus eligible for scholarship. To be in the 2-year program, they would be required to attend the six weeks' summer training (field training). A waiver thus would be superfluous. On the other hand, a person seeking an excused GMC must be considered in the 4-year program. Otherwise, there would be no necessity for the excusal. A person receiving an excusal on account of prior military service or education should be considered to have participated for four years in Senior ROTC.

b. Or, any ROTC cadet who has had the full GMC participation excused should be considered a member of the 2-year program. As a member of the 2-year program, the cadet would not be entitled to compete for an AFROTC scholarship. To waive the entire GMC program would be in effect instituting a 2-year scholarship program. Congress did not establish the program for cadets who are involved only in the 2-year program.

In agreement with the conclusion reached in our decision of July 7, 1966, 46 Comp. Gen. 15, the first question is answered in the affirmative.

During consideration of the bill which became the 1964 law, the House Committee on Armed Services said (with respect to financial assistance to students under the 4-year Senior ROTC program) that "This scholarship program could consist of a maximum of 4 years or a minimum of 1-year scholarship assistance, or any figure in between." See H. Rept. No. 925, 88th Cong., 1st sess. 22. The Senate Committee on Armed Services said:

* * * This scholarship assistance could be provided for a minimum of 1 year or a maximum of 4 years, and would be virtually the same as that now provided by the Navy in the so-called Holloway program.

See S. Rept. No. 1514, 88th Cong., 2d sess. 2.

In view of such comments, it seems clear that the minimum "four years of participation" in the program mentioned in 10 U.S.C. 2107(a)

refers to participation in the 4-year military service and training program and equivalent portions thereof previously received, the equivalency of which is to be determined by the Secretary of the military department concerned. Consequently, a student who does not in fact participate in the educational institution's Senior ROTC training program for 4 years may receive the financial assistance there authorized if the student is excused by the Secretary concerned from portions of the 4-year program on the basis of his having performed equivalent military training.

Where the entire General Military Course (GMC) or a portion thereof is waived by the Secretary of the Air Force in accordance with authority vested in him by 10 U.S.C. 2108(c), it is our view that each student in the classes mentioned in questions "2a," "b," and "c" may receive the benefits of the scholarship under 10 U.S.C. 2107 in the circumstances mentioned in the questions.

There is not apparent to us the basis of the observations in Committee Action No. 447 quoted above. The provisions of 10 U.S.C. 2104(b)(6) require as a prerequisite for "advanced training" under that section that the student "complete successfully" either "the first two years of a four-year Senior Reserve Officers' Training Corps course" or "field training or a practice cruise of not less than six weeks' duration" prescribed by the Secretary concerned as a preliminary requirement for admission to the advanced course.

It seems to us that if a student meets the statutory requirements for admission to the "advanced training" course by reason of prior military education and training, the 6 weeks' field training or practice cruise is not required by the statute as a preliminary requirement for admission to the "advanced course" (the last 2 years of college). To suggest otherwise indicates that the student is not qualified for an excusal of the General Military Course under 10 U.S.C. 2108(c).

There is nothing in the language of subsection 2108(c) or in its legislative history to suggest that its application is limited to the scholarship program provided in 10 U.S.C. 2107. Consequently, we must view the provisions of subsection 2108(c) as reaching the advanced training program provided in 10 U.S.C. 2104 as well as the scholarship program authorized in 10 U.S.C. 2107. Therefore, we are not aware of any statutory basis for denying a student—who is eligible for excusal under 10 U.S.C. 2108(c) from the General Military Course (GMC)—admission to the advanced course provided in 10 U.S.C. 2104 simply because of such excusal. In our opinion, a student who is eligible for such excusal "on the basis of his previous education, military experience, or both," insofar as the Reserve Officers' Training Corps Vitalization Act of 1964 is concerned, is eligible for the financial bene-

fits provided either in 10 U.S.C. 2104 or in 10 U.S.C. 2107, if he otherwise is qualified therefor.

[B-171488]

Military Personnel—Retired—Civilian Service—Civilian Disability Compensation and Military Retired Pay

A Regular Air Force sergeant retired pursuant to 10 U.S.C. 8914, who while employed as a civilian in the Federal Government loses the use of a finger, is not entitled to the concurrent payment of civilian disability compensation and military retired pay on the basis the compensation would be paid for a permanent partial disability and not a temporary total disability thus bringing the payment within the exception to the dual payment prohibition contained in 5 U.S.C. 8116 (a). In the application of the limitation in section 8116(a), there has been no recognition of a distinction between temporary and permanent disability, as the statute makes no such distinction insofar as the concurrent receipt of military or naval retired pay is concerned and legislation would have to be enacted to permit the concurrent payment of retired pay and disability compensation.

To Lieutenant Colonel N. C. Alcock, Department of the Air Force, January 14, 1971:

Reference is made to your letter dated November 9, 1970, which was forwarded here by letter dated December 7, 1970, from Headquarters United States Air Force, requesting an advance decision on the propriety of payment of a voucher in the amount of $372.60 in favor of Master Sergeant Lewis E. Chinn, USAF, retired, representing retired pay withheld for the period from March 4, 1969, through April 25, 1969, due to payment to him of compensation under the Federal Employees' Compensation Act. Your submission has been assigned Air Force Request No. DO-AF-1106 by the Department of Defense Military Pay and Allowance Committee.

You say that Sergeant Chinn retired effective August 31, 1961, pursuant to 10 U.S.C. 8914 after 20 years 3 months 17 days of active service. Upon having been advised by the Bureau of Employees' Compensation that he was entitled to compensation for the period March 4 to April 25, 1969, for the loss of use of the second middle finger, right hand, you notified Sergeant Chinn and the Bureau that retired pay was considered not payable for that period in view of the provisions of 5 U.S.C. 8116(a). The Bureau advised that he elected not to authorize offset of the indebtedness from the employees' compensation payment, and the debt was withheld from his retired pay pursuant to 5 U.S.C. 5514.

In letters dated March 19, 1970, and June 29, 1970, the Bureau of Employees' Compensation took the position that Sergeant Chinn is not precluded from receiving concurrent payments of civilian disability compensation and military retired pay for the reason that he was paid compensation for a permanent partial disability, not temporary total

disability, and that under the "exception" contained in 5 U.S.C. 8116(a) "There is NO bar to receiving the concurrent benefits when the Bureau is paying a scheduled award, such as in Mr. Chinn's case."

In view of the holding in 47 Comp. Gen. 9 (1967) that the provision to the effect that receipt of retirement benefits will not impair an employee's right to disability compensation for scheduled disabilities relates only to Federal civilian retirement programs, you requested a ruling as to whether the compensation payments made to Sergeant Chinn are excepted from the dual payment prohibition in 5 U.S.C. 8116.

A civilian employee's right to receive disability compensation on account of injuries suffered in line of duty and at the same time receive other payments from the United States is limited by the prohibition contained in section 7(a) of the Federal Employees' Compensation Act of September 7, 1916, as amended, currently codified in 5 U.S.C. 8116(a), which provides as follows:

> (a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay, or remuneration of any type from the United States, except—
>
> (1) in return for service actually performed; and
>
> (2) pension for service in the Army, Navy, or Air Force.
>
> However, eligibility for or receipt of benefits under subchapter III of chapter 83 of this title, or another *retirement system for employees* of the Government, does not impair the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title. [Italic supplied.]

It has long been held by the accounting officers of the Government that disability compensation payments made under the Federal Employees' Compensation Act may not be made to a person concurrently with the payment of military or naval retired pay in the absence of a statute exempting such person from the dual payment restrictions of section 7(a) of that act. See 18 Comp. Gen. 747 (1939); 38 *id.* 243 (1958); 40 *id.* 660 (1961); 47 *id.* 9 (1967), and *Steelman* v. *United States*, 162 Ct. Cl. 81 (1963). Compare our decision to you of January 23, 1970, B–165726. Except for certain provisions of law relating to members of Reserve components of the Armed Forces, we know of no authority which permits payment of military retirement pay and employees' compensation to a person at the same time. See *Tawes* v. *United States*, 146 Ct. Cl. 500 (1959), and 39 Comp. Gen. 321 (1959), in which we said we would follow the rule established in the *Tawes* case in the settlement of similar cases.

While sections 8105, 8106, and 8107, subchapter I, chapter 81, Title 5, U.S. Code, provide certain legislative distinctions between total disability, partial disability, and scheduled disability, respectively, the limitations on the right to receive compensation prescribed by 5 U.S.C.

8116(a) apply generally while an employee is receiving "compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued." The statute is unambiguous and applies to all compensation computed on the basis of a period of disability. In the application of the limitations contained in 5 U.S.C. 8116(a) prohibiting the concurrent receipt of employees' compensation and military retired pay, we have never recognized any distinction between temporary and permanent disability for a period of disability, and no such distinction is set forth in the statute insofar as concurrent receipt of military or naval retired pay is concerned.

While payment of medical, surgical, and hospital services necessary for treatment of an injury sustained by an employee in line of duty is "compensation" (see 5 U.S.C. 8101(12)), we said in 40 Comp. Gen. 711 (1961) that, since normally such payments are not made to the employee and there is no provision for their payment in installments over a period of time which has any relationship to the nature and extent of the injury involved, the payment of those expenses is to be distinguished from the compensation payable to the employee in installments or a commutation thereof over a period of disability. Thus 5 U.S.C. 8116(a) is not for application, and payment of benefits under 5 U.S.C. 8103 does not require a withholding of the employee's retired pay.

The stated position of the Bureau of Employees' Compensation in this case appears to be based upon an interpretation that the retirement system "exception" in 5 U.S.C. 8116(a) applies in case of eligibility under *any Federal act or program providing retirement benefits*, including eligibility for military retired pay. In our decision of July 7, 1967, 47 Comp. Gen. 9, we considered the legislative history of that "exception" and noted that prior to the effective date of the act of September 13, 1960, Public Law 86–767, 74 Stat. 906, a Federal employee who was injured at work had to elect whether to receive compensation benefits for disability or the benefits of the Civil Service Retirement Act, and that section 202 of the 1960 act provided that eligibility for or receipt of benefits under the Civil Service Retirement Act should in no way impair the employee's right to receive compensation for scheduled disabilities specified in the Federal Employees' Compensation Act.

By section 5(a) of the act of July 4, 1966, Public Law 89–488, 80 Stat. 253, 5 U.S.C. 757, the provision was extended to employees who are beneficiaries under another retirement system "for employees of the Government." Thus we held that the benefits provided in the 1966 act are limited to persons whose rights accrue under laws providing

retirement benefits for "employees" and as not authorizing concurrent payments of civilian disability compensation and military retired pay. Sergeant Chinn's case falls squarely within the rule of our 1967 decision, and nothing has been brought to our attention to provide any reason to change or modify that holding.

The inequity of permitting a retired Regular enlisted man to receive his full military retired pay and his full compensation as a civilian employee of the Government but denying him the right to receive military retired pay concurrently with disability compensation for an injury incurred in the course of his employment, which is in lieu of his civilian compensation, has been brought to the attention of the Congress through numerous bills in recent years.

H.R. 822 and H.R. 8290, 91st Congress, would have permitted the payment of retired pay or retirement pay received on account of service in one of the armed services concurrently with Federal employees' compensation disability payments. Other similar bills which have been introduced are H.R. 6852, 90th Congress; H.R. 314, 89th Congress; H.R. 1092, 88th Congress; H.R. 308, H.R. 3042 and H.R. 5093, 87th Congress; and H.R. 715 and H.R. 811, 86th Congress. All of these bills had the same purpose of allowing concurrent receipt of retired pay and Federal employees' compensation disability benefits. H.R. 11505, 90th Congress, and H.R. 4273 and H.R. 8290, 91st Congress, would have permitted concurrent receipt of military retired pay and Federal employees' compensation disability benefits retroactively to July 12, 1957. Favorable action has not been taken on any of these bills.

In letter of April 20, 1960, B–142494, this Office made a report to the House Committee on Education and Labor on H.R. 715 and H.R. 811, 86th Congress, setting forth a summary of our decisions concerning the ineligibility of retired military personnel to receive concurrently compensation under the Federal Employees' Compensation Act for injuries received as civilian employees. We pointed out that when Congress had made revisions to subsection 7(a) of that act, no change had been made in that subsection for the purpose of overcoming those decisions so as to authorize concurrent payments of disability compensation and military retired pay in such cases as proposed in those bills. Neither of those bills resulted in any change in the law with respect to concurrent payment of disability compensation and military retired pay.

The hearings held in the House of Representatives on H.R. 10721, 89th Congress, which became the Federal Employees' Compensation Act Amendments of 1966, include the text of H.R. 314, 89th Congress, a bill to permit retired military personnel to receive FECA disability compensation without relinquishing their military retired pay. The

hearings also include a statement setting forth the need for the new enactment in view of the decisions of this Office and of the Court of Claims holding that compensation may not, under the statute, be paid concurrently with retired pay. In those hearings it was urged that the restriction against concurrent receipt of compensation and retired pay in subsection 7(a) of the Federal Employees' Compensation Act creates an inequity and is a gross injustice, and that only additional legislation would do away with the gross injustice and inequity that exist under the interpretation of the wording of subsection (a) of section 7 of the Federal Employees' Compensation Act. However, the provisions of H.R. 314 were not enacted into law.

In such circumstances, the conclusion is required that under the provisions of laws currently in effect, Sergeant Chinn may not receive retired pay as a retired enlisted member of the Regular Air Force and compensation under the Federal Employees' Compensation Act for an injury incurred while employed as a civilian employee of the Government for the same period of time. There being no authority for payment of the voucher, it will be retained here.

[B-164515]

Compensation—Wage Board Employees—Increases—Retroactive—Wage Adjustments

In the retroactive application of the Monroney Amendment wage schedule, 5 U.S.C. 5341(c), pursuant to the United States Civil Service Bulletin No. 532-9, dated September 23, 1970, when the comparison of individual wage payments evidences previous wage schedule payments were less than an employee is entitled to under the Monroney Amendment, the employee should be paid the difference; and if the previous payment was greater than the amount due under the amendment, the employee may retain the difference. However, where a comparison of the individual payments shows that the underpayments equal the overpayments, no payment is due the employee.

To Lieutenant Colonel Edward D. Young, Department of the Air Force, January 15, 1971:

This is in reference to your letter dated November 24, 1970, reference ACF, requesting an advance decision on the propriety of retroactive pay under 5 U.S.C. 5341(c), the Monroney Amendment, as prescribed by United States Civil Service Bulletin No. 532-9, dated September 23, 1970.

The following portion of the attachment to the bulletin is pertinent to the questions you have presented:

GUIDANCE ON THE APPLICATION OF WAGE SCHEDULES ISSUED UNDER THE PROVISIONS OF THE MONRONEY AMENDMENT

GENERAL GUIDANCE.—The basic concepts with respect to entitlement to pay during the retroactive period are (1) that the new Monroney schedule is the only legal schedule in effect during the retroactive period and (2) that no

employee will have his pay reduced during the retroactive period. Accordingly, no retroactive change *as far as individual payments made during the retroactive period are concerned*, will be made if the actions taken and individual payments made during the period of retroactivity are higher than they would have been under the new wage schedule. These provisions relate to the comparative individual payments applicable during the retroactive period.

The retroactive application of the Monroney wage schedules should be effected along the following lines:

(a) Reconstruct all actions taken (step and rate of pay) during the retroactive period on the basis of the new Monroney wage schedules.
(b) Recompute all payments made during the retroactive period on the basis of the new Monroney wage schedules.
(c) Compare (1) the individual payments made during the retroactive period under the wage schedules then in effect with (2) the individual payments computed on the basis of the new Monroney wage schedules.
(d) Where the individual payments made under the previous wage schedules are less than those to which the employee is entitled under the Monroney wage schedules, the employee is paid the difference.
(e) Where the individual payments made under the previous wage schedules are greater than those to which the employee is entitled under the Monroney wage schedules no over-payment indebtedness is created because the payments made were legal in accordance with the schedule then in effect. Obviously, no collection is required.

You present the following example as the basis for your questions:

Pay Period	Hours	Was Paid Under Agency Wage System	Should be Paid Under Monroney Amendment	Difference
A	80	$3.18 ph—$254.40	$3.15 ph—$252.00	($2.40)
B	80	$3.32 ph—$265.60	$3.35 ph—$268.00	2.40

The questions submitted for an advance decision are as follows:

a. Is the pay due the employee considered on a composite basis and therefore no pay due the employee because the overpayment in period "A" offsets the pay due for period "B"?

b. If the answer to [a] is "No," should the employee be forgiven the $2.40 overpayment for period "A" and paid the $2.40 payment computed for period "B"?

Paragraph (c) of the "Guidance," quoted above, requires a comparison of individual payments; paragraph (d) provides that where individual payments made under the previous wage schedule are less than those to which the employee is entitled under the Monroney wage schedules, the employee is to be paid the difference; and paragraph (e) provides that employees are to retain individual payment amounts which were greater under previous schedules. While these requirements are, perhaps, ambiguous in terms of the questions you raise, it is proper and was intended that paragraphs (d) and (e) be applied to net over and under payments for the entire retroactive period. Thus, where as in the example presented, a comparison of the individual payments shows that the underpayments equal the overpayments, no payment would be due the employee. Question "a" is accordingly answered in the affirmative; and by reason of that answer, question "b" does not require consideration.

[B-171449]

Sales—Bids—Mistakes—"Apparent on Face of Bid" Requirement

A bid on surplus steel bars offering unit and extended prices that were incompatible with the footage shown in the sales invitation, and which was verified as intending to buy the steel at the total bid price reflected in the bid, thus making it the highest bid received, may not be accepted. While both the DSAM Disposal Manual and paragraph 2-406.2 of the Armed Services Procurement Regulation authorize the correction of a clerical mistake "apparent on the face of the bid," since the error could have occurred in either the unit or the bid price, the mistake is not apparent, as the intended bid cannot be ascertained from the bid itself; and bid correction, even if pecuniarily advantageous to the Government, would be harmful to the competitive system.

To the Surplus Tire Sales, January 21, 1971:

Further reference is made to your letters of November 30 and December 10, 1970, concerning your protest against award to any other bidder under Item 80, invitation for bids No. 44-1068, issued by the Defense Surplus Sales Office, Oakland, California.

The invitation offered for sale 124 items of surplus Government property, Item 80 of which described as follows:

80. Bar, Steel, Round: Carbon, Cold Finish, 1" diameter, composition Aisi No. C1045. FSN 9510-229-4827. Outside, Area F, Row 25—In Bundles—Unused—Fair Condition. Total Cost $3,820 Est. Total Wt. 24,286 pounds, 9096 FOOT.

The entry "9096 FOOT" was so placed under Item 80 as to correspond with the placement of the terms "LOT," "DRUM," "PACKAGE" and other terms describing the unit on which bid prices were to be submitted.

The record shows that you submitted a unit price of $0.0544 and a total price of $595.72 as your bid on this item. Review of your bid revealed that the unit and extended prices were not compatible with the advertised quantity of 9,096 feet, since the stated unit price multiplied by 9,096 feet would result in a total bid price of $494.82. A telephonic request to you for bid verification brought your allegation, confirmed by letter of November 20, 1970, that your unit bid price was incorrect, and that the total bid price was the correct and proper bid. If acceptable, your total bid for the item would be the highest received, since the second high bid was $534.84 for this item. Evaluation of all bids received on the item revealed that your bid is within the range of bids received on the basis of either unit or total price. However, if your unit bid price should be corrected from $0.0544 to $0.06549, so as to correspond to the total price bid of $595.72, it would displace another bidder's high unit price bid of $0.0588.

By letter of November 22, 1970, you forwarded a check in payment of several items awarded to you under IFB No. 44-1068, including therein payment for Item 80, with instructions that the check be returned if award of Item 80 would not be made. By letter of Novem-

ber 30, 1970, on advice of counsel, the sales contracting officer informed you of the "withdrawal" of your bid on Item 80 and returned you check for $1,720.41 with a request that a check for $1,120.91 be forwarded in payment for Items 78 and 93 only.

Your protests to this Office followed this rejection of your bid on Item 80. In your letter of November 30, 1970, to this Office you state, variously, that Item 80 has been confusingly described in that it has been offered on a per foot unit basis; that this is not the method or manner by which steel is either purchased or sold; and that the customary manner by which steel is and has been sold is by the pound or ton. You state further that you computed your bid on a tonnage basis, which came to an amount of $595.72, and that in dividing this amount by the footage you erroneously computed the unit to be 0.0544 per foot. In your letter of December 10, 1970, you supplement your protest by requesting consideration of your bid as an apparent clerical error, and its acceptance under the rule pertaining to such errors, citing DSAM 4160.1, part 3, chapter X, section A.2 of the Disposal Manual. You have also cited our decision B–162922, December 13, 1967, in support of your protest.

Regarding your contention that the item was misdescribed and that it should have been offered on a weight basis, it is administratively reported that there are circumstances when it would be appropriate to offer bar steel by weight, and it would then be so offered. For example, varying lengths of various sizes of bar steel are offered for sale by weight. Bar steel of uniform size and length could, on the other hand, be offered for sale by the each, by the foot, or by weight, since uniform bar stock can be converted accurately from footage to weight and weight to footage. We see no valid basis on which to disagree with the administrative position on this point.

As a general rule, correction of an erroneous bid will not be permitted when to do so would result in displacement of the ostensible successful bidder. 37 Comp. Gen. 210 (1957). The only exception to this rule is where the error is obvious *and* the intended prices can be ascertained from the bid form itself, without resort to extraneous worksheets, or other bid documents. See B–169688, May 27, 1970; B–157914, January 28, 1966; and B–155537, January 27, 1965.

You ask why the contracting officer did not treat your bid on Item 80 as a clerical error as provided for in DSAM 4160.1, contending that it is apparent that the unit price you erroneously stated ($0.0544 per pound) could not possibly have been the basis of your total bid of $595.72 if the unit of feet offered for sale (9,096 feet) were to be multiplied by the price you offered. Additionally, you point out that the amount of the bid deposit submitted with this bid ($286.84)

could not have been arrived at if you had intended to bid $0.0544 per pound.

Whether your bid on Item 80 is considered as having been submitted on a tonnage (weight) basis or on a linear measurement (footage) basis, it is still inconsistent inasmuch as a unit bid price of $0.0544 for an estimated tonnage of 10.842 gross tons produces a total price bid of only $0.5898. If considered as a unit price bid per pound, $0.0544 times the estimated total weight of 24,286 pounds results in a total price on the other extreme of $1,321.16. And if considered as a unit bid price of $0.0544 per foot times the total footage of 9,096, a total bid price of $498.82 results.

While both the cited Disposal Manual and ASPR 2–406.2 authorize the correction of a clerical mistake which is "apparent on the face of a bid," such a situation is not present here since it is not apparent from the face of the bid whether the error occurred in the unit price or in the extended price. The fact that a bid deposit equals 20 percent of an alleged intended bid has never been considered exclusively in determining that the intended bid is substantially ascertainable from the invitation and bid itself—the reason being that if a bidder inserts a correct unit price and makes an error in arriving at the total price, the bid deposit would normally reflect 20 percent of the total prices bid.

The factual situation considered in our decision B–162922, December 13, 1967, cited by you, is distinguishable from the situation considered herein. In that case there was no arithmetical bid error apparent or alleged. The protesting bidder had submitted a unit price which when extended on the basis offered equaled the total price bid. Further, while the unit bid price therein was not on the per piece basis requested but on a per pound basis, such fact was clearly shown. We held that the high bid was readily convertible to a definite bid price for the items and therefore should have been considered for the award. These facts bear no analogy to those in your case.

Under the circumstances, while it is obvious that there is a mistake in either the unit price or the extended price of your bid, we must conclude that the intended bid cannot be ascertained from the bid form itself, since the error could have been in either the unit or extended total price. Correction to the extent and in the manner requested by you would therefore confer upon you an unfair competitive advantage. While you maintain that the best interests of the Government would be served by acceptance of your higher bid, it is our view that the harm to the competitive bidding system would far offset any pecuniary advantage gained thereby. As we stated in B–166748, May 14, 1969, regardless of the good faith of the bidder

making a mistake, correction should be denied in any case in which there exists a reasonable basis for argument that public confidence in the integrity of the competitive bidding system would be adversely affected thereby.

Accordingly, since we cannot determine from the bid form alone whether the error was in the unit price or extended total price, your bid may not be corrected, and your protest against award to any other bidder must be denied.

[B-170174]

Contracts—Specifications—Qualified Products—Effect of Specification Revision

The administrative determination that the change in the weight of webbing for parachutes to be procured from the Qualified Products List (QPL) did not invalidate existing test data or require the requalification of manufacturers already on the QPL was proper where the modification was not the cause of rejecting sample parachutes submitted for qualification under an invitation canceled and reissued; and the fact that the cause for the failure of the parachute samples to pass the drop test cannot be determined does not impose the duty on the Government to pinpoint the failure where the unreasonable expenditure of time and money would be involved, nor may a conditional qualification be approved on the basis the contractor is not relieved from complying with drawings and specifications.

To the Switlik Parachute Company, Inc., January 22, 1971:

Further reference is made to your telegrams of June 29, 1970, and subsequent correspondence, protesting the standards and procedures utilized by the Department of the Air Force in testing your firm's parachute system for inclusion on Qualified Products List (QPL) 83255-1 in connection with the procurement of Air Force type A/B 28K-5 parachute systems under invitations for bids (IFB) Nos. F41608-70-B-1250 and F41608-71-B-0058, issued by the San Antonio Air Materiel Area, Kelly Air Force Base, Texas.

IFB -1250 was issued on May 1, 1970, with bid opening set for June 2, 1970, for 1,040 type A/B 28K-5, 23-foot special weapons parachute systems, in accordance with specification MIL-P-83255 dated February 17, 1970. The items for procurement are covered by QPL No. 83255-1 dated March 4, 1970. On June 1 and 10, 1970, that IFB was amended by modifications Nos. 0001 and 0002 to provide for certain changes in the delivery provisions and for an extension of the bid opening date to June 30, 1970.

On the extended bid opening date of June 30, 1970, three bids were received, the lowest of which was submitted by your firm. The other two bids were received from Pioneer Parachute Company, Inc., and M. Steinthal & Co., Inc. On July 17, 1970, the Air Force rejected all bids and canceled IFB-1250. Bidders were advised that the basis for

this action was an ambiguity in the delivery schedule of the IFB and that there would be a resolicitation covering the same requirement.

On July 20, 1970, IFB No. -0058 was issued and sent to prospective bidders requesting bids—to be opened August 4, 1970—for furnishing 1,040 A/B28K-5, 23-foot special weapons parachute systems. Prospective bidders were advised that there was an urgent requirement for the parachute systems.

It is reported that bids were received from Pioneer Parachute Company, Inc., and M. Steinthal & Co., Inc., in the amounts of $697 and $731, respectively. A bid was received from your firm; however, in a telegram dated September 18, 1970, you requested that your bid be returned to you unopened because of your protest against the alleged different methods used by the Air Force in testing your parachute system and the parachute systems of other companies. The record indicates that Steinthal, the lowest responsive and responsible bidder under IFB -1250, petitioned the United States District Court for the District of Columbia for an injunction restraining the Air Force from opening bids received in response to IFB -0058, or if bids have been opened, restraining the Air Force from making an award. On August 14, 1970, the District Court (Civil Action No. 2422-70) issued a temporary restraining order, and on September 17, 1970, the United States Court of Appeals for the District of Columbia Circuit by order No. 24,595 dissolved the order of the District Court for the purpose of permitting the Air Force to open the bids. We have been informally advised by the Air Force that an award under IFB -0058 was made to Pioneer on September 24, 1970, at $697 per unit.

Your protest was originally initiated with respect to IFB -1250. In your letter of July 9, 1970, you contend that the time allowed in the procurement covered by IFB -1250 for qualification of your first sample parachute system was insufficient and violated the requirements of paragraph 1-1105 of the Armed Services Procurement Regulation (ASPR). However, since IFB -1250 has been canceled, it appears that that question is academic. Also, the record indicates that your firm submitted a second sample parachute system for testing and that such parachute system, in addition to your first sample parachute system, also failed to pass the tests carried out by the Kirtland Air Force Base.

In regard to the qualification testing of your two sample parachute systems, Wright-Patterson Air Force Base reports as follows:

Subj: Qualification Testing of the Switlik Parachute.

1. Your PPI 011925ZJul70. The AF considers the design of the MC2606 (AF Type A/B28K-5) as firm and capable of fulfilling the military characteristics for weapon delivery. This decision was made prior to release of the procurement data package to the AFLC and has remained unchanged. For parachute design assurance, the AEC (Sandia Corp) imposed a requirement for five consecutive, successful overstrength tests with the same design configuration. This test condi-

tion requires the initiation of parachute deployment (tail can blow off) at an aerodynamic pressure of approximately 2670 pounds per square foot. Stockpile sampling tests to this same requirement are programmed for the production MC2606 parachute on the basis of one parachute per year per manufacturer. Each submitter of a qualification sample was specifically notified by letter that his item would be subjected to this 125 percent (2670 psf) test condition. Successful completion of the overstrength test series was completed in Mar 1970. Three separate plant facilities have now demonstrated a capability to manufacture an acceptable quality item using the AF design criteria.

2. All tests, including qualification, are conducted with an instrumented test shape and at an instrumented test range. Receipt and evaluation of this data are required in order to obtain full information of the test profile. A readout of unsmoothed, uncorrected test data on the Switlik parachute indicates the test program objectives were fulfilled up until the time of failure. The preliminary review of the telemetry data indicates that the parachute failed at a lesser force (G value) than has been successfully sustained on other manufacturer's parachutes. Switlik has not demonstrated a capability to build a high quality MC2606 product.

3. Switlik initiated qualification action after we had released a vision to the slotted webbing specification, MIL-W-38321. Use of this revision was required in the IFB package and its use was required of Switlik. The required use of MIL-W-38321A was to the advantage of Switlik in that it permits control by the fabricating plant to place their specific requirements for dimensional spacing between slots upon the weaver of the webbing. In fact on 29 Apr 70, we received very favorable comments from Switlik personnel that they recognized we had apparently solved some problems experienced by them in past use of the basic edition of the slotted webbing specification. During this same conversation, Switlik reported the use of the same webbing supplier as being used by Pioneer. Required use of the revised specification does not obsolete material in use or invalidate tests which have used material provided to the basic issue dated 1 Nov 1965. From a parachute design standpoint no change occurred by virtue of the specification revision. The slotted webbing material did not fail in the Switlik test sample.

4. Preliminary information received from AFSWC personnel who have reviewed the on-board camera coverage, reports the failure of the parachute started with the horizontal ribbon material at the approximate mid point of gore height.

5. This office has issued a message to Sandia Corp and the AFSWC requesting a priority effort be made to provide the reduced test data and return of the test parachutes to ASD. The Switlik test parachute will undergo a detailed inspection analysis after receipt.

Subj: Switlik Qualification Testing on Parachute System A/B28K-5.

Ref: ASD Msg 1415502 AUG 70, subject as above, and ASD Msg 281837Z AUG 70 to AFSWC with info SAAMA and Sandia Corp.

Subj: Parachute Overtest Criteria for the B43 Upgrade Program.

1. This message is to confirm the ASD position in the matter of subject qualification.

2. The dynamic pressure overtest criteria for the parachute development program is a requirement levied by the AEC/Sandia Corp to permit their unrestricted acceptance of the production parachute system. In a meeting with Sandia Corp and AFSWC personnel at Kirtland AFB on 20 Aug 70 the tolerances for the overtest condition were defined as plus 3 minus 5 percent and that any test exceeding the upper limit would be considered acceptable if parachute performance were satisfactory. Any test exceeding the upper limit resulting in unsuccessful delivery of the test shape would be classified "NO TEST." Any test below the lower limit is classified "NO TEST."

3. By application of the above criteria in retrospect, we note that the first Switlik qualification sample was subject to a "NO TEST" condition (having exceeded the overtest condition by six (6) percent). Switlik's second qualification sample was tested within the Sandia Corp stated range of obtainable accuracy and is therefore classified as a failure.

4. ASD Msg 191234Z AUG 70 notified Switlik Parachute Co, Inc of the second test structural failure and of disapproval for listing on QPL-83255. The specific cause of failure was unknown at that time.

5. ASD's continued investigation has failed to produce any evidence which might positively define the cause of failure of the Switlik sample. In addition to

examination of the failed parachute we have completely reviewed our parachute design and the test data on development acceptance and qualification of M. Steinthal and Co., Inc. and Pioneer Parachute Co. (two samples for two different plants.) No discrepancies or deficiencies have been found and we have verbal confirmation of acceptance of the ASD parachute design from Sandia Corp.

6. A letter to Switlik is being prepared apprising them of our findings along with photos of the damage. In addition we have contacted AFSWC to determine if the Sandia Corp can release (within security limitations) the data pertinent to the two Switlik qualification tests.

In your two telegrams and letter dated September 18, 1970, to the Department of the Air Force, four reasons are given as to why you believe that no award should be made by the Air Force under IFB–0058.

First, you contend that the Air Force is purchasing to a QPL (No. 83255–1) which is defective. You state that your company was requested to qualify its product to specifications different from those specifications used by the other eligible firms, in that your firm was required to use webbing heavier than that used by other eligible suppliers. You contend that this change in specifications ordinarily would require those suppliers to requalify their products, but that the Air Force did not require such requalification.

We are advised with regard to the foregoing by Headquarters Aeronautical Systems Division as follows:

a. Military Specification, MIL–W–38321, Revision A, dated 4 Mar 70, was coordinated with industry and released for use independent of any known requirement for a design or performance change in the Air Force Type A/B28K-5 Parachute System. The design of the A/B28K–5 parachute was confirmed prior to issuance of the revised webbing specification. Acceptance of the specification for continued use in the parachute system was made after a determination that the revision did not represent a design change. The specification change was made to facilitate production.

b. The Switlik Parachute Company was requested to use the revised specification as it represented the latest issue in effect at the time. For this same reason the revision was applicable to bid solicitation.

c. The revised specification does not obsolete material in use or invalidate tests of parachutes [previously] fabricated * * *.

3. Based upon the above information no justification exists for changing the current qualification status of sources for the A/B28K–5 Parachute System.

ASPR 1–1101 references chapter IV of the Defense Standardization Manual (DSM) 4120.3–M, which is concerned with qualified products and qualification procedures.

Paragraph 4–109, chapter IV, DSM, provides, in pertinent part, as follows:

*4–109 Re-examination and retest. Re-examination of a qualified product shall be required by the preparing activity under any of the following conditions:

* * * * * * *

(b) The requirements in the specification have been revised sufficiently to affect the character of the product.

Since it has been determined administratively that the specification change as to webbing did not invalidate existing test data or affect the character of the system, we find no basis to question the decision of

the Air Force not to require requalification solely because the weight of the webbing was increased.

Second, you maintain that the design of the parachute system which was prepared by the Air Force is completely faulty and that the Department does not have an adequate QPL for the type A/B 28K–5 parachute system. You point out that the Air Force admits that your first sample parachute was tested at 6 percent over the test criteria established by the Atomic Energy Commission (AEC); that such circumstances resulted in a "no test" condition; that your first sample parachute was dropped and destroyed at speeds greater than the authorized test speeds; and that if such action by the Air Force was accidental, it is possible that the two other qualified firms had their sample parachutes tested at speeds below the AEC test criteria.

We have been informally advised by the Air Force that the dropping of your first sample parachute at an excessive speed was accidental. However, your second sample parachute was tested within the AEC stated range of obtainable accuracy, but it failed to meet test requirements. It also is reported by the Air Force that it has reviewed the design of A/B 28K–5 parachute system and found it to be not faulty. It is regrettable that the Air Force has been unable to determine the exact cause of the failure of your second sample parachute to pass the drop test; however, we do not feel that the Air Force has a duty to pinpoint test failures where to do so would involve the unreasonable expenditure of time and money.

Third, you state in your letter of July 9, 1970, that since the parachute submitted by your company met the requirements of the specifications as to construction, your firm should have been given a conditional qualification, since prior qualification in no way relieves the contractor from complying with the drawings and specifications. You state that production has been completed of 732 17-foot ribbon parachutes, which you state are identical to the 23-foot parachutes covered by the instant procurement except as to size.

In regard to the granting of a conditional qualification, you submitted a clipping from "The Government Contractor," September 30, 1963, issue, in which our decision of September 4, 1963, reported in 43 Comp. Gen. 223, was discussed. In that decision, we held as follows (quoting the syllabus):

The substitution by the Government of a nondefective tube in an oscilloscope sample being tested for the qualified products list does not result in inequitable treatment of competing bidders and is permissible, the mere listing of a product on the qualified products list not relieving the contractor from the obligation to meet the specifications; therefore, the Government to avoid eliminating competition may inform a manufacturer of a defect in a product submitted for qualification, and a remedy when known, and in view of the restrictive aspects

of the qualified products system, a reasonable effort, avoiding discriminatory practices such as disclosing confidential or proprietary information to competitors, or offering active engineering or other assistance in the manufacture or construction of the product to be tested, should be made to qualify as many available sources of supply as possible.

The facts reported in 43 Comp. Gen. 223 are different from those present here. In the cited case, the Government found that a component was defective during the testing procedures; and in order to complete the testing, a new component was used by the Government. In your case, the Government was unaware of the cause of the failure of your second sample parachute to pass the drop test, and the Air Force was not in a position to correct a defect before or during testing.

In your letter of July 9, 1970, you state that your firm was in no position to know the exact nature of the test to which the parachute might be subjected, since no objective standards for testing were released by the Air Force. It is reported that the parachute design agency does not issue and publish standards for special weapons parachute qualification testing because of the restrictive nature of the data. However, your firm was advised by letter dated March 26, 1970, from Headquarters Aeronautical Systems Division, of the applicable design data required for qualification of the parachute system. Specifically, you were advised of the parameters of the drop test.

Finally, you stress that Steinthal was found to be qualified on the basis of its production of an experimental model under a research and development contract and that Pioneer originally had been qualified as a result of tests made in February 1970, which, you state, were made prior to the revision of the webbing specification. You point out that Pioneer's parachute weighed approximately 130 pounds; that your parachute weighed approximately 136 pounds; that the 6-pound difference is the exact difference in weight occasioned by the heavier webbing which, you allege, only your firm was required to use; and that this extra weight traveling at 1,250 miles per hour places a tremendous additional strain on the parachute. You contend that the action of the Air Force in requiring only your firm to use the heavier webbing was clearly discriminatory to your company. However, the contrary appears to be the case. The Air Force has stated that at the time of the drop test the parachute of Steinthal weighed approximately 136 pounds—the same as your parachute—that Steinthal's parachute was tested within the required range of obtainable accuracy; and that notwithstanding the fact that it weighed approximately 136 pounds, Steinthal's parachute successfully passed the drop test.

For the reasons set forth above, your protest is denied.

[B-170544]

Contracts—Requirements—Minimum Quantities

A request for proposals to furnish requirements for 10 different types of diesel-electric generator sets, that stated the Government's best estimate of total quantities needed but did not, because of lack of funds, guarantee the purchase of minimum quantities, contemplates a requirements-type contract within the meaning of paragraph 3-409.2(b) of the Armed Services Procurement Regulation, and the use of such a contract is valid since there is no evidence the Government's estimate of probable needs was arrived at in bad faith, and the agreement to procure all requirements without stating minimum guarantees constitutes adequate consideration. However, when funds are available and needs can be ascertained with reasonable certainty, use of a more definite type contract would be assurance that firm minimum quantities, commensurate to the maximum extent with estimated requirements, will be ordered.

To the A. G. Schoonmaker Company, Inc., January 22, 1971:

Further reference is made to your letter of August 8, 1970, and subsequent correspondence protesting the manner in which request for proposal No. DSA-400-70-R-8075 was structured.

The instant solicitation, issued by the Defense General Supply Center, Richmond, Virginia, on June 30, 1970, requested offers for Department of the Air Force requirements for 10 different types of diesel-electric generator sets, all belonging to the families of types MB-15 through MB-19, furnishing 150, 100, 60, 30 and 15 KW of power, respectively. The procurement was undertaken to satisfy the requirements of a Military Interdepartmental Purchase Request (MIPR) for the Air Force reflecting that the requirements to be covered are basically those of Fiscal Year 1971, with the Air Force furnishing its best estimate for the quantity of each of the generator sets it anticipates will be required, the total quantity in assorted sizes amounting to 1,176 units.

Since the filing of your initial protest, which raised many issues concerning the validity of this procurement, several amendments have been issued under the solicitation so as to remove all but one issue which you now feel is germane to our consideration of this matter, namely, "the absence of any provision in the solicitation requiring the Government to purchase a realistic minimum quantity." Specifically, you urge:

> The RFP is based on an indefinite quantity requirements type contract, with no guarantee of the purchase of even one generator, and no limit on the maximum number which can be ordered. In our opinion, this feature, coupled with the fact that the contract runs for an indefinite period results in an illegal contract. In any event, it is almost impossible to price, without large contingencies. The Government may order, and the contractor must remain in a position to furnish as many as ten different types of generator sets each in a maximum order quantity of twenty-five each within a thirty day period. To require a contractor to keep open production capacity capable of producing 250 generator sets in one month, which may never be utilized, is wasteful. It is extremely difficult for any offeror, other than Fermont, to quote a realistic price with these requirements.

In response to these objections, it has been reported by the contracting officer:

> The protestant indicates that it appears to it that no requirements exist if no minimum is guaranteed. The MIPR requests that a requirements contract be issued the Secretarial D & F speaks in terms of requirements rather than fixed quantities and the project manager specifically approved the issuance of a new requirements type contract in the early planning stages for this procurement * * *. There is a continuing need for the generator sets with 5,613 sets having been purchased under the three contracts made since Comptroller General's decision B–153145 [April 27, 1964]. However, the Air Force has informally advised that at this time only a small number of the generator sets involved in this procurement have been funded. Efforts are now being made by the Air Force to determine if a sufficient number of generator sets in all sizes can be funded to make an indefinite quantity contract more desirable to prospective offerors than a requirements contract. If so this Center will consider reissuing the RFP to provide for offers covering a specified minimum to maximum quantity.
>
> The protest also questions again the fact that a requirement contract is being sought * * * as stated in paragraph 8 of the original report the Air Force was attempting to ascertain whether a sufficient quantity of the anticipated requirements could be funded at this time to make an indefinite quantity contract which stated minimum and maximum quantities more attractive to potential offerors than a requirements contract. A representative of the project manager's office advised the undersigned in a meeting held at this Center on 9, 10 and 11 September 1970 that the requirements were considered firm and that several reviews had not resulted in the belief that any change should be made in the quantities being used as the estimated requirement. However, since only seventy units in assorted sizes were considered funded at this time, it was believed that any attempt to change the procurement to seek an indefinite quantity contract rather than a requirements contract would serve no useful purpose.
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> * * * * * * *
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> The requirements contract has no specific maximum on the quantity that can be ordered but it does have a maximum delivery order limitation (as shown on the page numbered 43 in Amendment No. 6) which protects a contractor from needing to keep an unlimited capacity open to meet the Government's requirements whatever they may be. The contract would not have been for an indefinite period, but the period would have been difficult to ascertain with preciseness prior to the approval of initial production units. To obviate this objection the ordering period has been changed in Amendment No. 6 to end on 28 February 1972. It is anticipated that this calendar date will give the Government basically a year to order production generator sets but give the contractor an additional number of days (approximately 90 days) to do a portion of the required First Article testing.

Concerning your argument that a contractor will be required to keep an open production capacity of 250 generator sets in 1 month, we think it sufficient to observe that page 43, as amended, of the solicitation limits the 30-day maximum to 125 units, and a lead time of 150 days is given on all orders. Thus we fail to see where a potential contractor would be required to keep an open production capacity to the extent alleged. Also, the same amendment provides for a definite contract period; namely, November 30, 1970, or date of award, whichever is later, and will continue in effect for ordering purposes until February 28, 1972.

The instant procurement contemplates a requirements-type contract, and the Courts and our Office have considered such contracts valid provided the estimate of the probable amount of goods or services to be generated was determined in good faith. See *Shader Contractors*,

Inc. v. *United States*, 149 Ct. Cl. 539 (1960), 276 F. 2d 1; 47 Comp. Gen. 365 (1968); 37 *id.* 688 (1958). *Shader* also stands for the proposition that there need be no minimum guarantees, and that an agreement to procure all of an agency's requirements, without minimum guarantees, constitutes adequate consideration. There is no evidence here that the estimate of the probable needs (BEQ) of the Government was arrived at in bad faith.

Section 3-409.2(b) of the Armed Services Procurement Regulation (ASPR), as presently structured, states:

(b) Applicability. A requirements contract may be used for procurements where it is impossible to determine in advance the precise quantities of the supplies or services that will be needed by designated activities during a definite period of time. * * *

Generally, the requirements contract is appropriate for use when the item or service * * * is commercial or modified commercial in type and when a recurring need is anticipated.

We have previously accepted the administrative conclusion that generator sets in the 15 to 150 KW sizes may be regarded as modified commercial items within the meaning of ASPR 3-409.2(b), and that the language of that provision is permissive in nature and should not be construed as an absolute prohibition against the purchase of these items through a requirements-type contract. B-154594, September 22, 1964, December 18, 1964. Consequently, we can find no legal objection to the procurement procedures herein employed, and your protest must be denied.

We are, however, suggesting to the Secretary of Defense and the Director of the Defense Supply Agency that consideration be given to amending the applicable regulations so as to require, where funds are available and the agency's needs have been ascertained with reasonable certainty, use of a more definitive type of contract which would operate to give assurance to the contractor that firm minimum quantities, commensurate to the maximum extent with estimated requirements, will be ordered.

[B-171134]

Pay—Retired—Disability—Physical Examination for Promotion Determination

A major in the Air Force Reserves, who before his recommended promotion to the grade of lieutenant colonel could take effect was retired under 10 U.S.C. 1201, effective July 9, 1970, with 80-percent disability, and who had undergone two physical examinations, one in connection with his "projected voluntary retirement," the other incident to his disability retirement, is not entitled to retired pay computed at the higher grade, as the disability for which the officer was retired was not found to exist as a result of a physical examination for promotion within the meaning of 10 U.S.C. 1372(3), nor are the examinations within purview of *Brandt* v. *United States*, 155 Ct. Cl. 345, holding that where physical examinations in connection with promotion and retirement are given close together, the physical disability can be said to be the result of an examination for promotion.

To Major N. C. Alcock, Department of the Air Force, January 22, 1971:

Further reference is made to your letter of October 13, 1970 (file reference RPTI), requesting an advance decision as to the propriety of making payment on a voucher in the amount of $294.35 in favor of Major William B. Blose, retired, representing the difference in retired pay between the grade of lieutenant colonel and that of a major for the period July 9, 1970, through August 31, 1970, under the circumstances disclosed. Your letter was forwarded here under date of October 26, 1970, by the Deputy Assistant Comptroller for Accounting and Finance and has been assigned Air Force Request No. DO-AF-1101 by the Department of Defense Military Pay and Allowance Committee.

By orders dated June 24, 1970, the officer was retired under 10 U.S.C. 1201, effective July 9, 1970, in the grade of major with 80-percent disability after completing over 27 years' service for basic pay purposes and over 22 years' service for retirement purposes. Those orders show that the officer was assigned to the Retired Reserve in the Reserve grade of lieutenant colonel.

You state that Major Blose was considered and selected for promotion to the Reserve grade of lieutenant colonel by a promotion board which adjourned on January 30, 1970, such promotion to be effective as of February 26, 1971. You report that the officer had a mandatory date of separation of June 30, 1970--presumably you refer to a prospective release from active duty under "Project 703"—but in lieu of separation he applied for voluntary retirement to become effective June 30, 1970. You further state that subsequent to January 30, 1970, he underwent a physical examination incident to retirement; and on June 23, 1970, the Secretary of the Air Force determined his unfitness for duty and directed that he be retired effective July 9, 1970, because of physical disability.

You say that the doubt as to the officer's retired pay grade stems from the question of whether the disability for which he was retired was found to exist as a result of a physical examination for promotion within the meaning of 10 U.S.C. 1372(3). In this connection, you refer to the comments and opinions accompanying your submission concerning this matter. You also refer to our decision in 41 Comp. Gen. 749 (1962).

Section 1372 of Title 10, U.S. Code, provides, in pertinent part, that unless entitled to a higher retired grade under some other provision of law, any member of an armed force who is retired for physical disability (under 10 U.S.C. 1201) is entitled to the grade equivalent to the highest of certain grades including:

(3) The permanent regular or reserve grade to which he would have been promoted had it not been for the physical disability for which he is retired and which was found to exist as a result of his physical examination for promotion.

The question of whether Major Blose is entitled to be retired in the grade of lieutenant colonel under 10 U.S.C. 1372(3) and have his retired pay computed on the higher grade was the subject of two opinions dated July 30, 1970, and August 18, 1970, respectively, by the Chief, Military Affairs Division, Field Extension, Office of The Judge Advocate General, Department of the Air Force. It is pointed out in the first opinion that as a result of "Project 703" the officer was scheduled to be involuntarily released from active duty effective June 30, 1970, but instead he applied for voluntary retirement. The opinion states that even though there is no specific statutory requirement for a promotion physical for a Reserve officer as there is for a Regular officer (10 U.S.C. 8309), 10 U.S.C. 1372(3) recognizes that Reserve promotions will not be effected when the member is determined to be physically disqualified.

The view is expressed in the JAG opinion of July 30, 1970, that a physical examination, no matter for what purpose, the results of which are used to remove an officer from a selected-for-Reserve-promotion list, should be considered as a "physical examination for promotion," as those words are used in 10 U.S.C. 1372(3). The opinion further states that if the physical examination in which it was discovered that Major Blose had a physical disability for which he was to be retired would be used also as a basis for removing him from the selected for promotion list, that examination should be considered a "physical examination for promotion," within the meaning of 10 U.S.C. 1372(3).

In support of this view, the opinion cites several Court of Claims decisions, namely, *Leonard* v. *United States*, 131 Ct. Cl. 91 (1955); *Fredrickson* v. *United States*, 133 Ct. Cl. 890 (1956); *Clark* v. *United States*, 151 Ct. Cl. 601 (1960); and *Williams* v. *United States*, 145 Ct. Cl. 513 (1959). However, no mention was made of the *Brandt* case, cited and discussed below.

The JAG opinion of August 18, 1970, which further considered Major Blose's case, refers to several Comptroller General decisions, namely 32 Comp. Gen. 104 (1952); 35 *id.* 696 (1956); 36 *id.* 492 (1957); 37 *id.* 89 (1957); 40 *id.* 240 (1960); and *id.* 256 (1960). Those decisions involved, or referred to, the fifth proviso of section 402(d) of the Career Compensation Act of 1949, now codified in clauses (3) and (4), section 1372 of Title 10. The opinion of August 18, 1970, concludes that:

* * * it is our opinion that so long as we use any and every physical examination for the purpose, if relevant, of determining an officer's physical fitness for promotion, each physical examination so used should be considered as a "physical examination for promotion" as those words are used in 10 USC 1372(3).

A different view from that adopted in the above-mentioned JAG opinions is expressed in comments by the Chief, Retirements Division, Directorate of Personnel Program Actions, Department of the Air Force. In communication dated August 7, 1970, that office stated that the examination to which Major Blose submitted was initiated 3 months (November 1, 1969) prior to his selection by the promotion board (January 30, 1970). The view was there expressed that since the examination was initiated in connection with the officer's projected voluntary retirement, his voluntary act of submitting an application for retirement had the effect of an action which would have removed him from an active status and resulted in his transfer to the Retired Reserve section, a status which also would have made him ineligible for promotion. The view was also expressed that it would be more appropriate to apply the provisions of 10 U.S.C. 1374(a) to Major Blose, transferring him to the Retired Reserve section in the grade of lieutenant colonel but with retired pay as a major.

Section 1374(a) of Title 10 provides, in part, that a Reserve commissioned officer, unless holding an appointment or entitled to a higher grade under another provisions of law, who is recommended for promotion to a higher Reserve grade and who, before being promoted, is transferred to the Retired Reserve because of physical disability, transfers to the Retired Reserve in the grade for which he had been recommended. However, subsection (d) of section 1374 precludes entitlement to increased pay or other benefits under that section unless otherwise provided by law. Rule 1, Table 8–2, Air Force Manual 35–7, is the regulation implementing that law. Since Major Blose was recommended for promotion to the grade of lieutenant colonel but before being promoted to that grade—it was not to take effect until February 26, 1971—he was transferred to the Retired Reserve because of physical disability, his situation ostensibly brings him within the purview of section 1374.

In the light of the court's holding in the *Williams* case cited above, we said in 40 Comp. Gen. 256, 259, that each case must be decided on its own merits; that is, whether under the particular facts and circumstances of the individual case concerned, the physical examination actually received may reasonably be viewed for purposes of the fifth proviso of section 402(d) of the 1949 act (clauses (3) and (4) of 10 U.S.C. 1372), as constituting a physical examination given in connection with effecting a promotion.

The Court of Claims and this Office have consistently viewed the fifth proviso of section 402(d) of the 1949 act and clauses (3) and (4) of section 1372, as requiring a definite degree of connection between the physical examination and the prospective promotion in order to

meet the conditions prescribed in those statutory provisions. In other words, the physical examination must have a direct and substantial bearing in connection with effecting a promotion. See the *Williams* case and *Brandt* v. *United States*, 155 Ct. Cl. 345 (1961). See, also, 40 Comp. Gen. 240 (1960); 41 *id.* 749 (1962); and compare decision of September 2, 1970, 50 Comp. Gen. 156.

In the Brandt case, the court took note of the plaintiff's contentions that there were physical examinations given in connection with promotion and retirement so close together as to be part and parcel of the same transaction, so that it might be properly said that the physical disability for which the plaintiff was retired was found to exist as a result of a physical examination given in connection with effecting a promotion, and that the case is on all fours with the *Fredrickson*, *Leonard*, *Williams*, and *Clark* cases.

The court pointed out that in the *Fredrickson*, *Leonard*, and *Clark* cases there were actual physical examinations designated as physical examinations in connection with promotions. The court distinguished the *Williams* case from the other three cases there cited in that Williams was not examined specifically in connection with his pending promotion, but he was examined in connection with his retirement for disability. The court held, however, that the inquiry made by the promotion board as to Williams' physical condition established sufficient connection between the physical examination and the promotion to meet the requirements of the fifth proviso of section 402(d).

The court further pointed out in the *Brandt* case that the plaintiff alleged nothing that would establish or even tend to indicate that he ever had a physical examination given "in connection with effecting a permanent promotion or a temporary promotion." In concluding that the plaintiff did not satisfy the requirements of the fifth proviso of section 402(d) of the 1940 act, the court stated in part:

> * * * In effect plaintiff asks this court to hold that solely by virtue of the fact that plaintiff was retired for physical disability at a time when he was being considered for promotion, he has met the requirements of the fifth proviso of section 402(d), and should thus receive disability retirement pay based on the higher rank to which he would have been promoted had he remained in the service. This we cannot do. Had Congress intended the proviso to operate in that manner we believe it would have stated so, rather than imposing the specific requirement explicit in the language of the statute. * * * Plaintiff has actually sought to have this court extend the tenor of the cases disinguished above one step further, so as to eliminate the requirement of a degree of connection between physical examination and promotion from the fifth proviso of section 402(d). Since we have declined to do this, the establishment of facts indicating at least a degree of connection between physical examination and proposed promotion remains requisite to a cause of action under the statutory provision. * * *

As the record indicates, Major Blose had a physical examination (on November 1, 1969) 3 months before his selection for promotion (January 30, 1970) to the grade of lieutenant colonel by the promotion

board, and he had another physical examination subsequent to such selection and before June 23, 1970 (the date the Secretary of the Air Force determined his unfitness for duty and directed that he be retired for physical disability). Nowhere does the record show any degree of connection between either physical examination and his selection for promotion to the higher grade of lieutenant colonel as contemplated by clause (3) of section 1372. On the contrary, the physical examination taken on November 1, 1969, is stated to have been in connection with his "projected *voluntary* retirement" and the examination subsequent to his promotion is stated to be "incidental to his retirement."

On the record before us and in the absence of a promotion physical examination within the purview of the court's holding in the *Brandt* case, it is our view that the specific requirements of clause (3), 10 U.S.C. 1372, have not been met in this case. Accordingly, there is no authority for payment of retired pay to Major Blose computed on the grade of lieutenant colonel. The voucher and supporting papers will be retained here.

[B-171252]

Contracts—Deliveries—Failure to Meet Schedule—Interpretation of "Time for Delivery" Provision

The interpretation of the "Time for Delivery" provision in a contract for court reporting and transcription service of hearings before the National Transportation Safety Board, Department of Transportation, is a question of law and not of fact for resolution under the "Disputes" clause of the contract. The requirement to deliver transcripts originating outside of Washington, D.C., to the Docket Section of the Board, located in Washington, within 10 days, means the transcripts must be in the custody of the specified office within 10 calendar days from the date of the hearing, and the mere fact of mailing the transcripts before the expiration of the 10-day period does not constitute full compliance with the delivery clause.

To the Hoover Reporting Company, Inc., January 22, 1971:

Further reference is made to your letter dated November 9, 1970, with enclosure, requesting our Office to interpret Article III (a) of contract No. DOT-SB-10003 with the National Transportation Safety Board, Department of Transportation (DOT).

The subject contract was awarded on June 29, 1970, for court reporting and transcription service of hearings before the National Transportation Safety Board for the period July 1, 1970, through June 30, 1971, in Washington, D.C., and throughout the United States, including its territories and possessions. Standard Form No. 32, June 1964 edition, which contained a "Disputes" clause, was incorporated into the contract by reference.

The part of the contract with which we are concerned deals with the time of delivery set forth in Article III, which reads as follows:

Copy to be furnished shall be designated REGULAR COPY or DAILY COPY as defined below and delivered as instructed by the presiding official:

(a) *REGULAR COPY:* Transcripts shall be delivered as follows: ten (10) calendar days outside the Washington, D.C. area; five (5) calendar days in the Washington, D.C. area.

(b) *DAILY COPY:* Complete transcripts of the day's proceedings shall be delivered not later than 9:00 a.m. on the following business day.

(c) Unless the contractor is otherwise directed, all transcripts ordered shall be delivered to the Docket Section, National Transportation Safety Board, Washington, D.C., during the regular business hours, with postage or other transportation charges fully prepaid by the contractor.

Under the contract, acceptance of all transcripts "will be at destinations;" that is, at the Docket Section, National Transportation Board, Washington, D.C.

You state that after meeting with representatives of DOT regarding the proper interpretation of the above-quoted delivery article, you have been unable to reach an agreement in view of DOT's contention that in order to comply with this article, transcripts from outside the Washington, D.C., area "must be received" in the Washington Office of DOT within 10 calendar days of the date of hearing. You contend that transcripts from outside the Washington, D.C., area which "are deposited in the United States Mail," postage prepaid, and addressed to DOT, Washington, D.C., within 10 calendar days from the date of hearing, are in compliance with the article. You believe that such interpretation is consistent with the manner in which you interpreted similar provisions in other Government contracts. In view of these two different interpretations, you request our views in the matter.

The record before us contains no indication of a dispute of fact which would be a matter initially for resolution by the administrative agency under the contract disputes clause, subject to review under standards contained in 41 U.S.C. 321. Rather, the question involved appears to be one of law rather than of fact; i.e., whether under the "Time of Delivery" provisions set forth in Article III of the contract the contractor is required to deposit transcripts from outside the Washington, D.C., area in the mail, if such mode of transmission is used, in sufficient time for them to be delivered to the Docket Section, National Transportation Safety Board, Washington, D.C., within 10 days.

It has been consistently held by the Court of Claims that the interpretation of the language of a contract is a question of law, not a question of fact. See *Dynamics Corporation of America* v. *The United States*, 182 Ct. Cl. 62 (1968), and the cases cited therein.

We think that the language contained in Article III is unambiguous and is subject to only one reasonable interpretation with regard to the delivery requirements of transcripts emanating from outside the Washington, D.C., area. We believe that the contractor, unless other-

wise directed, is required to take appropriate measures to assure that all transcripts originating outside Washington, D.C., will be delivered to the NTSB Docket Section within 10 days. If mail service is used, transcripts must be deposited in sufficient time to allow for delivery within the 10-day period to the designated place. In other words, under the terms of the time of delivery clause, delivery is effected when the transcripts are actually placed in the custody of the Docket Section within 10 calendar days from the date of the hearing. Hence, the mere fact of mailing before expiration of the 10-day period does not constitute full compliance with the clause. The foregoing is not intended in any manner to foreclose your company from pursuing any administrative remedies which might be available under the terms of the contract with further regard to the manner of contract performance.

[B-171459]

Gratuities—Reenlistment Bonus—Extension of Enlistment—Pay Increase Rate Applicability

A member of the uniformed services who had been paid a reenlistment bonus based on the 1969 pay scale for a 2-year extension of his enlistment, effective March 15, 1970, may only be paid upon the subsequent reextension of his enlistment for 1 year, effective March 15, 1972 on the basis of the 1969 pay scale, since the reenlistment bonus rate is governed by section 2(a) of Executive Order No. 11525, under which the bonus payment for the first extension was limited to the 1969 pay scale; and since by virtue of 10 U.S.C. 509 the second extension placed the member "in exactly the same status as though he originally extended his enlistment for the aggregate of all the extensions" on March 15, 1970, payment for the 3-year aggregate reenlistment bonus is restricted to the 1969 pay scale by section 2(b) of Executive Order No. 11525.

Gratuities—Reenlistment Bonus—Extension of Enlistment—More Than One—Effective Date of Aggregate Extension

Upon reextending his reenlistment for 1 year 4 months effective July 2, 1971, a member of the uniformed services who at the time he first extended his enlistment for 10 months, effective March 2, 1970, was not entitled to a bonus, is subject to section 2(a) of Executive Order No. 11525, which prohibits an increase in the payment of a reenlistment bonus to a member whose entitlement occurred after December 1969 and before April 15, 1970. Even though the member's bonus entitlement is based on the July 1971 extension of his enlistment, for the purpose of payment the day before the member began serving on his first extension corresponds to the statutory date "of discharge and release" contained in 37 U.S.C. 308(a); and the aggregate reenlistment became effective March 2, 1970, requiring the reenlistment bonus to be computed on the basis of the 1969 pay scale.

To the Secretary of Defense, January 22, 1971:

Further reference is made to letter dated December 2, 1970, from the Assistant Secretary of Defense (Comptroller) requesting a decision whether reenlistment bonus should be computed on the basis of the 1969 or the 1970 military pay rates for an extension of an enlistment entered into under the circumstances set forth in Department of

Defense Military Pay and Allowance Committee Action No. 446 which accompanied that letter.

The questions are stated in the Committee Action as follows:

1. If a member is paid a reenlistment bonus based on the 1969 pay scale for a 2-year extension of enlistment effective 15 March 1970, should an additional bonus for a subsequent 1-year reextension of the same enlistment effective 15 March 1972 be based on the 1969 or 1970 pay scale?
2. If a member is not entitled to a bonus when he first extends his enlistment for 10 months effective 2 March 1970, but becomes so entitled when he reextends for 1 year and 4 months effective 2 July 1971, should the bonus be based on the 1969 or the 1970 pay scale?

Statements suggesting the basis for the doubt with respect to the proper answers to these questions appear in the discussion in Committee Action No. 446 and are as follows:

Computing the additional bonus on the basis of a literal interpretation of the DODPM [Department of Defense Military Pay and Allowances Entitlements Manual] would require the use of the 1969 pay scale in the question one situation. It is noted, however, that Section 2(a) of Executive Order 11525 refers to entitlement which occurs after 31 December 1969 and before 15 April 1970. Entitlement to the additional bonus in the question one situation does not occur until 15 March 1972. It is also noted that if the 1970 rate is considered applicable for the additional bonus, the DODPM requires that the whole bonus (original plus additional) be computed on the basis of the combined extensions and then the bonus for the first extension is deducted. This type of computation would, in effect, give the member a total bonus based entirely on the 1970 rates.

In connection with question two, it is noted that a bonus is not payable for a 10-month extension because the DODPM requires an extension or combined extensions totaling 2 years or more for bonus entitlement. Although entitlement to the bonus in question two first accrues on 2 July 1971, it is again noted that the DODPM requires computation of a bonus at the pay rate applicable on the day before a member began serving on his first extension. In this regard, the problem in question two is similar to the one in the first question.

In implementing section 8(a) of the act of December 16, 1967, Public Law 90–207, 81 Stat. 649, 654, 37 U.S.C. 203 note, and the Federal Employees Salary Act of 1970, Public Law 91–231, April 15, 1970, 84 Stat. 195, 5 U.S.C. 5332 note, the President adjusted upward the rates of monthly basic pay for members of the uniformed services, the new rates being set forth in section 1 of Executive Order No. 11525, dated April 15, 1970, effective January 1, 1970. Section 2 of the same Executive order provides as follows:

Sec. 2(a) A person who became entitled after December 31, 1969, but before the date of enactment of the Federal Employees Salary Act of 1970, to payment for items such as lump-sum leave, reenlistment and variable reenlistment bonus, continuation pay, any type of separation pay, or six months death gratuity, shall not be entitled to any increases in any such payment by virtue of this order.

(b) Authority to prescribe other rules for payment of retroactive compensation shall be exercised for the uniformed services by the Secretary of Defense. Entitlement to retroactive pay under such rules shall be subject to the provisions of section 5 of the Federal Employees Salary Act of 1970, and shall conform as nearly as may be practicable to the provisions of Section 7 of the Act of December 16, 1967, 81 Stat. 654.

Pursuant to the quoted section 2(b), the Deputy Secretary of Defense in memorandum for the Assistant Secretary of Defense (Comptroller),

dated April 21, 1970, prescribed certain rules implementing the Executive order. Rule 1 of the memorandum states in part that—

> A person who became entitled, after December 31, 1969, but before April 15, 1970 to payment for items such as * * * reenlistment and variable reenlistment bonus * * * will not be entitled to any increase in any such payment by virtue of that Order.

A reenlistment bonus is authorized under 37 U.S.C. 308(a) computed, in the case of a member of a uniformed service who reenlists or voluntarily extends his enlistment in the Regular component of the service concerned for at least 2 years, on the basis of the basic pay to which the member was entitled "at the time of discharge or release." The Secretary of the service concerned is authorized by subsection 308(f) thereof to prescribe regulations for the administration of the provisions of that section.

Section 509 of Title 10, U.S. Code, provides that under such regulations as the Secretary of the service concerned may prescribe, the term of an enlistment of a member of an armed force may be extended or reextended with his written consent for any period not exceeding 4 years in all. Section 906 of Title 37, U.S. Code, provides that a member who extends his enlistment under 10 U.S.C. 509 is entitled to the same pay and allowances as though he had reenlisted; and that for the purpose of determining entitlement to reenlistment bonus, all extensions of an enlistment are considered one continuous extension.

In implementing these laws, paragraph 10904 of the Department of Defense Military Pay and Allowances Entitlements Manual provides in pertinent part as follows:

> Compute reenlistment bonus as for actual reenlistment when a member voluntarily extends his enlistment for 2 years or more. This includes combined extension as provided below. * * * The additional bonus payable is computed on the basis of the combined extensions, * * *. Compute at pay rate applicable on day before he began serving on his first extension. * * *

In our decision of July 18, 1960, 40 Comp. Gen. 14, we held that under provisions of law substantially the same as those in 10 U.S.C. 509 and 37 U.S.C. 906, providing that a series of extensions is considered as one continuous extension and places the member in exactly the same status as though he had originally extended his enlistment for the total period of all the extensions, the reenlistment bonus is computed on the basis of the rate of pay received on the day before the effective date of the first extension.

We also held in that decision that if a reenlistment bonus is paid for extensions aggregating 2 years, and a subsequent extension is made aggregating 3 or 4 years, an appropriate reenlistment bonus is payable computed on the longer period, but the previous bonus paid for the shorter period must be deducted. See also 46 Comp. Gen. 322 (1966) and B–163038, January 11, 1968.

In regard to the first question, the member's bonus for the aggregate of 3 years should be based on the 1969 pay scale, since the reenlistment bonus rate would be governed by section 2(a) of Executive Order No. 11525, which in effect provided that such a member was not entitled to have his bonus computed on the 1970 pay scale for his first extension, and since his second extension places him "in exactly the same status as though he originally extended his enlistment for the aggregate of all the extensions."

With respect to question 2, as indicated above, all extensions of an enlistment are considered one continuous extension for the purpose of determining entitlement to reenlistment bonus (37 U.S.C. 906) and the reenlistment bonus is computed on the rate of monthly "basic pay to which member was entitled at the time of discharge or release" (37 U.S.C. 308). Regulations in Executive Order No. 11525 provide that a person who becomes entitled to payment of reenlistment bonus after 1969 and before April 15, 1970, will not be entitled to any increase in any such payment by virtue of that order. Implementing regulations in Department of Defense Military Pay and Allowances Entitlements Manual provide that in case of combined extensions of enlistment, the reenlistment bonus will be computed at the pay rate applicable on the day before the person began serving on his first extension.

Since the total period of the extension of enlistment in this question amounted to less than 2 years prior to the second extension of enlistment, the member did not legally become entitled to a bonus based upon his extension of enlistment until July 1971, when he began his second extension. The computation of the reenlistment bonus must, however, under the law and regulations, be based upon the rates of basic pay in effect on the day before the effective date of his first extension of enlistment; that is, on the "day before he began serving on his first extension," which corresponds to the statutory date "of discharge or release" in 37 U.S.C. 308(a). Since for the purpose of payment of reenlistment bonus the member is thus placed in the status of initially extending his enlistment for the aggregate of 2 years 2 months, effective March 2, 1970, he became entitled by virtue of the second extension of enlistment to a bonus after December 31, 1969, but before April 15, 1970, and is subject to the provisions of section 2(a) of the Executive order.

Accordingly, the bonus in question 2 is for computation on the basis of the 1969 pay scale.

[B-163654]

Compensation—Overtime—Inspectional Service Employees—Traveltime

In the administration of inspection and grading programs, when events are not within the control of the Department of Agriculture, and an Agricultural Commodity Grader is required to travel 8½ hours on Sunday to report for duty 8 a.m. on Monday to inspect and checkload a shipment of peanut butter being purchased by the Department, the travel is compensable at the overtime rates prescribed in 5 U.S.C. 5542(b)(2)(B), as the travel could not have been scheduled within the employee's regular hours. The fact that the Government is reimbursed for all the costs incurred in providing the inspection and checkloading services has no bearing on the employee's entitlement to the payment of overtime for the services performed.

Compensation—Overtime—Traveltime—Administratively Controllable

When an employee of the Dairy Division of the Division of Consumer and Marketing Services of the Department of Agriculture is ordered to travel on Sunday in order to attend two national milk hearings scheduled during the week, one on Monday morning and the other on Friday, the requirement in the Administrative Procedure Act, 5 U.S.C. 554(b), which provides that the convenience of participants should be considered in fixing the time and place for hearings, does not remove the scheduling of hearings from the Department's control; for while the provision imposes a rule of reasonableness upon the agency's freedom in scheduling the hearings, it does not require the hearings to be scheduled at any particular time. Therefore, the traveltime of the employee is not traveltime within the meaning of 5 U.S.C. 5542(b)(2)(B) that is compensable as overtime.

Compensation — Overtime — Traveltime — Status — Waiting for Transportation

A Department of Agriculture employee returning from performing the temporary duties of an Agricultural Commodity Grader, whose air flight was delayed, is entitled under 5 U.S.C. 5542 to compensation for the "usual waiting time" for the interrupted travel that is prescribed by the Federal Personnel Manual, which means the time necessary to make connections in the ordinary travel situation, consistent with the performance of travel as expeditiously as possible, with an extension of time for heavy holiday traffic and inclement weather, minus time for eating and rest. As traveltime that cannot be scheduled or controlled qualifies for work, the employee whose regular tour of duty is 8 a.m. until 4:30 p.m., having traveled from 3:10 a.m. to 10:30 a.m. on Thanksgiving Day, is entitled to payment at his overtime rate from 3:10 a.m. to 8 a.m. and at the holiday premium pay rate from 8 a.m. to 10:30 a.m.

Compensation—Overtime—Inspectional Service Employees—Traveltime

Under the Agricultural Marketing Act of 1946 (7 U.S.C. 1622), the Department of Agriculture is required to perform inspection and grading services when products are shipped or received in interstate commerce; and, therefore, the required services are not within the control of the Department to enable the scheduling of an inspector's travel during his regular duty hours. Therefore, an Agricultural Commodity Grader whose travel could not be scheduled during his regular duty hours is entitled to be compensated for his travel at the overtime rates prescribed by 5 U.S.C. 5542(b)(2)(B).

Compensation—Overtime—Traveltime—Administratively Controllable

The traveltime of a Food Inspector in the Consumer Protection Program of the Division of Consumer and Marketing Services of the Department of Agriculture, performed from 9 p.m. Sunday until 4 a.m. Monday—hours outside his regular tour of duty—in order to relieve an inspector who had been granted nonemergency annual leave, is not compensable as overtime since in scheduling the annual leave the need for a relief inspector should have been considered and the travel of the relief inspector scheduled within his regular duty hours. Also, the return travel of the relief inspector outside his regular tour of duty was not required by an event that could not be scheduled or controlled administratively; and, therefore, the return travel from the inspection site is not compensable under 5 U.S.C. 5542(b) (2) (B) as overtime.

To the Secretary of Agriculture, January 26, 1971:

This refers to the letter of October 6, 1970, from your Assistant Secretary for Administration, Mr. Joseph M. Robertson, regarding application of the provisions of Public Law 90-206, Federal Salary Act of 1967, approved December 16, 1967, which amended 5 U.S.C. 5542 to provide:

(a) Hours of work officially ordered or approved in excess of 40 hours in an administrative workweek or * * * in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:

* * * * * * *

(b) For the purpose of this subchapter—

* * * * * * *

(2) time spent in a travel status away from the official-duty station of an employee is not hours of employment unless—

* * * * * * *

(B) the travel * * * (iv) results from an event which could not be scheduled or controlled administratively.

Federal Personnel Manual Letter 550-52, containing implementing instruction and information, provides in pertinent part:

Travel which results from an event which cannot be scheduled or controlled administratively is also a new condition under which travel is considered hours of work. The phrase "could not be scheduled or controlled administratively" refers to the ability of an Executive agency * * * and the government of the District of Columbia to control the event which necessitates an employee's travel. The control is assumed to be the agency's whether the agency has sole control, or the control is achieved through a group of agencies acting in concert, such as a training program or conference sponsored by a group of Federal agencies, or sponsored by one in the interest of all, or through several agencies participating in an activity of mutual concern, such as an agency hearing on an aircraft accident.

* * * * * * *

On the other hand, travel will be considered hours of work when it results from unforeseen circumstances (e.g., a breakdown of equipment) or from an event which is scheduled or controlled by someone or some organization outside of government. * * *

The Assistant Secretary suggests that the concept of administrative control by the Government set out is not fully realistic as it relates to certain inspection and grading services which the Department of Agriculture is required to render under 7 U.S.C., sections 71–87 and 1621–1627. He states:

> While the statutes require the provision of services, they do not specifically establish the times at which such services must be provided. In practice, however, the degree of administrative control which the Agency may have in the strict language of the law does not exist in any realistic administration of the inspection and grading programs. Frequently, if the services * * * are not furnished at the times they specify, they would suffer severe economic losses. For example, if a ship in port requests a grain appeal inspection, this must be done before longshoremen can proceed with loading its cargo. If C&MS [Division of Consumer and Marketing Services of the Department of Agriculture] were to deny this service until an employee could be ordered to travel within his regular hours of work, the ship could be tied up in dock and faced with possible demurrage costs of three to four thousand dollars a day for each day of delay in port.

The letter poses several cases as being typical of those encountered by the Agriculture Department. The first is the case of Mr. Ray E. Tannehill, who is employed as an Agricultural Commodity Grader of the Fruit and Vegetable Division of C&MS. Mr. Tannehill was ordered to travel for 8½ hours on a Sunday from Fayetteville, Arkansas, to Dallas, Texas, in order to report for duty at 8 a.m. on Monday to inspect and checkload a shipment of peanut butter being purchased by the Agriculture Department. The applicable purchase agreement for the peanut butter provides for certain inspection and checkloading functions to be provided by the Government. With regard to this contract requirement, the letter states:

> * * * Before the contractor can ship the carlots required, he must have complied with the requirement for inspection and checkloading * * *. If services are not provided when he requests them, the contractor could be assessed liquidated damages for late delivery of a product by the same agency that would not furnish him the inspection and checkloading services in time to permit him to meet his deadline.
>
> * * * * * * *
>
> * * * We believe that when requirements are imposed on contractors to obtain inspection or checkloading services from USDA before they can make delivery of the commodities, the furnishing of these services at times requested by the contractors becomes an event which USDA cannot realistically schedule or control. * * *

We recognize that while certain inspections are of such a nature that to be of any value, they must be on a "surprise" basis and are schedulable by the Government, many others can be performed only at certain stages of production or when certain events occur which, as a practical matter, are not within the control of the Government. Where an employee's travel is occasioned by the necessity for an in-

spection of the latter type, and his travel cannot be scheduled within his regular working hours, as in Mr. Tannehill's case, his travel would be compensable at overtime rates as prescribed by 5 U.S.C. 5542(b)(2)(B).

It is further inquired whether the fact that the Government is reimbursed for all costs incurred in providing the inspection and checkloading services makes it proper to compensate the employees performing travel. We do not believe this factor is material, since entitlement to overtime compensation under the statute previously referred to is in no way related to reimbursement to the United States for the cost of services by its employees.

The second case posed is that of Mr. Dunn, an employee of the Dairy Division of C&MS, who was ordered to travel on Sunday in order to attend two national milk hearings in Washington scheduled during the week, one on Monday morning and the other on Friday. The letter states that if the first meeting had not been scheduled on Monday, the work necessary for the second meeting would not have been completed before Saturday, thereby requiring the parties involved to stay the weekend to resume the following week. For this reason, it appears to be the opinion of your agency that the decision to convene the hearing on Monday morning was required by the Administrative Procedure Act (5 U.S.C. 554(b)), which provides:

> * * * In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

The question is asked whether the existence of a law such as this, which influences where and when meetings and hearings are to be scheduled by the Government, removes such scheduling from agency control and whether, under the circumstances described, Mr. Dunn's traveltime is thus compensable.

While the cited statute imposes a rule of reasonableness upon the agency's freedom to schedule hearings, nevertheless it does not require the hearing to be scheduled at any particular time. The fact that economy or other reasons may be responsible for scheduling a meeting on Monday does not provide a basis for concluding that such a meeting is beyond the administrative control of the agency involved. We note that hearings and conferences are singled out in the FPM Letter as being among the activities over which an agency or group of agencies ordinarily has control:

> * * * The phrase "could not be scheduled or controlled administratively" refers to the ability of an Executive agency * * * to control the event which necessitates an employee's travel. The control is assumed to be the agency's

when the agency has control, or the control is achieved through a group of agencies acting in concert, such as a training program or conference sponsored by a group of Federal agencies, or sponsored by one in the interest of all, or through several agencies participating in an activity of mutual concern such as an agency hearing on an aircraft accident.

Under the circumstances described, Mr. Dunn's traveltime would not be compensable as overtime.

The third case posed is that of Mr. Gerald R. Savitz, an Agricultural Commodity Grader with the Grain Division of C&MS, who was released from temporary duty in New Orleans, Louisiana, and ordered to return to Spokane, Washington. He left New Orleans on a flight which departed at 11:05 a.m., CST, on November 27, 1968, and arrived in Seattle at 2:45 p.m., PST, the same day. Mr. Savitz had standby reservations on the next flight to Spokane, but since space was not available, he waited for the next flight, which departed Seattle at 8:15. The Spokane airport was closed by fog, and after circling for nearly 2 hours, the flight returned to Seattle at 11:45 p.m. There having been no flights to Spokane until 2 p.m. on the following day, which was Thanksgiving, Mr. Savitz took a chartered bus provided by the airline, which left Seattle at 3:10 a.m. and arrived in Spokane at 10:30 a.m.

Federal Personnel Manual, Supplement 990–2, Book 550, subchapter S1–3, page 550–8.01 provides:

In determining the amount of time in a travel status which would be included as hours of employment, an employee is considered to be in a travel status only for those hours actually spent traveling between his official duty station and his point of destination, or between two temporary duty points, and for usual waiting time which interrupts travel.

We have not been given any indication of the reason for Mr. Savitz' return travel to Spokane. We would stress in this connection that the fact that his travel to New Orleans might have been occasioned by an administratively uncontrollable event would not of itself serve to qualify the return travel as overtime within the requirements of 5 U.S.C. 5542(b)(2)(B). The return travel must also have been in connection with an uncontrollable event, in order to be compensable as hours of work. However, for purposes of considering the question of what is "usual waiting time" within the meaning of the quoted FPM provision, it will be assumed that the return travel falls within the requirement of 5 U.S.C. 5542.

Mr. Savitz spent 5½ hours waiting for the Spokane flight from Seattle, and an additional 3½ hours awaiting the bus. Your agency's question concerns his entitlement to compensation for these waiting periods. The term "usual waiting time" refers to the time necessary

to make connections in the ordinary travel situation, consistent with the overriding mandate that travel should be performed as expeditiously as practicable. In Mr. Savitz' case, the time which he was required to wait between connections was extended because of heavy holiday traffic and inclement weather. While the full amount of such waiting time may not be regarded as "usual," we believe that it would not be unreasonable to allow up to 3 hours of waiting time beyond Mr. Savitz' regular tour of duty, reimbursable at overtime rates in accordance with 5 U.S.C. 5542. Thus on November 27, Mr. Savitz would be entitled to 6½ hours overtime computed as follows: waiting time—4:30 p.m. to 8:30 p.m., minus 1 hour for rest and eating equals 3 hours, plus 3½ hours traveltime from 8:15 p.m. to 11:45 p.m.

Further inquiry is made as to how much of the traveltime on November 28, Thanksgiving Day, should be paid at the overtime rate and how much is compensable as holiday premium pay. For purposes of subchapter 5, 5 U.S.C. 5542(b) defines as "hours of employment" time spent in a travel status as a result of an event which could not be scheduled or controlled administratively. Subchapter 5, at 5546(b) makes provision for holiday premium pay as follows:

> An employee who performs work on a holiday designated by Federal Statute, Executive order * * * is entitled to pay at the rate of his basic pay, plus premium pay at a rate equal to the rate of his basic pay, for that holiday work which is not—
>
> (1) in excess of 8 hours; or
>
> (2) overtime work as defined by section 5542(a) of this title.

Thus, time spent in a travel status meeting the requirement of 5542(b)(2)(B) would qualify as work within the meaning of 5546(b). See B–168726, January 28, 1970, wherein hours of travel were compensated at holiday premium pay rates.

On Thanksgiving Day, for the time from midnight until 3:10 a.m., no waiting time is allowable, since the maximum of 3 hours per trip was used on November 27. Mr. Savitz did, however, perform travel which constituted work from 3:10 a.m. until 10:30 a.m. Since his regular tour of duty was from 8 a.m. until 4:30 p.m., traveltime from 8 a.m. until 10:30 a.m. would be compensable as holiday premium pay, while travel performed between 3:10 a.m. and 8 a.m. would be compensable at the overtime rate. See 37 Comp. Gen. 1 (1957); 38 *id.* 560, (1959).

The third question presented in connection with Mr. Savitz' travel is whether any deduction ought to be made for sleeping and eating time. In this connection, note the treatment of eating time in the computation of overtime for November 27. With regard to November 28,

we feel, in light of the fact that the travel was not performed over an extended period of time and because there apparently were no accommodations on the bus for sleeping, that no time need be deducted for sleeping. Nor, in view of the particular circumstances of Mr. Savitz' travel, need eating time be deducted for the 28th.

The fourth case posed is that of Mr. Albert W. Chumley, an Agricultural Commodity Grader with the Livestock Division, C&MS, who was ordered to travel on two Sundays in order to perform meat grading duties on Monday morning at approximately 6 a.m.

The Agricultural Marketing Act of 1946 (7 U.S.C. 1622) provides:

> The Secretary of Agriculture is directed and authorized * * * (h) to inspect, certify, and identify the class, quality, quantity and conditions of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary of Agriculture may prescribe * * *.

The USDA regulations implementing this section which are found in 7 CFR, part 53, provide:

> § 53.8 How to obtain service.
>
> (a) Application. Any person may apply to the Director or Chief for service under the regulations with respect to livestock or products in which the applicant is financially interested * * *
>
> (b) Notice of eligibility for service. The applicant for service at any establishment will be notified whether his application is approved. * * *
>
> * * * * * * *
>
> § 53.9 Order of furnishing service.
>
> Service under the regulations shall be furnished to applicants in the order in which requests therefor are received, insofar as consistent with good management, efficiency and economy. * * *

In practice, applicants request grading services at specific hours, and you state that it has been the policy of your agency to meet their requests even though doing so requires travel by your employees outside their regular hours of work.

The statute under which the Agriculture Department is required to perform inspection and grading services contemplates that such services as are required will be provided when the agricultural products are shipped or received in interstate commerce, which is a matter over which the Government is without control. In order for inspection and grading to serve the purpose intended by the statute, the services must be provided when requested, and to the extent that on this account an employee's travel cannot be scheduled during his regular duty hours, his travel is compensable at overtime rates. We view the needs of the applicants for inspection and grading services as events over which the agency has no administrative control, giving rise to an official necessity for the travel. This should obviate the necessity for

an answer to the question of whether the requirement of applicants for grading services constitutes a valid reason for ordering your employees to perform noncompensable travel.

The final example concerning the need for replacing an employee granted leave is similar to example No. 2 in the Federal Personnel Manual, except that travel in the case which you pose was incurred to relieve an employee who had been granted nonemergency annual leave rather than emergency annual leave. Mr. Buddy Sebastian, a Food Inspector in the Consumer Protection Program of C&MS, traveled outside of his regular duty hours from 9 p.m. Sunday until 4:30 a.m. on Monday morning, from Dallas, Texas, to Russellville, Arkansas, to relieve an inspector there who had been granted nonemergency annual leave. His assignment was to perform the inspection required by 21 U.S.C. 455(b) which provides:

> The Secretary, whenever processing operations are being conducted, shall cause to be made by inspectors, post mortem inspection of the carcasses of each bird processed * * *

Mr. Sebastian returned to Dallas the following Sunday, traveling from 12:30 a.m. to 8:30 p.m. It is asked whether Mr. Sebastian is entitled to overtime compensation for the hours spent traveling to and from his temporary duty assignment in Russellville.

With respect to Mr. Sebastian's travel to Russellville, it is clear that the leave in question and the required travel involved could have been administratively arranged to avoid the necessity for such travel outside of Mr. Sebastian's regular workweek. Absence of the inspector at Russellville because of nonemergency annual leave beginning on a Monday was an event which could have been avoided by proper administrative scheduling. For example, the leave could have been scheduled to begin on a Tuesday or Wednesday, and Mr. Sebastian's traveltime could have been scheduled within his regular working hours. Federal Personnel Manual, chapter 630, subchapter 3, provides:

> 3.4(b) *Agency authority*
>
> (1) General: Annual leave provided by law is a benefit and accrues automatically. However, supervisors have the responsibility to decide when the leave may be taken. This decision will generally be made in light of the needs of the service rather than solely on the desires of the employee. Supervisors should insure that annual leave is scheduled for use so as to prevent any unintended loss at the end of the leave year.

In view of the statutory inspection requirement cited above, one factor which should have been taken into consideration in scheduling annual leave was the installation's need for a relief inspector, giving

due regard to the policy of scheduling the relief inspector's travel within his regular duty hours. Since there was administrative control over the scheduling of leave at the Russellville installation, as well as Mr. Sebastian's travel thereto, the hours of such travel are not compensable as overtime work.

As in examples No. 1 and No. 5 of the Federal Personnel Manual, the Civil Service regulations or instructions provide that unless return travel outside of duty hours is required by an event which itself could not be scheduled or controlled administratively, it is not hours of work. In Mr. Sebastian's case, no reason for the performance of the return travel at the time it was in fact performed was indicated. Apparently Mr. Sebastian's return travel on Saturday morning was because the Russellville inspector's leave terminated at that time.

We trust that the foregoing adequately covers the questions presented.

[B–170306]

Meetings—Attendance, Etc., Fees—Federally Sponsored Meetings—Military Personnel

The registration fees incurred by a member of the uniformed services while on temporary duty, incident to attendance at a meeting, conference, or workshop sponsored by a Federal agency, may be reimbursed to the member from appropriations available to the Department of Defense for travel expenses under appropriate Departmental regulations when the member is otherwise properly directed by orders of competent authority to attend the meeting in a temporary duty status; but since the Federal agency meeting is not a meeting of a technical, scientific, professional, or similar organization within the contemplation of 37 U.S.C. 412, the approval of the Secretary of Defense required by section 412 is not necessary.

To the Secretary of the Navy, January 27, 1971:

Further reference is made to letter dated June 18, 1970, from the Assistant Secretary of the Navy (Manpower and Reserve Affairs) requesting a decision as to whether there is any legal bar to the use of Department of Defense appropriations available for travel expenses to reimburse a member for registration fees incident to the attendance at a meeting, conference, or workshop sponsored by a Federal agency when such expense is incurred by him while on temporary duty. The letter was forwarded here on July 2, 1970, by the Department of Defense Per Diem, Travel and Transportation Allowance Committee and the request was assigned PDTATAC Control No. 70–32.

In his letter, the Assistant Secretary advised that the above Committee has received for consideration a recommendation that paragraph M4408 of the Joint Travel Regulations be revised to indicate

that a registration fee as mentioned above is not a miscellaneous reimbursable expense. In this connection, the Assistant Secretary says that while 37 U.S.C. 412 provides for the use of Department of Defense appropriations available for travel when approved by the Secretary concerned or his designee, for expenses incident to the attendance of a member of an armed force under that department at a meeting of a technical, scientific, professional, or similar organization, it is silent regarding its application to both privately and federally sponsored meetings.

He says it has been the policy through the years, however, to apply its provisions only to meetings sponsored by private organizations. He also states that even though the law does not specifically provide for reimbursement of a registration fee, such fee has been considered an integral part of the privately sponsored meeting and is currently reimbursable to a member who pays it from personal funds.

Accordingly, the Assistant Secretary has expressed the belief that the above provision of law does not preclude reimbursement to a member of an armed force of the required registration fee paid by him incident to his attendance at a meeting sponsored by a Federal agency, and neither does such provision require prior approval by the Secretary concerned or his designee before travel funds can be used for such temporary duty. However, he says that a question has arisen as to the propriety of reimbursing a member for registration fees incident to attendance at a federally sponsored meeting.

Section 412, Title 37, U.S. Code, reads as follows:

> Appropriations of the Department of Defense that are available for travel may not, without the approval of the Secretary concerned or his designee, be used for expenses incident to attendance of a member of an armed force under that department at a meeting of a technical, scientific, professional, or similar organization.

That provision of law stems from section 605 of the Department of Defense Appropriation, Act, 1954, dated August 1, 1953, Ch. 305, 67 Stat. 349, 5 U.S.C. 174a (1952 ed., Supp II). Similar provisions, on a fiscal year basis, were contained in the prior appropriation acts for the fiscal years 1945 through 1953.

Prior to the issuance of Change 192 on January 1, 1969, paragraph M4408 of the Joint Travel Regulations, included in part I, chapter 4, relating to miscellaneous reimbursable expenses in connection with travel and temporary duty, limited reimbursement of registration fees to those incident to attendance at meetings of a technical, professional, scientific, or other non-Federal organization, as set forth in adminis-

trative regulations of the Service concerned. By Change 192, paragraph M4408 was changed to provide, under regulations of the Service concerned, for reimbursement of registration fees incident to attendance at meetings sponsored by Federal agencies, as well as meetings of non-Federal organizations, as previously authorized incident to temporary duty.

Current implementing regulations of the Department of the Army (Army Regulation No. 1–211, dated April 24, 1970) and the Department of the Air Force (Air Force Regulation 30–9, dated October 28, 1968), which provide for the attendance of military personnel at meetings of technical, scientific, professional, and other similar private organizations, expressly exclude from their application attendance at meetings and conferences sponsored or convened by Federal agencies. However, the regulations of the Department of the Navy, promulgated on the basis of the above-mentioned Change 192 provide otherwise. Paragraph 5 of SECNAVINST 4651.8H, dated January 30, 1970, specifies that attendance by military personnel at and participation in meetings sponsored by Federal agencies and recognized non-Federal societies and organizations and expenses incident thereto shall only be authorized when the criteria contained in enclosure (1) are met.

Enclosure (1) to the instruction sets forth criteria and procedures for authorizing attendance at meetings sponsored by non-Federal organizations as well as meetings sponsored by Federal agencies. Paragraph 1a(a) provides that expenses incident to the attendance at and participation in meetings convened or sponsored by Federal agencies may be authorized under the the provisions of existing military travel instructions; and that where a registration fee is required incident to the attendance at and participation in these meetings, approval by the Secretary or his designee will be required.

We find nothing in the legislative history of the act of August 1, 1953, or in the prior appropriation laws, indicating any intention by the Congress that the law was to apply to meetings sponsored by or held under the auspices of a Federal department or agency. And there would seem to be no proper basis for considering a Federal department or agency, as such, as a "technical, scientific, professional, or similar organization," within the contemplation of section 412, Title 37, U.S. Code.

Therefore, we are of the opinion that, under appropriate Departmental regulations, appropriations available for travel expenses may be used for reimbursement of registration fees paid incident to attend-

ance at federally sponsored meetings of the type involved when the member is otherwise properly directed by orders of competent authority to attend the meeting in a temporary duty status. Also, it is our view that Secretarial approval is not required as it otherwise would be if the meeting were sponsored by an organization within the contemplation of section 412.

[B-171017]

Contracts—Awards—Small Business Concerns—Bid Bond Principal Deviation

The low bid submitted under a total small business set-aside for an Air Force Base construction project which bore the three names of the joint venture shown in the bid bond accompanying the bid, but was signed by the president of the only small business concern involved, may not be awarded to either the joint venture or the small business concern on the basis the two large business firms had associated with the small business concern only for the purpose of obtaining the bid bond. As to the joint venture, there was none at the time of bid submission or opening, and subsequently submitted information could not create the joint venture for the purpose of bid ratification—even if it could, the joint venture as a large concern would be ineligible for award, nor would an award to the small concern be proper as the bid bond named a joint venture as the principal.

To Sellers, Conner & Cuneo, January 28, 1971:

We refer to your protest, by telegram of October 13, 1970, as supplemented by subsequent correspondence, on behalf of Balboa Structural Industries, Inc. (Balboa), of San Diego, California, against the rejection of a low bid submitted in the name of "Balboa Structural Ind. Inc. Zurn-Huwin" on a Department of the Army construction project at Galena Air Force Base, Alaska. The procurement solicitation is invitation for bids (IFB) DACA85-71B-0004, issued June 23, 1970, by the United States Army Engineers District, Alaska, and the procurement is a total small business set-aside.

The bid, which bore the signature of Arch W. Coutris over the title "Pres. Balboa Struct. Ind.," included a certification that the bidder was a small business concern. The required bid bond, which accompanied the bid, was signed by Arch W. Coutris over the title "President." The principal named in the bid bond was "Balboa-Zurn-Huwin, a Joint Venture," and the bidder also represented itself as a joint venture in the Representations and Certifications, Standard Form 19-B, which accompanied its bid.

The record establishes that the low bidder concedes the joint venture does not qualify as a small business concern for the purpose of

the procurement; however, Balboa alone does so qualify. The question before our Office for decision, therefore, is whether the low bid as submitted may be accepted as a bid by Balboa in consideration to evidence furnished by Balboa to the Government after bid opening to the effect that Balboa's association with Huwin (Huwin Corporation) and Zurn (Zurn Engineers) is not a joint venture but simply an indemnification arrangement whereby Balboa has been enabled to obtain the bid bond and other bonding, if necessary, as required by the IFB.

The evidence submitted by Balboa to the contracting officer and to the Small Business Administration (SBA) after bid opening includes a memorandum of understanding signed on September 16, 1970, by the presidents of Balboa, Huwin, and Zurn. Pursuant of agreement of the parties as set forth in the memorandum, Zurn and Huwin are to receive payments of $50,000 each from Balboa in return for their agreement to be indemnitors on the bonding required of Balboa; Zurn and Huwin will have no other obligations with reference to the project; and Balboa alone is to be responsible for performing the work required by the contract. The record also includes, however, copies of letters dated September 24, 1970, in which Zurn and Huwin separately advised the contracting officer that Balboa's president had power of attorney to bind the respective companies on the bid bonds and on the bidding documents for the project in question and specifically stated, "We shall sign the Performance and Payment Bonds and the contract if requested by the U.S. Army Corps of Engineers."

A letter addressed by Balboa under date of September 18, 1970, to the SBA San Diego District Office includes the following pertinent statements:

> When I prepared the final bid documents for submittal from those prepared by our Mr. Whalen, I became concerned that the bid documents required the same name as that indicated on the bond. Otherwise, our bid would be nonresponsive. Therefore, under Balboa Structural Industries, Inc., I added Zurn Huwin to conform more closely with the name Balboa-Zurn-Huwin on the bond.
>
> The bid bond was validated by my signature only and by the corporate seal of Balboa Structural Industries, Inc. only, showing that Balboa was the company totally responsible for all the work. Zurn and Huwin were providing bonding support only for a fixed fee previously agreed upon. The bid documents were also signed and validated only by my signature to signify Balboa's exclusive responsibility as the sole prime contractor for the project.
>
> Since this project was established as a small business set-aside, we were inspired to bid, knowing that large firms who sometimes bid even below cost could not qualify as bidders. Our problem was bonding only. We have the resources and the talent to perform a fine project for the Alaska U.S. Army Corps of Engineers. We were extremely fortunate to have introduced to Zurn, a large

listed corporation on the New York Stock Exchange and to Huwin, a very successful company financially, who were willing to indemnify our bonding company. They helped to solve our bonding problem.

A memorandum dated September 17, 1970, bearing the signature of the SBA District Counsel and relating to the subject of the size determination of Balboa Structural Industries, Inc., commences with the statement, "Balboa admits that if Balboa is a joint venturer with Zurn-Huwin that Balboa would *not* be a small business concern as defined in section 121.3-8(a)(1) of the Small Business Administration's Rules and Regulations." The memorandum also includes a discussion of the difficulties encountered by small business construction firms in obtaining necessary bonding for construction projects; reviews the evidence submitted by Balboa and expresses Counsel's opinion that only an indemnification agreement exists between Balboa, Zurn, and Huwin; and concludes that Balboa is a small business concern for the procurement in question. A letter dated September 18, 1970, from the District Director of the SBA San Diego office to the procuring activity reads as follows:

Confirming teletype of today, copy attached, this office has made an examination of all evidence regarding the subject. Our findings indicate subject firm is a small business firm within the purview of the Small Business Administration's rules and regulations for the above noted construction work. Our findings also indicate this is not a joint venture project within the purview of same rules and regulations.

The contracting officer justifies his rejection of the low bid on the basis of nonresponsiveness in view of what he regards as a direct conflict between the memorandum of understanding, evidencing only an indemnification agreement among the three firms, and the Zurn and Huwin letters of September 24, evidencing agreement of Zurn and Huwin to be bound on the contract. The notice of rejection, by letter of October 14, 1970, addressed to Mr. Coutris of Balboa, reads as follows:

This is to advise you that your bid on Invitation DACA85-71-B-0004 for the construction of certain additional facilities at Galena Airport, Alaska is rejected as it is considered not responsive. Your bid was as a joint venture and the documents subsequently submitted by you do not support that alleged relationship. It is questionable whether or not you had authority to bind either Zurn Engineers and/or Huwin Corporation as a joint venture in the bidding or the subsequent obligation to execute a contract conforming to the obligations of your bid and the invitation.

In your protest, you maintain that Balboa, as attested by the presidents of Balboa, Zurn, and Huwin in separate affidavits dated October 30 and November 2, which you have forwarded to our Office, has authority to sign all of the bid documents and contract documents in

the name of Balboa-Zurn-Huwin. You further maintain that the parties do not have a joint venture relationship, because a joint venture would not have qualified for the small business set-aside in light of the status of Zurn and Huwin as large business and that the joint venture format was used on the bid and on the bid bond only because such was the form in which the bonding company agreed to issue the bid bond. Accordingly, you urge, the bid should be considered as the bid of Balboa alone, who does have the status of a small business concern as represented in the bid, and not as the bid of an ineligible joint venture. You specifically request, however, that the award be made to "Balboa Structural Ind. Inc., Zurn-Huwin," the name which is reflected in both the bid and the bid bond.

The statute which governs the award of this advertised procurement, 10 U.S.C. 2305(c), provides for award to the responsible bidder whose bid conforms to the invitation for bids and is most advantageous to the Government, price and other factors considered. Paragraph 2–407.1, Armed Services Procurement Regulation, relating to award of formally advertised procurements, is consistent with the statute. A joint venture is recognized as an entity to which a contract may be awarded under such provisions. 39 Comp. Gen. 524, 529 (1960). However, the contract which is awarded under the statute must be executed with the entity which submitted the bid. 33 Comp. Gen. 549 (1954).

There is substantial agreement that in order to constitute a joint venture, certain factors must be present. Such factors include a contribution by the parties of money, property, effort, knowledge, skill, or other assets to a common undertaking; a joint property interest in the subject matter of the venture and a right of mutual control or management of the enterprise; expectation of profits or the presence of adventure; a right to participate in the profits; and usually a limitation of the objective to a single undertaking or *ad hoc* enterprise. 46 Am. Jur. 2d 7.

The evidence submitted by Balboa indicates that Zurn and Huwin had not agreed at time of bid submission or bid opening to participate in performance of, or to be equally bound with Balboa on, the contract. It is apparent, therefore, that there was no joint venture, and therefore no legal entity, answering to the name of Balboa Structural Ind., Inc., Zurn-Huwin for the purpose of bid submission or contract performance, either at the time the bid was submitted or at the time the bids were opened, as was represented in the bid and in the bid bond.

With respect to the statements dated September 24, which were submitted by Zurn and Huwin after bid opening, advising that Balboa's president was authorized to sign the bid and contract in their names, it would appear that such statements could only serve to create a joint

venture at such late date. If in fact a joint venture was created at such time, it would appear to be conceded by the record that the joint venture would necessarily have to be classified as a large business concern and therefore would not be eligible to receive an award. However, even if that were not true, it is our opinion that a joint venture cannot be created after bid opening for the purpose of ratifying a bid submitted without authority in the name of the joint venture.

We must therefore conclude that an award to "Balboa Structural Ind. Inc., Zurn-Huwin" would not result in an enforceable contract as contemplated by the procurement statute and regulations. Neither would an award in the name of Balboa Structural Industries, Inc., alone be proper, since the bid bond named a joint venture as the principal, and the surety's liability to the joint venture could not be imputed to Balboa as a bidder or contractor independent of the joint venture. See section 4.14, *Stearns Law of Suretyships*.

In line with the foregoing, it is our opinion that the low bid may not properly be accepted, and your protest is therefore denied.

[B–171616]

Contracts—Deliveries—Defective Supplies, Etc.—Government Inspection Prior to Delivery

The approval by the contracting agency of a press proof of the artwork for plastic litter bags submitted by the contractor in accordance with the specification requirements, notwithstanding the word "Boundary" was misspelled as "Boundry," estops the agency from denying payment to the contractor on the basis the bags were defective within the contemplation of paragraph 5(d) of Standard Form 32; and, therefore, the Government's acceptance was not conclusive, since the inspection and approval of the press proofs of the artwork was separate from the inspection and acceptance intended under paragraph 5(d) concerned with a latent defect that cannot be discovered by inspection. Whether or not the offer of the contractor to furnish labels with the word "Boundary" correctly spelled for attachment to the bags is accepted does not affect the agency's obligation for the contract price.

Appropriations—Availability—Expenses Incident to Specific Purposes—Necessary Expenses

The propriety of the Forest Service of the Department of Agriculture to use the appropriation entitled "Forest Protection and Utilization" for the payment of plastic litter bags is for determination on the basis of whether the contract involved is reasonably necessary or incident to the execution of the program or activity authorized by the appropriation. If no other appropriation provides more specifically for items such as litter bags, the appropriation may be used to satisfy the contract.

To George W. Webster, Department of Agriculture, January 29, 1971:

Reference is made to your letter of November 16, 1970, Reply No. 6540, requesting an advance decision concerning the propriety of a possible payment pursuant to Forest Service Contract No. 09–1066.

The contract was consummated with the Bemis Company, Inc., on January 19, 1970, in the amount of $2,000 for the supply of 50,000 plastic litter bags to the Superior National Forest, Duluth, Minnesota. The contracting officer contends that Bemis should be refused payment for delivering bags which were defective in that the artwork embodied a misspelled word (Boundry instead of Boundary) on one side of the bags.

Included in the Solicitation was a sheet of Supplemental Instructions and Conditions to SF–33A which required:

3. *Proof*
Before final printing it is required that a press proof be sent and approval received to proceed with final printing.

This same clause was repeated in part B, Technical Specifications, on a Specification Sheet which was appended to the contract.

Pursuant to these requirements, a Mr. Manion of the Bemis Company submitted the final artwork layouts on February 2; and they were inspected, approved, and accepted by Robert H. McHugh, as evidenced by his letter of February 3, 1970.

Relying upon this approval of the photographic plates of the artwork, Bemis printed and delivered the bags on February 25, 1970, which, Forest Service admits, met specifications in all respects except for the misspelled word.

On March 6, Bemis was informed that the bags were unacceptable due to said error, after which the Government encumbered itself in the amount of $2,000 by placing a separate order for 50,000 litter bags with the corrected printing.

Attention is directed to Standard Form 32 of the General Services Administration, which was included in the contract. Paragraph 5(d), under the section entitled "INSPECTION" provides:

The inspection and test by the Government of any supplies or lots thereof does not relieve the Contractor from any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to acceptance. Except as otherwise provided in this contract, *acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud.* [Italic supplied.]

In construing paragraph 5(d), our Office has consistently declared that in the absence of an allegation of fraud, acceptance by the Government is conclusive unless the defect may be properly described as latent. "A latent defect is one which could not have been discovered by inspection. *Washburn Storage Co.* v. *General Motors Corp.*, 83 S.E. 2d 26, 29." B–146714, April 3, 1962.

Included in the instant solicitation were facsimiles of the artwork to be performed on each side of the litter bags. The word "Boundary," which was misspelled on the approved photographic plates, appears in large capital letters squarely in the center of the layout in such a salient fashion that the error should be readily apparent. As such, there re-

mains no basis whatsoever for doubt that this was any but the most patent of defects. While paragraph 5(d) is generally construed to relate to inspection and acceptance of the end items delivered under the contract, it is our opinion that where, as in the instant case, artwork is to be incorporated into the end item and the contract requires the contractor to submit press proofs for inspection and approval prior to proceeding with manufacture and delivery of the end items, such inspection and approval must be viewed as a separate inspection and acceptance of the artwork under paragraph 5(d). It follows that inspection and approval of the press proofs operated as acceptance of the patent error contained therein, and the Government is now estopped to renounce such acceptance. In this connection, see 36 Comp. Gen. 5, 7 (1956), where we concluded:

> * * * There seems no doubt that the manufacturer materially changed its position to its disadvantage when the first lots of hooks and axes were inspected, accepted and released for shipment.
>
> In the circumstances, and considering the further fact that the reported defects were not latent defects, we are of the opinion that the Government has no valid claim * * *

While not legally liable to the Government for the defect, the record indicates that Bemis nevertheless manifested good faith in obligating itself in the additional amount of $490 by manufacturing 50,000 pressure-sensitive labels with the word "Boundary" correctly spelled, and now offers to supply such labels to the Forest Service at no additional cost. Whether the Forest Service should accept delivery of the bags and corrective labels is a matter for administrative determination. However, irrespective of whether delivery is accepted or declined, based upon the present record it is our opinion the Forest Service is obligated to Bemis for the contract price of $2,000.

You have also requested our opinion concerning the propriety of using the appropriation entitled "Forest Protection and Utilization" for such a payment.

The test which our Office has applied is whether the contract involved is reasonably necessary or incident to the execution of the program or activity authorized by the appropriation. 29 Comp. Gen. 419 (1950). The language of the appropriation act provides that the entitled appropriation's purpose is:

> For necessary expenses of the Forest Service, not otherwise provided for, including the administration, improvement, development and management of lands under Forest Service administration, fighting and preventing forest fires on or threatening such lands * * *. P. L. 91-98, 91st Cong. H.R. 12781, October 29, 1969.

If there is no other appropriation providing more specifically for items such as litter bags, our Office will not object to the use of this appropriation to satisfy the contract, since the litter bags would appear to be reasonably necessary or incident to the activities described above.

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